PUBLIC DOCUMENT

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE 1976 UNCITRAL ARBITRATION RULES

BETWEEN:

WESTMORELAND MINING HOLDINGS LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/20/3)

GOVERNMENT OF CANADA

Expert Report of Kathryn A. Coleman

December 16, 2020

Hughes Hubbard & Reed LLP
One Battery Park Plaza, 16th floor
New York, New York
10004-1482

TABLE OF CONTENTS

I. QUALIFICATIONS

1. I am a partner at Hughes Hubbard & Reed LLP. I am based out of the firm's New York City office, which is located at One Battery Park Plaza, New York, NY. I have practiced bankruptcy law in the United States for over 35 years and have been a law firm partner since 1992. I am barred in California, New York, and the District of Columbia, and admitted to practice before numerous United States federal courts, including the Southern and Eastern Districts of New York, the Central, Northern, Southern, and Eastern Districts of California, and the Southern District of Texas. I have advised clients in dozens of bankruptcy cases pending before United States bankruptcy courts across the country, at both the bankruptcy court and appellate levels. I have represented the full range of interested parties in bankruptcy proceedings, including bankrupt companies, secured lenders, unsecured creditors, unsecured creditors' committees, special committees of boards of directors, purchasers of assets out of bankruptcy, and equity holders.

2. I am a Fellow of the American College of Bankruptcy[1] and served on the Board of Directors of the American Bankruptcy Institute ("ABI")[2] for the maximum allowed two terms. I gave testimony on bankruptcy law reform to the ABI Commission to Study the Reform of Chapter 11 [of the U.S. Bankruptcy Code]. I frequently speak at bankruptcy law conferences hosted by the Practising Law Institute[3] and the ABI. I have published numerous articles on various aspects of bankruptcy law and am one of the authors of A PRACTITIONER'S GUIDE TO PRE-PACKAGED

---

[1] AMERICAN COLLEGE OF BANKRUPTCY, About | American College of Bankruptcy (last visited 11 December 2020) ("The American College of Bankruptcy is an honorary public service association of United States and international insolvency professionals who are invited to join as Fellows based on a proven record of the highest standards of expertise, leadership, integrity, professionalism, scholarship, and service to the bankruptcy practice and to their communities.")

[2] AMERICAN BANKRUPTCY INSTITUTE, About Us | ABI (last visited 11 December 2020) ("The American Bankruptcy Institute is the nation's largest association of bankruptcy professionals, made up of over 12,000 members in multi-disciplinary roles, including attorneys, auctioneers, bankers, judges, lenders, professors, turnaround specialists, accountants and others.")

[3] Practising Law Institute, About | Practising Law Institute (last visited 11 December 2020) ("Practising Law Institute is a nonprofit learning organization dedicated to keeping attorneys and other professionals at the forefront of knowledge and expertise." The organization prides itself on providing "the highest quality, accredited, continuing legal and professional education programs in a variety of formats which are delivered by more than 4,000 volunteer faculty including prominent lawyers, judges, investment bankers, accountants, corporate counsel, and U.S. and international government regulators.")

BANKRUPTCY.[4] In 2018, I was named a Bankruptcy MVP by Law360, and I have been recognized in Chambers' and Lawdragon's listings of leading bankruptcy practitioners.

3. I graduated *magna cum laude* from Pomona College, Phi Beta Kappa, and earned my J.D. from Berkeley Law School (Boalt Hall), where I was elected to the Order of the Coif. I clerked for the Honorable C. Martin Pence, United States District Judge for the District of Hawaii.

4. Further details regarding my professional credentials can be found in my *curriculum vitae*, a copy of which is appended to this report at Annex A.

II. PURPOSE AND SCOPE OF REPORT

5. I was asked by the Government of Canada ("Canada") to prepare an expert report discussing issues of U.S. bankruptcy law that have arisen in connection with the NAFTA Chapter Eleven matter captioned *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) (the "Arbitration Proceeding"). In particular, I was asked to discuss the U.S. bankruptcy cases initiated by Westmoreland Coal Company ("WCC") and certain of its affiliates in the U.S. Bankruptcy Court for the Southern District of Texas[5] (the "WCC Bankruptcy Proceeding"), including the sale transaction in which WCC sold its interests in the Canadian companies now owned by Westmoreland Mining Holdings LLC ("WMH").

6. The materials I have reviewed include publicly available documents docketed, or filed, in the WCC Bankruptcy Proceeding, and various publicly filed reports and other publicly available information.

7. I have no personal relationship to, or interest in, either Canada or WMH. I have never personally been retained to represent either party as a lawyer, although Canada, or its government-related agencies, has retained my firm to represent it in other unrelated matters. I do not believe that my role as an expert witness on issues of U.S. bankruptcy law in this Arbitration Proceeding

---

[4] Paul Basta et al., A PRACTITIONER'S GUIDE TO PREPACKAGED BANKRUPTCY (Steven C. Krause ed., American Bankruptcy Institute 2011).

[5] As discussed in greater detail below at note 53, the cases were jointly administered under the caption *In re Westmoreland Coal Company*, No. 18-35672 (DRJ) (Bankr. S.D. Tex. 2018). Although jointly administered, WCC and its debtor affiliates were treated as distinct entities by the WCC Bankruptcy Court (as defined below).

gives rise to a conflict of interest. I have been compensated on an hourly basis for my work on this case. My compensation is in no way contingent on the opinions that I express in this report or on the outcome of this Arbitration Proceeding. These opinions reflect my independent views and genuine beliefs based on the materials I have reviewed to date. I may update this report based on my review of further materials.

III. EXECUTIVE SUMMARY

A. Facts of the WCC Bankruptcy Proceeding

8. On October 9, 2018, after extensive negotiations with creditors that culminated in an agreement regarding their restructuring, WCC and certain of its affiliates (collectively, the "WLB Debtors")[6] filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

9. One of the agreements that WCC made was that it and the other WLB Debtors would sell substantially all of their assets to pay down the debts owed to the WLB Debtors' secured creditors (the "First Lien Lenders"), who had liens on the WLB Debtors' assets. In turn, the First Lien Lenders agreed to serve as the purchasers of last resort if the sale process did not yield a satisfactory bid. In the end, no other bids were made for the WLB Debtors' assets, so the First Lien Lenders, acting through their acquisition vehicles, WMH and Westmoreland Mining LLC ("WML"), credit bid a portion of their claims (a concept discussed in detail below) to acquire the WLB Debtors' assets. The assets acquired included WCC's 100% equity interest in Westmoreland Canada Holdings Inc. ("WCHI"), which owned Prairie Mines & Royalty ULC ("Prairie").

10. In its order approving the WCC Plan (as defined below), the WCC Bankruptcy Court (as defined below) determined that the sale was transacted at arm's length, and that the assets involved

---

[6] Westmoreland Coal Company is sometimes referred to in the bankruptcy court filings as "WCC," and sometimes as "WLB." For instance, the WCC Plan refers to WLB, **R-042**, Westmoreland Coal Company, et al., *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates*, Exhibit A to United States Bankruptcy Court, *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 1 March 2019 [Excerpt] ("WCC Plan") art. I.A.239 (defining "WLB" as "Debtor Westmoreland Coal Company"), while a separately filed supplement to the WCC Plan refers to WCC, **R-043**, Westmoreland Coal Company, et al., Description of Transaction Steps, Exhibit G to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 18 March 2019 ("Description of Transaction Steps") § I.b.iii. (defining "WCC" as "Westmoreland Coal Company"). For purposes of this report, I refer to Westmoreland Coal Company individually as "WCC" and to the Westmoreland Coal Company along with certain of its relevant affiliates as the "WLB Debtors."

were purchased "free and clear" of pre-existing liens, claims, encumbrances, and interests. The WCC Bankruptcy Court's order further provided that the purchasers of the assets (i.e., the First Lien Lenders' acquisition vehicles, including WMH) would have no "successor liability" as a result of the purchase of the assets.

11. The WCC Bankruptcy Court approved the asset sale, which was then consummated by the WLB Debtors, as sellers, and WMH and WML, the First Lien Lenders' acquisition vehicles, as buyers. WMH and WML did not purchase the equity of WCC, which, as of the date of this report, remains a debtor in the chapter 11 bankruptcy proceedings.

B. Conclusions

12. My review of the documents available from the WCC Bankruptcy Proceeding, and my decades of experience in negotiating, consummating, and observing transactions similar to those consummated pursuant to the WCC Plan, lead me to conclude that the WLB Debtors and the First Lien Lenders accomplished what they set out to do: sell substantially all of the assets of the WLB Debtors for the benefit of the First Lien Lenders, who had liens on, and security interests in, virtually all of the WLB Debtors' assets. The sale of the WLB Debtors' assets was negotiated at arm's length between a seller (the WLB Debtors) and buyer (WMH and WML, acting on behalf of the First Lien Lenders), who were legally adverse parties represented by separate counsel in the transaction, and resulted in the partial satisfaction of the First Lien Lenders' claims.

13. Among the outcomes of the WCC Bankruptcy Proceeding are: (1) WMH and WML (its subsidiary) were created on behalf of the First Lien Lenders to take title to the purchased assets in satisfaction of their secured claims, in accordance with the agreed plan of reorganization in the WCC Bankruptcy Proceeding; (2) WMH now owns and operates the assets formerly owned by the WLB Debtors, including the equity of WCHI; (3) WMH acquired the purchased assets "free and clear" of liens and claims against the WLB Debtors; (4) the WCC Bankruptcy Court's order confirming the WCC Plan, which is now final and non-appealable, insulates WMH from the assertion of claims based on theories of "successor liability"; (5) the WLB Debtors' obligations to the First Lien Lenders have been satisfied in accordance with the WCC Plan; and (6) the WLB Debtors, including their parent, WCC, have either already wound down and dissolved, or will do so in the near to medium term.

14. Section IV of this report provides a general overview of certain concepts fundamental to U.S. bankruptcy law, including a description of certain key aspects of a chapter 11 proceeding. Section V applies the general concepts from Section IV to the WCC Bankruptcy Proceeding. My conclusions with respect to the effect of the WCC Bankruptcy Proceeding are contained in Section VI.

IV. GENERAL PRINCIPLES OF U.S. BANKRUPTCY LAW

A. Overview of the Bankruptcy Code

15. Article I, Section 8 of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."[7] Under this grant of authority, Congress enacted the "Bankruptcy Code" in 1978. The Bankruptcy Code, which is codified as title 11 of the United States Code,[8] is the uniform federal law that governs all bankruptcy cases.[9]

16. The Bankruptcy Code offers debtors tools to help them address their obligations as they exist at the time that a debtor initiates a bankruptcy case.[10] It is guided by two fundamental objectives.

---

[7] **R-044**, U.S. Const. art. I, § 8, cl. 4.

[8] **R-045,** 11 U.S.C. §§ 101 *et seq.* [Excerpts]

[9] Although the Bankruptcy Code is federal law and therefore does not change from state to state, the interpretation of the Bankruptcy Code can vary slightly based on the court applying law to fact. The United States federal judicial system is divided into three tiers: (i) the "district courts," which are trial courts hearing cases in the first instance; (ii) the "courts of appeal," which are intermediate federal appellate courts; and (iii) the Supreme Court of the United States, which is the court of last resort and is the final arbiter of law in the United States. There are 94 federal judicial districts, each of which "sits," or is located, within one of the thirteen judicial departments overseen by a court of appeal (called "circuits"). Legal precedent established by a circuit court is binding on each of the district courts within that circuit. Bankruptcy courts are separate courts that are at the district court, or trial, level, and are technically part of the district court. Bankruptcy courts are similarly bound by circuit precedent.

In certain instances, however, the Bankruptcy Code defers to existing state law. For instance, property rights are determined by reference to state law rather than by the Bankruptcy Code.

[10] The Bankruptcy Code deals principally with the debtor's obligations that originated prior to the filing of the petition for relief, the instrument that commences a bankruptcy case. As a result, the date the debtor files its petition seeking relief under the Bankruptcy Code—referred to as the "petition date"—becomes critically important in establishing creditors' rights. Obligations that arise from arrangements that exist on the petition date are referred to as "prepetition" obligations.

17. First, the Bankruptcy Code seeks to facilitate the equitable and non-discriminatory distribution of the value of the debtor's assets to its existing stakeholders.[11] It contains a number of rules designed to achieve this goal. For example, the commencement of a bankruptcy case creates an "estate" consisting of all of the debtor's interests in property, wherever located, legal and equitable, tangible and intangible.[12] The bankruptcy process is intended to maximize the value of these assets and deliver their value to the debtor's creditors, either by virtue of an immediate payment or in an instrument to be paid over time. To ensure that this distribution of value to a debtor's existing creditors is carried out in an equitable and non-discriminatory manner, the Bankruptcy Code also contains rules for prioritizing which claims will be satisfied from the available assets.

18. Second, the Bankruptcy Code seeks to provide the debtor with a financial "fresh start" from its burdensome debts as it seeks to distribute value to its creditors.[13] The concept of the "fresh start" is embodied in two core statutory mechanisms: in the short term, the Bankruptcy Code automatically stays all collection actions against the debtor or the debtor's property; in the long term, the Bankruptcy Code "discharges," or releases the debtor from its legal obligation to fulfill, certain of the obligations that arose before the debtor sought relief under the Bankruptcy Code.

19. The Bankruptcy Code contains six basic types of relief, which are usually referred to by their chapter number.[14] The mechanism most commonly used by commercial enterprises is chapter 11,

---

[11] A "stakeholder" is anyone with an interest or concern in the debtor's business, generally. Practically speaking, it means both a debtor's creditors and its shareholders. Because shareholders are last in priority under the Bankruptcy Code, as discussed in Section IV.D below, they rarely receive a distribution through the bankruptcy process. As a result, bankruptcy practitioners often do not address shareholder recoveries through the bankruptcy process, and address only creditor recoveries. I generally follow that practice in this report.

[12] **R-045**, 11 U.S.C. § 541(a)(1). The term "estate" is very broadly defined to centralize and protect all of the debtor's property interests within the jurisdiction of the bankruptcy court, pending resolution of the bankruptcy case. This protection extends also to potential litigation claims or causes of action that the debtor might assert against other parties.

[13] The concept of the "fresh start" has its origins in consumer bankruptcy, whereby individuals could seek a "discharge" of their debts in order to begin their financial lives afresh after going through the bankruptcy process. **R-046**, *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). The concept is nevertheless utilized today in reference to large, complex commercial bankruptcies as well.

[14] The five other chapters of title 11 are chapter 7 ("Liquidation"), chapter 9 ("Adjustment of Debts of a Municipality"), chapter 12 ("Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual

entitled "Reorganization." Discussed in greater detail in Section IV.E below, chapter 11 provides a debtor with a statutory framework to develop a court-approved "plan" for repaying its creditors, who vote to accept or reject the plan. Unlike other chapters, chapter 11 allows a debtor to continue operating its business under existing management and board supervision during the bankruptcy process.

B. The Role of the Bankruptcy Court

20. At the same time as it enacted the Bankruptcy Code, Congress also established dedicated federal courts to oversee "any and all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code]."[15] Those courts are what we now call "bankruptcy courts." Bankruptcy courts are charged with ensuring the debtor's compliance with the Bankruptcy Code and resolving disputes that arise in the bankruptcy case. Once a bankruptcy case has been initiated, bankruptcy court approval is required for any action that the debtor takes other than certain routine day-to-day matters.[16]

21. The interactions that a debtor and its creditors have with the bankruptcy court will vary depending on the type of bankruptcy proceeding and the debtor and creditors' respective interests in the proceeding. Issues contested between the debtor and its creditors that require bankruptcy court intervention may arise in each case. However, at a minimum, all bankruptcy cases under the Bankruptcy Code are initiated by filing a "petition for relief" with the bankruptcy court,[17] and require a court order to conclude the process.

Income"), chapter 13 ("Adjustments of Debts of an Individual with Regular Income", typically relating to individual consumers) and chapter 15 ("Ancillary and Other Cross-Border Cases", typically relating to foreign representatives). **R-045**, Title 11 of the U.S. Code - Bankruptcy, p. 1.

[15] **R-047**, 28 U.S.C. § 157(a). Although the bankruptcy courts were established by statute in 1978, Congress did not confer jurisdiction over "any and all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code]" upon the bankruptcy courts until 1984.

[16] For instance, a debtor must seek approval from the bankruptcy court before it can enter into any financing arrangements post-petition.

[17] Complex rules govern which bankruptcy court a debtor may petition for relief. Because those rules are not relevant to the matter at hand, I do not explain those rules here.

C. Commencing a Bankruptcy Case

22. As noted, a debtor initiates a bankruptcy case when it files with the bankruptcy court a petition for relief under one of the six chapters of the Bankruptcy Code.[18] Section 109 of the Bankruptcy Code governs a debtor's eligibility to file a petition for relief under the various chapters.[19] A debtor's insolvency, or its inability to pay debts as they become due, is not an eligibility requirement under the Bankruptcy Code.

23. There are a number of reasons why a debtor may file for bankruptcy, notwithstanding its ability to pay outstanding obligations, including to:

- stave off foreclosure or obtain temporary relief from other debt collection devices;
- revise an unworkable capital structure, such as by converting unserviceable debt to equity;
- address litigation claims, such as mass tort claims, on a collective basis that will result in more equitable treatment for creditors;
- facilitate the sale of assets at the maximum possible value if the out-of-court environment is depressing prices or potential purchasers' enthusiasm;
- obtain financing that otherwise would have been contractually prohibited; and
- generally, rationally restructure its liabilities in a forum that brings together all of its assets and all of its creditors.

24. Each debtor faces a different set of facts and circumstances that may compel it to seek relief.

D. Classification of Claims and Interests in a Bankruptcy Case

25. The Bankruptcy Code enables debtors to bundle their prepetition[20] liabilities and obligations into discrete pools that the debtor can effectively settle through the bankruptcy process. The parties to whom those liabilities and obligations are owed, including creditors (who hold "claims") and equity holders (who hold "interests"), become "parties in interest" in the bankruptcy process because the debtor uses the bankruptcy process to alter (or, in some cases, eliminate) creditors' and equity holders' right to recover on the liabilities and obligations owed to them by the debtor.

---

[18] Under certain circumstances, a debtor's creditors may also initiate a bankruptcy case.

[19] **R-045**, 11 U.S.C. § 109.

[20] See note 10 above for a discussion of the significance of the "prepetition" distinction.

26. The Bankruptcy Code defines "claim" very broadly as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[21] Bankruptcy courts look to applicable non-bankruptcy law with respect to the validity and amount of a claim, as well as to define the scope of property interests, and with respect to whether a right constitutes a claim or an equity interest.

27. The Bankruptcy Code creates a hierarchical method of categorizing claims according to the priority of payment to which the claim is entitled. "Administrative" claims are those that were incurred or arose after the start of the bankruptcy case.[22] Administrative claims are the highest priority claims.[23] "Secured" claims, or claims that are "secured" by liens or mortgages on a debtor's property (i.e., collateral), are the second highest priority. A creditor holding a secured claim has the legal right to satisfy its claims from the property securing the obligation.[24] As a result, it would be unfair to distribute the value of that collateral amongst the general creditor population when one creditor, or a few creditors, have a superior interest in the collateral.

28. The Bankruptcy Code also lists several types of "priority" unsecured claims.[25] These claims are required to be paid in full after administrative claims and secured claims, but before distributions are made on general unsecured claims. They are not, however, to be paid during the case without advance permission from the court after notice to parties in interest and the opportunity for a hearing.

---

[21] **R-045**, 11 U.S.C. § 101(5). For instance, a "claim" includes a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.

[22] **R-045**, 11 U.S.C. § 503(b).

[23] **R-045**, 11 U.S.C. § 507(a)(2).

[24] **R-045**, 11 U.S.C. § 506.

[25] Examples of "priority" unsecured claims include relatively modest employee claims arising shortly before the commencement of the bankruptcy case and certain prepetition tax claims. **R-045**, 11 U.S.C. § 507(a)(3)-(10).

29. Most prepetition unsecured claims fall into the category of non-priority, general unsecured claims that generally can be paid only after the administrative, secured, and priority unsecured claims have been paid in full.

30. Equity holders are last in priority, and can recover only after all claims have been satisfied in full. They often do not see any recoveries through the bankruptcy process.

E. General Features of a Chapter 11 Bankruptcy

31. Chapter 11, at least as originally contemplated, provides the opportunity for a debtor to "reorganize" as a continuing business enterprise and to allow the business to emerge from bankruptcy protection to continue operations free of an unworkable capital structure. In this scenario, the debtor's corporate form does not change and it retains ownership of its assets.[26]

32. However, some chapter 11 debtors, particularly those with multiple levels of secured debt and no meaningful unsecured debt, are ultimately unable to reorganize in this manner and instead must choose to sell the whole business (or parts of it), and distribute the proceeds to their creditors. In this situation, the assets comprising the business (or parts of it) are typically sold to a new entity,[27] while the debtor entity continues on in the bankruptcy process until that process concludes and the debtor winds down and dissolves.

33. Chapter 11 allows debtors a great deal of latitude to develop a plan of reorganization through which the debtor's obligations and liabilities are settled.[28] For this reason, while the general framework is consistent across all chapter 11 cases, the details of each particular chapter 11 case can vary greatly. Nonetheless, the following subsections provide an overview of some of the common features of a chapter 11 bankruptcy.

---

[26] On emergence, the property of the bankruptcy "estate" is re-vested in the "reorganized," post-bankruptcy debtor. *See* **R-045**, 11 U.S.C. § 1141(b). This may include the debtor's right to assert any legal claims it had pre-bankruptcy (although circuits vary as to what is required for a reorganizing debtor to preserve its legal claims post-bankruptcy).

[27] The new entity that takes over the business provides jobs to the debtor's former employees and products or services to the debtor's former customers without being burdened by the debtor-seller's pre-existing obligations.

[28] The latitude afforded to debtors is circumscribed by certain statutory parameters.

a. Plans and Restructuring Support Agreements

34. A chapter 11 plan sets out the debtor's proposal for repaying its creditors. It is voted on by the debtor's stakeholders,[29] and must be confirmed, or approved, by the bankruptcy court before it can be effectuated. A chapter 11 plan that is filed with the court may be amended from time to time during the bankruptcy proceeding before it is confirmed.

35. Ideally, a chapter 11 case involves the negotiation of a plan that maximizes distributions to creditors (and interest holders if there is sufficient available value) while preserving the business going forward, including the jobs it provides and the products or services upon which its customers depend. The distribution of value to creditors in such a plan may take many forms, including cash, new debt issued by, or equity in, either the reorganized debtor or a new entity entirely, or interests in post-reorganization litigation trusts.[30] The form of distribution will vary depending on the circumstances of each case, including what the debtor is able to offer and what the stakeholders are willing to accept.

36. The chapter 11 plan formulation process was designed to facilitate good-faith negotiation among the debtor and its stakeholders that leads to a consensual plan. The Bankruptcy Code promotes negotiation in that—within a general scheme that protects the greater rights of administrative, secured, and priority creditors—it contains provisions that give all parties in interest some negotiating leverage. This leverage includes the ability to litigate issues that may have the effect of delaying the confirmation of a chapter 11 plan and the debtor's emergence from bankruptcy.[31]

---

[29] As discussed in note 11 above, a "stakeholder" is anyone with an interest or concern in the debtor's business, generally.

[30] As discussed in note 12 above, all of the debtor's legal rights, including its right to assert legal claims against others, become part of the debtor's bankruptcy estate. Because reducing these legal claims to a money judgment that can then be distributed to creditors may take a long time—longer than the debtor is willing to stay in bankruptcy—the debtor may sometimes, through its plan, place these claims in a trust for a trustee to pursue. The debtor's creditors then receive a beneficial interest in the trust through the plan, and the trustee becomes responsible for distributing any proceeds from the trust to the creditors. Alternatively, a debtor who emerges from bankruptcy intact may retain its legal rights to pursue on its own account once the bankruptcy process concludes. See discussion at note 26, above.

[31] For instance, issues relating to the debtor's enterprise valuation or the value of a particular piece of collateral require resolution prior to the bankruptcy court's confirmation of a chapter 11 plan.

37. A debtor will often begin negotiations with key stakeholder constituencies before even commencing a bankruptcy proceeding. The parties may come to an agreement on the key terms of the chapter 11 plan, particularly the treatment of the different classes of claims and interests. If they do, they often enter into a written agreement setting forth the acceptable terms of the debtor's plan. The debtor agrees to propose an acceptable plan, and the participating stakeholders commit to support the debtor's plan once the debtor files its petition for relief with the bankruptcy court. These documents are known as "Restructuring Support Agreements" or "RSAs." The practice of agreeing to an RSA with certain stakeholders has become commonplace for large companies contemplating a chapter 11 process.

b. Disclosure Requirements and Stakeholder Consent

38. The Bankruptcy Code requires a chapter 11 debtor pursuing a plan to file a disclosure statement with the bankruptcy court before it may solicit votes from its stakeholders on its plan.[32] The disclosure statement sets out, among other information, a plain language description of the debtor and why it filed for bankruptcy, as well as a summary of significant events in the chapter 11 case, a summary of the proposed chapter 11 plan, and a rough estimate of the value of different classes of creditors' and interest holders' distributions under the plan.[33] The disclosure statement is typically filed with the bankruptcy court at the same time as the plan. The plan generally cannot be voted on prior to the bankruptcy court's approval of the disclosure statement.[34]

39. Once the disclosure statement has been approved, it is mailed, along with a copy of the proposed plan and a ballot, to those stakeholders (i.e., creditors and interest holders) entitled to vote on the plan. The plan typically is voted on by stakeholders that will receive some distribution

---

[32] **R-045**, 11 U.S.C. § 1125. The purpose of the disclosure statement is to provide those voting on the plan with "adequate information" to make an informed decision about whether to accept or reject the plan. *See* **R-045**, 11 U.S.C. § 1125(a)(1). The bankruptcy court holds a hearing to determine whether the disclosure statement contains adequate information. *See* **R-045**, 11 U.S.C. § 1125(b).

[33] Other topics a disclosure statement will often address include, for instance, an explanation of the valuation methodologies the debtor used and cash flow and earnings projections.

[34] There are certain cases, called prepackaged cases, where the debtor essentially conducts a complete plan process, including soliciting votes, before it even files its petition. In these cases, the bankruptcy court certifies that the disclosure statement provided parties in interest with adequate information to make an informed decision with respect to the plan after the debtor has solicited votes. Because the WCC Bankruptcy Proceeding was not prepackaged, I do not discuss this exception further in this report.

under the plan but will not be paid in full.[35] Stakeholders who will be paid in full are deemed to have accepted the plan,[36] and those who will receive nothing under the plan are deemed to have rejected the plan.[37]

c. Asset Sales

40. One of the tools available to a debtor as it pursues its obligation to maximize value for all stakeholders is selling its assets.[38] The Bankruptcy Code allows for the court-approved sale of assets outside of the ordinary course of the debtor's business,[39] including as part of consummating a plan of reorganization.[40]

41. When the debtor elects to pursue a sale transaction in a bankruptcy proceeding, the bankruptcy court must approve the sale mechanism and procedures. The sale is most often conducted by public auction to secure the highest bid for the assets.[41]

42. After marketing the assets to potential purchasers, the debtor may enter into an asset purchase agreement with a prospective buyer who will commit to buying the debtor's assets for a certain price, irrespective of whether any other bidders ultimately participate in the auction. Such a bidder is known as a "stalking horse."[42] The stalking horse sets the floor purchase price in the

---

35 Any stakeholder that receives less than what it is entitled to under law is deemed "impaired." **R-045**, 11 U.S.C. § 1124.

36 **R-045**, 11 U.S.C. § 1126(f).

37 **R-045**, 11 U.S.C. § 1126(g).

38 Once sold, the debtor's ownership of the purchased assets ends and title passes to the purchaser.

39 **R-045**, 11 U.S.C. § 363(b). When the Bankruptcy Code talks about selling property "other than in the ordinary course of business," it means that a debtor whose business is selling widgets does not need bankruptcy court authority to continue selling widgets.

40 **R-045**, 11 U.S.C. § 1123(b)(4).

41 The bankruptcy court can also approve private sales, but they are much less common.

42 It is both advantageous and disadvantageous to be a stalking horse bidder. The stalking horse bidder essentially pre-bids for the assets, effectively valuing the assets. It must be careful not to overbid for the assets, and risk paying above-market value. But the stalking horse also has the opportunity to acquire the assets at the lowest price it is willing to pay if the debtor does not receive a better bid at the auction. Moreover, the stalking horse bidder is entitled to be compensated for its efforts and for providing a floor price for the assets if it is outbid.

upcoming auction—protecting against "lowball" bids—and attracts other prospective purchasers to bid on the assets. If there are no bids in the auction higher than the stalking horse's, the stalking horse will purchase the assets in accordance with the asset purchase agreement.

43. The stalking horse bidder is often one or more of the debtor's secured creditors with a lien on the assets to be sold. The Bankruptcy Code affords a secured creditor the right to use its secured claim as currency in a sale of the creditor's collateral.[43] Referred to as "credit bidding," this practice allows a secured creditor to use the money owed to it by the debtor as consideration to purchase the debtor's assets, irrespective of the value of the creditor's collateral. This gives the secured creditor a significant advantage over other bidders: the secured creditor can set a floor price with its credit bid, wherein it can "pay" for the assets by bidding its claim against the debtor, while any other bidder must pay the purchase price in cash. The secured creditor can thus set its bid at the lowest price at which it is willing to accept in cash satisfaction of its secured claim, rather than effecting repayment by taking possession of its collateral.[44]

44. There are several important advantages available to a purchaser of assets from a debtor's estate. Perhaps the most important advantage is that the purchaser of the assets can obtain them "free and clear" of liens and most other liabilities[45] if the bankruptcy court so orders.[46] For instance, the liens that encumbered the assets prior to the sale, such as mortgages, will not continue to encumber assets that are sold "free and clear" once ownership is transferred to the purchaser.

This compensation, referred to as "bidder protections," is generally around three percent of the stalking horse's bid amount.

[43] **R-045**, 11 U.S.C. § 363(k).

[44] For example, a secured lender who is owed $100 and has a lien against a piece of the debtor's equipment (meaning that it has a legal right to take possession of the equipment should the debtor default on its obligations to the lender) may choose to set the credit bid floor at $50. By doing so, the secured lender indicates to the market that it would rather take possession of the equipment (which lenders are generally loath to do, since cash is king) than receive less than $50 for the equipment. But if another bidder were to offer $60, the lender might take the cash instead.

[45] Third parties with prepetition claims against a debtor will no longer have recourse to the sold assets once they are transferred to the purchaser pursuant to a bankruptcy court order. The bankruptcy court order will often explicitly provide that the purchaser does not become liable for the debtor's prepetition obligations as a result of the sale, thereby virtually foreclosing any liability the purchaser may have solely by virtue of being successor in title to the debtor's assets (a concept known under U.S. law as "successor liability").

[46] **R-045**, 11 U.S.C. §§ 363(f), 1141(c).

Instead, after the sale, the lien will attach to the proceeds of the sale that the debtor receives. The result is that the liability stays with the debtor, and does not affect the new owner.

45. Purchasers can (and often do) elect to use an acquisition vehicle to take title to purchased assets on their behalf, rather than taking title directly. There are a number of reasons for this, including the logistical issues that arise in the course of integrating the new business into the purchaser's existing business. Creating an acquisition vehicle can also be a practical solution in situations where there are multiple purchasers who will be jointly taking title. There may also be tax considerations for taking title to purchased assets through a separate entity. The reasons why purchasers use an acquisition vehicle will vary depending on the particular circumstances of the transaction in question.

d. Court Confirmation of the Chapter 11 Plan

46. In addition to its approval of the disclosure statement, the bankruptcy court must also approve, or "confirm," the plan in a chapter 11 case. The bankruptcy court is required to hold a plan confirmation hearing before it enters its confirmation order.[47] The debtor's significant stakeholders will often attend the hearing either to express support for the plan or to oppose it.

47. The Bankruptcy Code contains a number of requirements that a chapter 11 plan must meet before it can be confirmed by the bankruptcy court.[48] For example, the court must be satisfied that the plan: is proposed in good faith and not by any means forbidden by law; designates the classes of claims and interests into which it divides the creditors and interest holders; and provides the same treatment for each claim or interest in a particular class.[49]

---

47 *See* **R-045**, 11 U.S.C. § 1128(a).

48 *See generally* **R-045**, 11 U.S.C. §§ 1123(a)(1)-(7), 1129(a)(1)-(15).

49 **R-045,** 11 U.S.C. §§ 1129(a)(3), 1123(a)(1), 1123(a)(4). Other requirements under the Bankruptcy Code include that the plan provides adequate means for the plan's implementation, and is "feasible"—that is, is not likely to be followed by a liquidation or another financial reorganization (unless the plan provides for the debtor's liquidation, in which case the proponent must show that the debtor has the resources to carry out the plan's purpose). **R-045,** 11 U.S.C. §§ 1123(a)(5), 1129(a)(11). Moreover, if there are impaired classes entitled to vote, at least one impaired class must have voted to accept the plan. **R-045,** 11 U.S.C. § 1129(a)(10). As noted in note 35 above, an "impaired" class is one that will receive less than what the class is entitled under applicable non-bankruptcy law.

48. The bankruptcy court must determine whether the plan complies with these requirements.[50] Once the court enters its confirmation order, the debtor is authorized to enter into the transactions contemplated to effectuate the plan. Once the transactions are initiated, the plan (and its component transactions) is effectively insulated from the effect of any appeal of the confirmation order.[51]

V. WESTMORELAND COAL COMPANY'S CHAPTER 11 BANKRUPTCY

A. Background

49. On October 9, 2018, the WLB Debtors filed voluntary petitions[52] for chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of Texas (the "WCC Bankruptcy Court" or the "Court").[53]

50. The WLB Debtors' filings with the Court, including a declaration made by WCC's Chief Restructuring Officer, explained the circumstances that brought them to chapter 11.[54] Beginning in the early 2000s, WCC and its affiliates pursued "significant acquisition and expansion efforts,"[55] which "nearly tripled [their] debt obligations."[56] The WLB Debtors "encountered challenges integrating these acquisitions into their business enterprise," and "coal sales and revenue did not

---

50 *See* **R-045**, 11 U.S.C. § 1129(a).

51 *See* **R-048**, *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996).

52 A petition is "voluntary" when the debtor files of its own volition, as opposed to being forced into a chapter 11 proceeding by its creditors, who file a petition against the debtor.

53 WCC and thirty-six of its affiliates each filed voluntary petitions on October 9, 2018. The WCC Bankruptcy Court ordered that all thirty-seven cases be jointly administered, with WCC as the lead debtor. However, the term "WLB Debtors" excludes WCC-related debtors Westmoreland Resources GP LLC, and Westmoreland Resource Partners LP and its subsidiaries. The WCC Plan did not address these debtors; they were instead addressed by a separate plan, which is not relevant to the issues described in this report. Therefore, I do not address these other debtors further.

54 *See, e.g.*, **R-049**, Westmoreland Coal Company, et al., *Declaration of Jeffrey S. Stein in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt of Declaration] ("Stein First Day Declaration"). The Stein First Day Declaration was made on behalf of all of the WCC-affiliated debtors, including the non-WLB Debtors discussed in note 53, above.

55 **R-049**, Stein First Day Declaration ¶ 59.

56 **R-049**, Stein First Day Declaration ¶ 60.

rise proportionately" to the debt obligations, which left WCC and its debtor affiliates "significantly overleveraged."[57]

51. The sections that follow outline the specific circumstances of the WLB Debtors' bankruptcy proceedings.

B. The WCC Restructuring Support Agreement

52. In the spring and summer of 2018, after defaulting on certain loan facilities, the WLB Debtors began negotiations with certain of their creditors and others to refinance their debt obligations through a bankruptcy process.[58] On October 9, 2018, WCC and certain of its affiliates entered into an RSA (the "WCC RSA") with the majority of their secured creditors, including the First Lien Lenders.[59]

53. The WCC RSA provided that WCC and certain of its affiliates would commence voluntary cases under chapter 11 of the Bankruptcy Code to facilitate certain transactions to restructure their capital structure.[60] As part of the chapter 11 proceedings, the WLB Debtors would file a joint plan (discussed further below) that would effectuate the restructuring transactions contemplated by the WCC RSA.[61] In exchange, the secured creditors would support the plan before the WCC Bankruptcy Court.[62]

---

[57] **R-049**, Stein First Day Declaration ¶ 60. "Overleveraged" means having taken on too much debt such that debt obligations cannot be met by cash inflows.

[58] **R-049**, Stein First Day Declaration ¶¶ 67-77.

[59] **R-049**, Stein First Day Declaration ¶ 78; *see also* **R-050**, Westmoreland Coal Company, et al., Restructuring Support Agreement, Exhibit A to *Declaration of Jeffrey S. Stein in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt] ("WCC RSA"). A list of the WCC-affiliated signatories to the WCC RSA can be found at p. 65 of 167. The secured creditor signatories are described in the preamble of the WCC RSA, at p. 40 of 167.

[60] **R-050**, WCC RSA, Recitals. Schedule 1 to the WCC RSA (found at p. 67 of 167) identifies which WCC-affiliated signatories were contemplated as debtors and which were not.

[61] **R-050**, WCC RSA, Recitals & § 7.01.

[62] **R-050**, WCC RSA, Recitals & § 5.03(a)(i).

54. The WCC RSA contemplated a "going concern sale of substantially all of the WLB Debtors' assets" pursuant to a chapter 11 plan of reorganization.[63] The WLB Debtors would file a motion with the bankruptcy court approving bidding procedures for an auction, and the assets would be marketed for sale to the highest bidder.[64]

55. The WCC RSA appended a term sheet setting out preliminary details for the sale, including specifying that a newly-formed entity acting on behalf of, and to be owned by, the First Lien Lenders would serve as the stalking horse bidder for the sale (discussed further below).[65]

C. Commencement of the WCC Bankruptcy Proceeding

56. On October 9, 2018 (the "Petition Date")—the same day WCC announced the WCC RSA—the WLB Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the WCC Bankruptcy Court to implement the transactions contemplated in the WCC RSA.[66]

57. Prior to the Petition Date, WCC had pledged its equity in its Canadian affiliates (the "Canadian Entities")[67] to secure certain prepetition debt obligations of the WLB Debtors, including the obligations owed to the First Lien Lenders.[68] As a result of commencing the WCC Bankruptcy

---

63 **R-051**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof*, [Court Docket, Doc. 208], 18 October 2018 ("Bidding Procedures Motion"), ¶ 1. A "going concern" sale is typically one in which the debtor's underlying business continues to operate after the sale in much the same way it did prior to the sale, although under new ownership. *See also* **R-050**, WCC RSA Ex. B (Sale Transaction Term Sheet).

64 **R-049**, Stein First Day Declaration ¶ 78; *see also* **R-050**, WCC RSA Sched. 2 (Milestones).

65 **R-050**, WCC RSA Ex. B (Sale Transaction Term Sheet).

66 *See, e.g.*, **R-052**, Westmoreland Coal Company, Voluntary Petition For Non-Individuals Filing For Bankruptcy, [Court Docket, Doc. 1], 9 October 2018.

67 Westmoreland Canada, LLC; Westmoreland Canadian Investments, LP; WCC Holdings B.V.; Westmoreland Canadian Holdings Inc. ("WCHI"); and Prairie Mines & Royalty ULC ("Prairie"). The Canadian Entities did not file petitions for bankruptcy relief.

68 **R-049**, Stein First Day Declaration ¶¶ 29-31.

Proceeding, WCC's equity interests in the Canadian Entities became part of WCC's bankruptcy "estate." The value of that estate, including the equity in the Canadian Entities, would be available to be distributed to the WLB Debtors' creditors through the WCC Bankruptcy Proceeding.

D. The Bidding Procedures Motion and Proposed Asset Sale

58. Shortly after the Petition Date, on October 18, 2018, the WLB Debtors filed a motion with the WCC Bankruptcy Court (the "Bidding Procedures Motion") seeking authorization to, among other things, (i) conduct a marketing process for the sale of certain of the WLB Debtors' assets, including WCC's equity in the Canadian Entities; and (ii) enter into a stalking horse purchase agreement with an entity formed on behalf of the First Lien Lenders.[69]

59. As discussed above, the stalking horse sets the floor purchase price in the auction to attract other bids, and to ensure that the debtor does not receive "lowball" bids.[70] The First Lien Lenders' stalking horse bid in this case was a credit bid,[71] made using a portion of their $669 MM (USD) secured claim,[72] rather than cash, and pursuant to the terms of a purchase agreement that the WLB Debtors negotiated with the First Lien Lenders (the "Stalking Horse Purchase Agreement," discussed further below).[73]

60. On November 15, 2018, the WCC Bankruptcy Court approved the Bidding Procedures Motion and established January 15, 2019 as the deadline for the WLB Debtors to receive bids for

---

69 **R-051**, Bidding Procedures Motion ¶ 2 & Ex. 2 at p. 2.

70 As discussed above, a stalking horse bid may represent the lowest cash price the secured creditor is willing to accept in satisfaction of its secured claim, rather than repayment by taking possession of its collateral.

71 **R-051**, Bidding Procedures Motion ¶ 1; *see also* **R-053**, Westmoreland Coal Company, et al., Stalking Horse Purchase Agreement, Exhibit H-6 to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019 ("Stalking Horse Purchase Agreement") § 2.07(a).

72 *See* **R-042**, WCC Plan art VIII.A.2. The First Lien Lenders credit bid $390.1 MM (USD) of their $669 MM (USD) secured claim. Their credit bid had the effect of reducing their claim in the bankruptcy by the amount of the bid (i.e., to $278.9 MM (USD)). Another way of thinking about this consideration is that the First Lien Lenders reduced the Debtors' outstanding secured debt by $390.1 MM (USD) in exchange for the purchased assets. The remainder of their claim was satisfied through a combination of new loans that were issued by the Purchaser (as defined below) and cash. *See* **R-042**, WCC Plan art III.B.3(c)(i).

73 **R-051**, Bidding Procedures Motion ¶ 1.

the WLB Debtors' assets.[74] The Court also authorized the First Lien Lenders (through their as yet unformed acquisition vehicle) to serve as the stalking horse bidder.[75]

E. The WCC Plan, Disclosure Statement, and Stalking Horse Purchase Agreement

61. On October 25, 2018, the WLB Debtors filed their initial joint chapter 11 plan (as amended, the "WCC Plan" or the "Plan") and accompanying disclosure statement (as amended, the "Disclosure Statement").[76]

62. On November 2, 2018, the WLB Debtors filed a motion with the Court seeking approval of their Disclosure Statement.[77] In the motion, the WLB Debtors explained that "[t]he WLB Debtors' goal during the chapter 11 cases is to drive a value-maximizing Sale Transaction that will provide enhanced stakeholder recoveries."[78] They further confirmed that:

> The Plan and Disclosure Statement contemplate (a) the sale and transfer of substantially all of the WLB Debtors' assets and equity interests, (b) efficient distributions to their creditors,

---

[74] **R-054**, United States Bankruptcy Court, *Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof*, [Court Docket, Doc. 519], 15 November 2018 ("Order Approving Bidding Procedures") ¶ 3.c.

[75] **R-054**, Order Approving Bidding Procedures ¶¶ C-D, 5-6.

[76] **R-055**, Westmoreland Coal Company, et al., *Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 294], 25 October 2018 [Excerpt]; **R-056**, Westmoreland Coal Company, et al., *Disclosure Statement for Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 293], 25 October 2018 [Excerpt].

[77] **R-057**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 354], 2 November 2018 [Excerpt] ("Motion to Approve the DS")

[78] **R-057**, Motion to Approve the DS ¶ 6.

and (c) a subsequent wind-down of the WLB Debtors' businesses and affairs upon distribution of the sale proceeds pursuant to the Plan.[79]

63. The WCC Bankruptcy Court approved the WLB Debtors' Disclosure Statement on December 18, 2018.[80]

64. The WCC Plan contemplated a transaction that would transfer certain WLB Debtors' assets to the First Lien Lenders. However, the First Lien Lenders elected not to acquire the assets directly. Instead, they elected to use one or more acquisition vehicles (the "Purchaser")[81] to consummate the purchase of the WLB Debtors' assets on their behalf.[82]

---

[79] **R-057**, Motion to Approve the DS ¶ 6.

[80] **R-058**, United States Bankruptcy Court, *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto*, [Court Docket, Doc. 841], 18 December 2018 [Excerpt] ("DS Approval Order").

[81] The WLB Debtors use the term "Purchaser" (or "Buyer") inconsistently in many of their filings. For example, in the Description of Transaction Steps, "Purchaser" is defined as WML. **R-043**, Description of Transaction Steps § II.a. But the same filing refers to the Amended and Restated Limited Liability Company Agreement of WMH as "Purchaser Formation Documents." **R-059**, Westmoreland Coal Company, et al., Purchaser Formation Documents, Exhibit H-1 to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019. For the purposes of this report, I consider both WMH and WML to fall within the scope of the term "Purchaser" as it is used in the WCC Plan Confirmation Order and the WCC Plan, as both appear to be entities newly created on behalf of the First Lien Lenders for the purpose of taking title to the purchased WLB Debtors' assets in partial satisfaction of the First Lien Lenders' secured claims.

[82] As originally contemplated in the WCC RSA, only one acquisition vehicle was mentioned, although it could be created in one of two ways: either (i) the First Lien Lenders would arrange for the formation of a new Delaware limited liability company to take title to the assets; or (ii) the First Lien Lenders would instruct WCC to create a new subsidiary, which would become a chapter 11 debtor in the consolidated cases, for the purpose of taking title to the assets, and then distribute the equity of that subsidiary to the First Lien Lenders through the WCC Plan. **R-050**, WCC RSA Ex. B. However, a later-filed supplement to the WCC Plan indicates that the First Lien Lenders elected to have at least two new entities created for the purpose of taking title to the purchased assets on their behalf. **R-043**, Description of Transaction Steps §§ II.a. & III.a.

The publicly available documents do not clearly indicate whether the First Lien Lenders elected to form new Delaware limited liability companies or to instruct WCC to create a new subsidiary to effectuate the purchase. However, among other indications on the record, prior versions of Exhibit G to the Plan Supplement suggest that the First Lien Lenders opted not to have WCC create WMH as a subsidiary of WCC. *See* **R-060**, Westmoreland Coal Company, et al., Redline of Description of Transaction Steps, Exhibit G-1 to *Notice of Fourth Amendment to the Plan Supplement*, [Court Docket, Doc. 1538], 28 February 2019, pp. 140 -141 ("Westmoreland Mining Holdings LLC ('HoldCo') will ~~either~~ be formed ~~(i) by WCC, as a direct wholly-owned subsidiary of WCC; or (ii)~~ as an entity with an initial sole member acting as a nominee of the Ad Hoc Group of First Lien Lenders" and "~~In the event HoldCo is not initially formed by WCC, this~~ This contribution shall

65. The Stalking Horse Purchase Agreement between the WLB Debtors and the Purchaser[83] confirms which assets and liabilities the Purchaser would acquire from the WLB Debtors, and which assets and liabilities would remain with the WLB Debtors.[84] Among other things, the Stalking Horse Purchase Agreement details:

- the assets that the First Lien Lenders, through the Purchaser, proposed to purchase;[85]
- the "excluded assets," or the assets that the First Lien Lenders, through the Purchaser, would not purchase;[86]
- the "assumed liabilities," i.e., liabilities that the First Lien Lenders, through the Purchaser, would assume as part of the purchase;[87] and
- the "excluded liabilities," i.e., the liabilities that the First Lien Lenders, through the Purchaser, would not take on as a result of the purchase.[88]

---

cause…") (as stricken in the Redline). No newly-created subsidiary of WCC filed a chapter 11 petition to become part of the administratively consolidated WCC Bankruptcy Proceedings.

[83] The Purchaser, acting on behalf of the First Lien Lenders, negotiated the Stalking Horse Purchase Agreement against the WLB Debtors. Pursuant to their adverse positions, the First Lien Lenders, WMH, and WML, on the one hand, and the WLB Debtors, on the other, had separate counsel. The WLB Debtors were represented primarily by Kirkland & Ellis LLP, while the First Lien Lenders, WMH, and WML were represented by Kramer Levin Naftalis & Frankel LLP ("Kramer Levin"). *See* **R-061**, Kramer Levin Naftalis & Frankel LLP & Porter Hedges LLP, *Verified Statement of Kramer Levin Naftalis & Frankel LLP and Porter Hedges LLP Pursuant to Federal Rule of Bankruptcy Procedure 2019*, [Court Docket, Doc. 496], 14 November 2018 (providing notice that Kramer Levin was representing the First Lien Lenders); **R-053**, Stalking Horse Purchase Agreement § 12.01 (listing Kramer Levin as a notice party on behalf of WML as "Buyer"); **R-062**, Westmoreland Coal Company, et al., *Notice of Seventh Amendment to the Plan Supplement* [Court Docket, Doc. 1849], 17 May 2019 ("WMH Formation Documents") § 15.3 (listing Kramer Levin as a notice party on behalf of WMH).

[84] **R-053**, Stalking Horse Purchase Agreement §§ 2.01-2.05.

[85] **R-053**, Stalking Horse Purchase Agreement §§ 2.01-2.02. For example, purchased assets include equipment, coal inventory, and all intercompany receivables. **R-053**, Stalking Horse Purchase Agreement § 2.01(c), (e) & (t).

[86] **R-053**, Stalking Horse Purchase Agreement § 2.03. For example, excluded assets include all director and officer insurance policies, certain specific real property leases, and certain employee benefit plans. **R-053**, Stalking Horse Purchase Agreement § 2.03(c), (j) & (*l*).

[87] **R-053**, Stalking Horse Purchase Agreement § 2.04. For example, assumed liabilities include workers' compensation liabilities for occupational injuries to transferred employees arising after the closing and obligations arising out of the WLB Debtors' bankruptcy financing facility. **R-053**, Stalking Horse Purchase Agreement § 2.04(h) & (d).

[88] **R-053**, Stalking Horse Purchase Agreement § 2.05. For example, excluded liabilities include certain statutory liabilities for workers that arose prior to the closing and any liability with respect to coal sales by non-acquired entities. **R-053**, Stalking Horse Purchase Agreement § 2.05(c) & (i). Likewise, the WCC Plan Confirmation Order provides specifically that, "[e]xcept as otherwise expressly provided in the Sale Transaction Documentation, the Plan, or this Confirmation Order, . . . neither the Purchaser, nor any of its Affiliates, shall

66. The Stalking Horse Purchase Agreement further confirms that the Purchaser did not acquire any equity interests in WCC.[89]

67. The Plan contemplated that the WLB Debtors would transfer the specific categories of included assets to the Purchaser "free and clear of all Liens, Claims, Interests, charges, and other encumbrances (other than the Assumed Liabilities and Permitted Encumbrances)."[90] As explained above, a debtor's ability to transfer assets "free and clear" is one of the principal advantages for the purchaser in an asset sale under the Bankruptcy Code.

68. Among the assets and interests that the WLB Debtors were to transfer to the Purchaser "free and clear" were "100 percent of the equity interests in the Entities comprising the Company's Canadian business."[91] The Stalking Horse Purchase Agreement also provided for the transfer of a limited number of causes of action, including one identified as the "NAFTA Claim."[92] I discuss the treatment of the "NAFTA Claim" in the sale transaction in Section V.I below.

---

be liable for any claims against or in the assets purchased under the Sale Transaction Documentation or against the WLB Debtors or any of their predecessors or Affiliates." **R-063**, United States Bankruptcy Court, *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 2 March 2019 [Excerpt] ("WCC Plan Confirmation Order") ¶ 49.

89 In order to come to this conclusion, we connected a series of defined terms in the Stalking Horse Purchase Agreement—specifically, "'Transferred Assets' means, collectively, the Purchased US Assets and the Purchased Equity Interests"; "Purchased US Assets" includes a series of assets, none of which include equity in WCC, "'Purchased Canadian Equity Interests' means all of the shares of issued and outstanding capital stock of the Canadian Target"; "'Canadian Target' means WCHI"; and "'WCHI' means Westmoreland Canada Holdings Inc., an Alberta corporation." Therefore, the term "Transferred Assets" does not include equity in WCC. **R-053**, Stalking Horse Purchase Agreement § 1; *see also* **R-043**, Description of Transaction Steps § III.f.

90 **R-064**, Westmoreland Coal Company, et al., Disclosure Statement, Schedule 1 to United States Bankruptcy Court, *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 841], 18 December 2018 [Excerpt] ("Disclosure Statement"), art. VI.C.

91 **R-064**, Disclosure Statement art. VI.C. *See also* **R-053**, Stalking Horse Purchase Agreement § 2.02(a). As discussed in greater detail below, WMH acquired WCC's equity interests in the Canadian Entities.

92 **R-053**, Stalking Horse Purchase Agreement § 2.01(*l*). The "NAFTA Claim" was defined in the Stalking Horse Purchase Agreement as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by Westmoreland on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)." **R-053**, Stalking Horse Purchase Agreement § 1. "Westmoreland" was defined in the same Purchase Agreement as "Westmoreland Coal Company, a Delaware corporation." **R-053**, Stalking Horse Purchase Agreement, Recitals.

69. The WLB Debtors did not receive any bids other than the Purchaser's stalking horse credit bid by the January 15, 2019 bid deadline.[93] As a result, on January 21, 2019, the Purchaser's stalking horse credit bid became the successful bid for certain of the WLB Debtors' assets.[94]

70. On January 31, 2019, WMH was formed as a limited liability company ("LLC")[95] under the laws of Delaware for the purpose of effectuating the sale transaction with the WLB Debtors. On February 12, 2019, WML was formed in a similar manner and for the same purpose.[96]

F. The Bankruptcy Court's Plan Confirmation Order

71. On March 2, 2019, the Westmoreland Bankruptcy Court entered an order approving the WCC Plan (the "WCC Plan Confirmation Order").[97] The WCC Plan Confirmation Order authorized the WLB Debtors and the First Lien Lenders to execute the sale transaction contemplated by the WCC Plan.

72. The WCC Plan Confirmation Order included a series of specific rulings by the WCC Bankruptcy Court.[98] In addition to authorizing the WLB Debtors to enter into the transaction to effectuate the transfer of their assets, the WCC Plan Confirmation Order contains findings and

---

93 **R-065**, Westmoreland Coal Company, et al., *Declaration of Jeffrey S. Stein in Support of Confirmation of the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtors Affiliates* [Court Docket, Doc. 1452], 22 February 2019 ("Stein Plan Declaration"), ¶ 22. Because no other bids were received by the deadline, the auction was cancelled.

94 **R-066**, Westmoreland Coal Company, et al., *Notice of Cancellation of Auction and Designation of Successful Bidder* [Court Docket, Doc. 1112], 21 January 2019.

95 An LLC is a form of business entity created by U.S. state statute that permits the pass-through federal tax treatment of a partnership and the liability protections of a corporation.

96 It is common for a purchaser of assets out of a bankruptcy case to include a reference to the debtor's name in the name of the entity created to serve as an acquisition vehicle. Asset purchasers very often do this to maintain the name association that the debtor had with customers and suppliers, even though the ownership and the legal identity of the business have changed. Thus, when WMH was created on behalf of the First Lien Lenders to take title to the WLB Debtors' assets, they included "Westmoreland" in its name.

97 **R-063**, WCC Plan Confirmation Order.

98 Although ultimately entered by the bankruptcy court, orders such as the WCC Plan Confirmation Order are typically drafted and proposed by the debtors before being filed with the bankruptcy court. Parties in interest in the bankruptcy proceedings then can negotiate the order further or even object to the order and present their opposition to the bankruptcy court. After the hearing, the debtors will submit a final proposed order, incorporating the terms resolved at the hearing. As long as the final proposed order accurately reflects the results of the hearing, the bankruptcy judge will typically enter the order without further modification.

rulings relating to the sale to the Purchaser (including WMH) as being free and clear of encumbrances, made in good faith and at arm's length, and with limitations on successor liability, including limitations on third parties' ability to pursue remedies against the WLB Debtors and the First Lien Lenders. I cover each of these specific provisions below and explain their significance:

a. Sale Free and Clear. The WCC Plan Confirmation Order provides that the purchased WLB Debtors' assets were "transferred, conveyed, assigned or sold" to the Purchaser "free and clear of all Liens, Claims, encumbrances, and interests pursuant to sections 363(f), 1123(a)(5), and 1141(c) of the Bankruptcy Code."[99] This finding serves, in essence, to eliminate prepetition liens and claims against the assets being sold. Even if the property to be sold is encumbered with liens or security interests, a longstanding component of the Bankruptcy Code is the ability to sell property to a third party free and clear of liens and interests. The reasoning behind this is plain: unencumbered property will yield a higher sale price, while the holder of the released interest is fully protected by having the lien or security interest attach to the proceeds. The secured party either (i) will receive its share of the proceeds from the sale in satisfaction of its secured claim, by virtue of its lien having attached to the proceeds received by the estate; or (ii) can use its claim against the debtor as currency to pay the purchase price, as happened here.

b. Good Faith Purchaser. The WCC Plan Confirmation Order provides that the "Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and is therefore entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code. The Purchaser has proceeded in good faith in all respects in connection with this proceeding."[100] By acting in good faith, a purchaser can secure the protections of section 363(m), which make the sale less susceptible to

---

[99] **R-063**, WCC Plan Confirmation Order ¶ 45.

[100] **R-063**, WCC Plan Confirmation Order ¶ 46.

being unwound if there is ultimately a successful appeal of the order approving the sale.[101]

c. Arm's-Length Sale. The WCC Plan Confirmation Order provides that the "Stalking Horse Purchase Agreement and other Sale Transaction Documentation was negotiated, proposed and entered into by the WLB Debtors and the Purchaser without collusion, in good faith and from arm's-length bargaining positions."[102] A finding that the sale was completed from "arm's-length bargaining positions" insulates the sale from a court applying a stricter analysis that would be applied if the purchaser was determined to be an insider of, or closely related party to, the debtor.[103] This provision in the WCC Plan Confirmation Order is the Court's ruling that the stricter standard of review for insider transactions does not apply to the sale of the WLB Debtors' assets to the Purchaser.[104]

d. No Successor Liability for Purchaser. The WCC Plan Confirmation Order provides that:

> [N]either the Purchaser, nor any of its Affiliates, shall be liable for any claims against or in the assets purchased under the Sale Transaction Documentation or against the WLB Debtors or any of their predecessors or Affiliates, and the Purchaser and its Affiliates shall have no successor, transferee, derivative, or vicarious liabilities of any kind or character, whether known or unknown as of the closing of the Sale Transaction, then existing or hereafter arising, whether fixed or contingent, asserted or unasserted, liquidated or unliquidated, with respect to the WLB Debtors or

---

101 *See* **R-045**, 11 U.S.C. § 363(m).

102 **R-063**, WCC Plan Confirmation Order ¶ 47.

103 *See* **R-045**, 11 U.S.C. § 101(31)(E) (defining "insider" to include affiliates of the debtor). The Bankruptcy Code defines "affiliate" as an entity owning or controlling the debtor, that is owned by the debtor, or that is owned by an entity owning or controlling the debtor. Ownership or control is determined by ownership of, control of, or the power to vote 20% or more of the debtor's outstanding voting securities. It excludes entities holding securities in a fiduciary or agency capacity or solely to secure debt. *See* **R-045**, 11 U.S.C. § 101(2)(A)-(B).

104 This determination is made by considering the sale transaction as a whole. Intermediary steps taken to effectuate the transaction do not affect the bankruptcy court's finding in this regard.

> their Affiliates or any obligations of the WLB Debtors or their Affiliates arising prior to the closing of the Sale Transaction ….[105]

These types of rulings make clear that creditors whose claims accrued before or during the bankruptcy case are bound by any plan or distribution in that case.[106] As a result of such finding, a purchaser of assets will not be held liable for a debtor-seller's obligations unless the purchaser expressly agrees to do so (or an exception to the rule exists). Thus, the WCC Bankruptcy Court determined that the Purchaser could not be held liable for the obligations of the WLB Debtors solely by virtue of acquiring the WLB Debtors' assets.

G. Execution of the Sale Transaction Contemplated by the Plan

73. Following the Court's entry of the WCC Plan Confirmation Order, the WLB Debtors and the First Lien Lenders effectuated the transfer of the WLB Debtors' assets contemplated by the WCC Plan by taking the corporate actions necessary to achieve the asset transfer. As explained above, two Delaware LLCs were formed on behalf of the First Lien Lenders to complete the sale transaction: (i) WMH, on January 31, 2019; and (ii) WML, on February 12, 2019.[107] WMH and WML were each "formed as an entity with sole members acting as nominees of the [. . .] First Lien Lenders."[108] Although the term "nominee" is not defined in this context, the common usage of the term refers to an appointed agent acting on behalf of the First Lien Lenders.[109]

---

[105] **R-063**, WCC Plan Confirmation Order ¶ 49.

[106] The effect of bankruptcy court orders, such as the WCC Plan Confirmation Order, on those with "unknown" claims may be limited by the concept of "due process" embodied in the U.S. Constitution. Because such "due process" concerns are not relevant to this report, I do not expand on this potential limitation here.

[107] **R-067**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545, accessed on 13 December 2020; **R-068**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining LLC, Entity No. 7266728, accessed on 13 December 2020; *see also* **R-062**, WMH Formation Documents, Recitals; **R-043**, Description of Transaction Steps §§ II.a. & III.a.

[108] **R-043**, Description of Transaction Steps §§ II.a. & III.a. The equity interests in an LLC are referred to as "membership interests," and their holders are "members."

[109] Compare with definition of "Nominees" from the WLB Debtors' Motion to Approve the Disclosure Statement, identifying "certain brokerage firms and banks or their agents" as the "Nominees." Motion to Approve the DS ¶ 26.

74. Each of WMH and WML was formed for the express purpose of taking title to the WLB Debtors' assets. Pursuant to the WCC Plan, as supplemented, the transaction resulted in each of WMH and WML taking title to certain of the purchased assets.[110] In WMH's case, these assets included 100% of the equity in WCHI, 100% of the equity in WML, and the "NAFTA Claim."

75. Although the execution of the sale transaction had many steps, most of which occurred virtually simultaneously on or around March 15, 2019, three steps are most relevant for the purposes of this report because they address the transfer of the purchased assets to WMH and WML in partial satisfaction of the First Lien Lenders' secured claims: (a) WML's acquisition of the equity in a number of the WLB Debtors' entities (the "U.S. Acquisition"); (b) WMH's acquisition of WCHI (the "Canadian Acquisition"); and (c) the distribution of 100% of the equity interests in WMH to the First Lien Lenders in satisfaction of their secured claims against the WLB Debtors.

a. The U.S. Acquisition

76. The U.S. Acquisition involved the following actions:

- Certain WLB Debtors each contributed to WML the membership interests[111] they held in newly-formed U.S. subsidiaries,[112] into which certain purchased U.S. assets and assumed liabilities had already been placed.[113] In exchange, these contributing WLB Debtors received membership interests in WML.[114] As a result, WML held the membership interests of several newly-formed subsidiaries holding some of the purchased U.S. assets, while the contributing WLB Debtors held the membership interests of WML.[115]

---

[110] **R-043**, Description of Transaction Steps §§ II, III.

[111] A membership interest is the equity interest in an LLC.

[112] **R-043**, Description of Transaction Steps §§ II.b.-h.

[113] *See generally* **R-043**, Description of Transaction Steps § I.

[114] **R-043**, Description of Transaction Steps §§ II.b.-h.

[115] **R-043**, Description of Transaction Steps §§ II.b.-h. Thereafter, the Description of Transaction Steps indicates that the membership interests of the original founding members of WML were cancelled. **R-043**, Description of Transaction Steps § II.i.

- These contributing WLB Debtors then distributed to WCC their respective membership interests in WML, such that WCC then held all of the membership interests in WML.[116]

- WCC then contributed a number of assets and interests to WMH, including, among other things, (i) all of the membership interests in WML; and (ii) the Purchased US Assets (as defined in the Stalking Horse Purchase Agreement) that were owned directly by WCC (including the "NAFTA Claim"), subject to certain exclusions.[117] In exchange, WCC received, among other consideration, membership interests in WMH.[118] (As described below, these membership interests in WMH would ultimately be distributed by WCC to the First Lien Lenders.)

b. The Canadian Acquisition

77. Prior to the Canadian Acquisition, the WLB Debtors' corporate structure with regard to the Canadian Entities was as follows:

Figure 1: Pre-Sale WCC Corporate Structure Pertaining to the Canadian Entities[119]

---

[116] After distributing their WML membership interests to WCC, the contributing WLB Debtors were then dissolved. **R-043**, Description of Transaction Steps §§ II.j. & V.a.

[117] **R-043**, Description of Transaction Steps § III.b. The "NAFTA Claim" was identified in the Stalking Horse Purchase Agreement as a "Purchased US Asset." **R-053**, Stalking Horse Purchase Agreement § 2.01(*l*).

[118] **R-043**, Description of Transaction Steps § III.b. Thereafter, the membership interests of the original founding members of WMH appear to have been cancelled. **R-043**, Description of Transaction Steps § III.b.

[119] This chart was made for the purpose of this report based on an exhibit to a Form 8-K filing with the U.S. Securities and Exchange Commission, dated May 21, 2018, made by WCC. **R-069**, Westmoreland Coal Company, Current Report (Form 8-K), 21 May 2018, Ex. 99.2. As used in this chart, "LP" refers to the limited partner, who typically has no right to manage the business but is insulated from most liabilities of the

78. The Canadian Acquisition involved the following actions:

- DutchCo contributed the stock of WCHI to WMH.[120] In exchange, DutchCo received, among other consideration, new membership interests in WMH.[121] These membership interests were separate from those interests held by WCC as consideration for the U.S. Acquisition (i.e., those described in the third bullet of paragraph 76 above).

- DutchCo then distributed the additional membership interests in WMH, along with the other consideration it received, to Westmoreland Canadian Investments L.P., which in turn distributed the consideration to WCC.[122] WCC thus received 100% of the membership interests in WMH as consideration in both the U.S. Acquisition and the Canadian Acquisition.[123] (As described below, these membership interests were ultimately distributed to the First Lien Lenders.[124])

c. Final Steps

79. Immediately thereafter, once WMH received the assets described above, WMH then contributed to WML all of the assets it received, *other than* (i) the equity interests in WML, (ii) the equity interests in WCHI, (iii) the "NAFTA Claim," and (iv) certain insurance policies and debt instruments.[125] As a result, prior to the distribution of all WCC's equity interests in WMH to the First Lien Lenders, WMH held only (i) the equity interests in WML, (ii) the equity interests in WCHI, (iii) the "NAFTA Claim," and (iv) the insurance policies and debt instruments.

---

partnership, while "GP" refers to the general partner, who manages the business and has unlimited liability stemming from the partnership. WCC is the limited partner and Westmoreland Canada LLC is the general partner in Westmoreland Canadian Investments, LP.

120 **R-043**, Description of Transaction Steps § III.c.

121 **R-043**, Description of Transaction Steps § III.c.

122 **R-043**, Description of Transaction Steps § III.c.

123 **R-043**, Description of Transaction Steps § III.c.

124 **R-043**, Description of Transaction Steps § III.f.

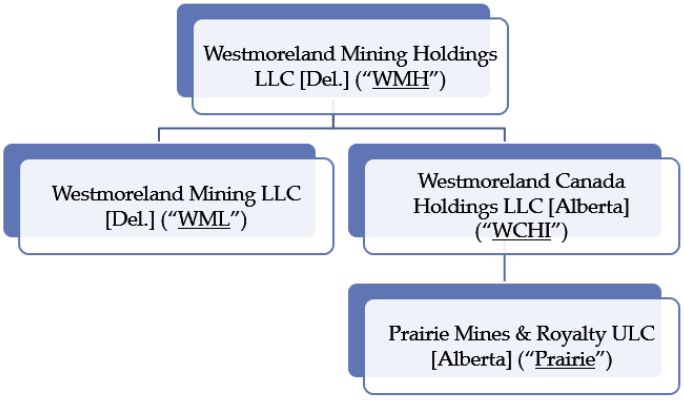
125 **R-043**, Description of Transaction Steps § III.d.

80. Finally, 100% equity interest in WMH was distributed to the First Lien Lenders on a *pro rata* basis which, in addition to the other consideration afforded to the First Lien Lenders under the WCC Plan,[126] fully satisfied their secured claims.

d. Result of the Transaction

81. The corporate structure of the First Lien Lenders' holdings as a result of the transaction was as follows:

Figure 2: Post-Sale First Lien Lenders' Corporate Holdings[127]



82. At the conclusion of the transaction, WCC no longer held any interest in WMH, WML, or the assets purchased pursuant to the Stalking Horse Purchase Agreement. Obligations arising from the operation of the businesses that arose after the closing of the transaction became the sole responsibility of WMH and WML.

83. In addition, the WLB Debtors' prepetition obligations to the First Lien Lenders were satisfied by consummation of the transaction.

---

[126] **R-042**, WCC Plan art. III.B.3(c)(i). In addition to receiving their pro rata interest in WMH, the First Lien Lenders received their pro rata share of (i) a certain new second lien debt instrument issued by WMH; (ii) the proceeds stemming from the sale of assets not included in the assets purchased by WMH; and (iii) all other proceeds of the WLB Debtors' assets that constitute collateral of the First Lien Lenders and were not transferred pursuant to the Stalking Horse Purchase Agreement. *See also* **R-043**, Description of Transaction Steps § III.f.

[127] This chart was created for the purpose of this report based on my understanding of the corporate structure of WMH following consummation of the sale transaction, as outlined in the Description of Transaction Steps.

H. The Post-Sale Dissolution of the WLB Debtors

84. Each of the WLB Debtors that remained following the sale or other disposition of all of their assets was (or is in the process of being) wound down and dissolved. At this time, WCC has not yet been fully dissolved. As sometimes happens in chapter 11 cases, WCC has remained in existence to administer the remaining bankruptcy process.[128] Upon completion, it too will dissolve.

85. A chapter 11 debtor can choose to wind down and dissolve following the sale of substantially all of the debtor's assets. There is no business left to operate, and winding down as quickly as possible in order to close the chapter 11 proceedings saves bankruptcy fees and insulates management employees (if any remain after the sale) and board members against liability for any pre- or post-petition claims being asserted against an entity that has no assets and no way of funding a response to claims.

I. Treatment of the "NAFTA Claim"[129] in WCC's Chapter 11 Bankruptcy

86. Section 541 of the Bankruptcy Code defines "property of the estate" very broadly to include all existing and potential claims, including legal claims, and other sources of value in which the debtor has an interest.[130] However, a legal claim that becomes part of a bankruptcy estate remains subject to all applicable laws, including any defenses and legal infirmities that applied to it outside of the bankruptcy.

87. As discussed above, the debtor in bankruptcy has the obligation to maximize the value of all of its assets, including legal claims, and also has broad discretion to address how to discharge that obligation. For instance, in a case where the debtor reorganizes and emerges from bankruptcy retaining its corporate form and all of its assets, among the assets it retains are the rights to pursue

---

128. By way of example, remaining tasks in administering the bankruptcy estate may include litigating contested bankruptcy claims and making distributions once resolved, paying final professional fees (which are payable as administrative claims), and ensuring the proper disposition of any regulatory approvals that the debtor used while in operation (either cancelling or ensuring proper transfer thereof).

129 See note 92 above for the definition of the "NAFTA Claim" pursuant to the Stalking Horse Purchase Agreement.

130 See discussion at note 12 above.

legal claims that existed on the petition date.[131] Alternatively, a debtor (regardless of whether it will emerge from bankruptcy or dissolve) may assign its legal claims to a trust for the benefit of certain stakeholders.[132] It may also attempt to negotiate a settlement in exchange for the release of such legal claims, with the result that any cash consideration received as part of such settlement may become available for distribution to creditors. Or, as happened here, the debtor may attempt to sell the right to pursue the legal claim.

88. During the course of the WCC Bankruptcy Proceeding, the "NAFTA Claim" was sold by the WLB Debtors to WMH pursuant to the Stalking Horse Purchase Agreement. The Bankruptcy Code facilitates such transfers of legal claims as a means of transferring value to stakeholders. However, the Bankruptcy Code defers to applicable non-bankruptcy law—whether it be state, federal, or international law—as to two important aspects of transferred claims. First, the Bankruptcy Code is silent on the issue of transferability itself.[133] In other words, if applicable non-bankruptcy law limits the transferability of a particular claim, the fact that the claim is sold as part of an asset sale in chapter 11 does not change that result. Second, the Bankruptcy Code also defers to applicable non-bankruptcy law as to the merits of a claim and who may assert it. Accordingly, the Bankruptcy Code does not alter the applicable non-bankruptcy limitations on who may assert "NAFTA Claim," and whether the "NAFTA Claim" is transferable.

VI. CONCLUSIONS REGARDING THE WCC BANKRUPTCY PROCEEDING

89. My review of the documents available from the WCC Bankruptcy Proceeding, and my decades of experience in negotiating, consummating, and observing transactions similar to those consummated pursuant to the WCC Plan, lead me to conclude that the WLB Debtors and the First Lien Lenders accomplished what they set out to do in the negotiated WCC RSA: sell substantially all of the assets of the WLB Debtors for the benefit of the First Lien Lenders, who had liens on, and security interests in, virtually all of the WLB Debtors' assets.

---

131 See discussion at notes 26 and 30 above.

132 See discussion at note 30 above.

133 There is an exception to the general principle that the Bankruptcy Code does not override or alter a debtor's ability to transfer its rights. However, it pertains to executory contracts or unexpired leases, which are not relevant here. *See* **R-045**, 11 U.S.C.§ 365(f).

90. In the WCC Bankruptcy Proceeding, the WLB Debtors and the real parties in interest in the Purchaser, the First Lien Lenders, were adverse to each other, as debtor and creditor. In the negotiated sale of the WLB Debtors' assets, the seller (the WLB Debtors) and buyer (the Purchaser,[134] acting on behalf of the First Lien Lenders) were also legally adverse to each other, and were represented by separate counsel.

91. As a result of the consummation of the Plan, the WLB Debtors (including WCC) are no longer liable to the First Lien Lenders, because the WLB Debtors transferred their assets to the Purchaser in satisfaction of the First Lien Lenders' secured claims. The WLB Debtors are also relieved of certain other obligations—to pay their employees, for example—because the Purchaser, in acquiring the WLB Debtors' assets, has taken on certain of the WLB Debtors' obligations as well. The net result is exactly the same as it would be had the sale been accomplished out of court: the seller (i.e., the WLB Debtors) no longer owns the transferred assets and is no longer obligated with respect to the transferred liabilities, and the purchaser (i.e., WMH and WML as Purchaser on behalf of the First Lien Lenders) no longer has an obligation to the seller for the purchase price because it has been paid.

VII. RESERVATION OF RIGHTS

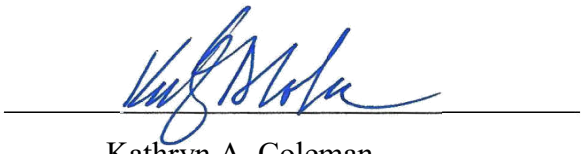
92. My opinions herein are based solely on the information available and work performed through the date of this report. I reserve the right to supplement my opinion should further information be produced, and to respond to any expert opinions offered by, or on behalf of, the parties to this matter. My testimony may also supplement this report. This report is therefore subject to change or modification and should additional relevant information become available that bears on the analyses opinions, or conclusions contained herein.

---

[134] As discussed in note 81 above, I view the term "Purchaser" as used in the WCC Plan Confirmation Order and the WCC Plan as encompassing both WMH and WML.

I declare that the statements and opinions contained in this report are true and correct to the best of my knowledge and belief.

Dated: December 16, 2020
New York, New York



Kathryn A. Coleman

ANNEX A: CURRICULUM VITAE

Hughes Hubbard & Reed

Kathryn A. Coleman

Partner

New York City

katie.coleman@hugheshubbard.com

+1 (212) 837-6447

Education

University of California, Berkeley Law School
J.D., Order of the Coif

Pomona College, B.A., magna cum laude

Bar Admissions

California

District of Columbia

New York

Areas of Focus

Corporate Reorganization
& Bankruptcy

Cross-Border Insolvency

Complex Litigation

Kathryn A. (Katie) Coleman, a partner in Hughes Hubbard & Reed's New York office, co-chairs the Corporate Reorganization & Bankruptcy practice and sits on the firm's Executive Committee. Katie has handled a wide range of chapter 11 representations and other high-stakes insolvency-related matters in her more than 35 years in practice, including dealing with "bet-the-company" litigation claims including trade secret and RICO cases, nationwide DOJ investigations, chapter 11 restructurings for US and non-US companies, cross-border insolvency matters, out-of-court restructurings, acquisitions and investments. Her clients include chapter 11 debtors, special committees of boards of directors, DIP lenders, equity sponsors, traditional and nontraditional secured lenders, unsecured creditors (both official committees and significant creditors for their own account), and financial and strategic buyers.

Ms. Coleman is a trusted advisor to the inner management circles of her clients, with substantial expertise in advising management and boards of directors on corporate governance, fiduciary duty and D&O insurance matters.

Ms. Coleman has advised clients on, and litigated at the trial and appellate levels, the significant legal issues inherent in modern restructuring and financial practice, including contested plan confirmations, prepackaged plans, credit bidding, exclusivity, debtor-in-possession financings, valuation, adequate protection of security interests, the ability to collaterally attack orders of the bankruptcy court and cash collateral usage. She has substantial experience litigation venue, remand, removal and stay issues, and has represented recovery trustees dealing with a myriad of post-confirmation issues and litigation.

Ms. Coleman is a Fellow of the American College of Bankruptcy. She serves on the Board of Directors of the American Bankruptcy Institute, and co-chairs its annual Complex Financial Restructuring Program. She frequently speaks on bankruptcy law and distressed investing, participating in programs sponsored by the Practising Law Institute, the American Bankruptcy Institute, Turnaround Management Association, AIRA, the M&A Advisor, the New York City Bar Association, California Continuing Education of the Bar and the American Bar Association. She also serves on the Steering Committee of the NYC Bankruptcy Assistance Project.

Ms. Coleman was named a 2018 Bankruptcy MVP by Law360 and one of the 100 Most Influential Women in Business by the San Francisco Business Times. She is ranked by Chambers USA as a leading restructuring lawyer. Ms. Coleman was also designated a leading lawyer in bankruptcy in The Best Lawyers in America, and her expertise in cross-border insolvency was noted in the IFLR 500 and in PLC's Cross-Border Restructuring and Insolvency Handbook. She has also been named to Lawdragon's inaugural list of 500 Leading U.S. Bankruptcy & Restructuring Lawyers.

Ms. Coleman graduated magna cum laude from Pomona College. She earned her J.D. from Boalt Hall School of Law (U.C. Berkeley), where she was elected to the Order of the Coif. She served as Senior Articles Editor of the California Law Review and is the author of "Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights," 70 Cal. L. Rev. 1107 (1982).

Ms. Coleman clerked for the Honorable C. Martin Pence, U.S. District Judge for the District of Hawaii.

Highlighted Matters

Chapter 11 Debtors

- Pace Industries: Financing counsel to the nation's largest metal die-caster in its prepackaged chapter 11 case.
- Patriot National Inc.: Lead chapter 11 debtor's counsel to Florida-based insurance services company and 18 of their domestic subsidiaries in its chapter 11 restructuring. Three months after filing, Patriot National confirmed a plan involving an exit loan facility and a new term loan facility.

- CST Industries: Lead chapter 11 debtors' counsel to CST Industries, the world's largest and leading tank and dome manufacturer, in its chapter 11 restructuring. After four months in chapter 11, CST sold substantially all of its assets to a new investor, thereby preserving hundreds of jobs and significant creditor value.
- Exelco NV: Lead chapter 11 debtor's counsel to Exelco NV, a Belgian diamond wholesaler and distributor, and six of its U.S. affiliates.
- Delta Petroleum Corporation: Lead chapter 11 debtor's counsel to Delta, a public oil and natural gas exploration and production company, and eight affiliated entities in all aspects of their chapter 11 restructuring. Eight months after its chapter 11 filing, Delta confirmed an innovative plan of reorganization that both realized value for Delta's assets and preserved over $1 billion of tax attributes for the benefit of creditors.
- Affiliated Media, Inc.: Lead restructuring counsel in prepackaged bankruptcy of second-largest newspaper publisher in the U.S. Achieved acceptance of prepackaged plan by virtually all creditors, and confirmation of plan in 41 days.
- Almatis: Ms. Coleman was lead restructuring counsel to Almatis, a European-based chemicals company in its restructuring negotiations and developed a strategy for a chapter 11 filing in the United States and related insolvency proceedings in Europe.
- The Scotia Pacific Company LLC: Ms. Coleman served as lead chapter 11 counsel to Scotia Pacific in its highly contentious chapter 11 case, which was filed in the United States Bankruptcy Court for the Southern District of Texas (Corpus Christi Division). The Scotia Pacific/Pacific Lumber case is remarkable for the number of issues that were fully litigated, including venue, use of cash collateral, Scotia Pacific's alleged status as a single-asset real estate debtor, exclusivity, valuation, cramdown standards, administrative claims, and a stay pending appeal. Ms. Coleman and her team defeated the noteholders' attempt to have Scotia Pacific declared a "single asset real estate debtor," and obtained an affirmance of the trial-level decision at the Fifth Circuit Court of Appeals in one of the first cases to be directly certified to the Circuit Court of Appeals from the bankruptcy court. The opinion, which was the first Circuit Court of Appeals decision on the issue, is reported at 508 F.3d 214 (5th Cir. 2007). The multi-week contested confirmation trial in the Scotia Pacific case initially involved five competing plans of reorganization, cramdown standards, and valuation of Scotia Pacific's assets. The confirmation of the plan for Scotia Pacific and its related debtors was appealed to the Fifth Circuit and resulted in an important opinion on equitable mootness, reported at 584 F.3d 229 (5th Cir. 2009).
- Scotia Pacific's chapter 11 filing followed two years of negotiations between Scotia Pacific and its secured noteholders, during which Ms. Coleman led a team in formulating proposed restructuring plans and negotiating with the noteholders over the terms of the proposed restructuring, retention and payment of advisors and trading restrictions during the negotiation period.

- Hoop Holdings LLC (The Disney Store): Hoop operated several hundred Disney Stores in the United States and Canada. Ms Coleman was lead restructuring counsel in Hoop Holdings' pre-negotiated chapter 11 case, filed in the United States Bankruptcy Court for the District of Delaware.
- NextCard: Ms. Coleman was lead chapter 11 counsel to Nextcard, one of the first Internet-only banks. Nextcard's bankruptcy case was filed in the United States Bankruptcy Court for the District of Delaware.
- Solutia, Inc.: In Solutia's chapter 11 case filed in the U.S. Bankruptcy Court for the Southern District of New York, Ms. Coleman led the team responsible for negotiating, documenting, and obtaining approval for both the initial debtor-in-possession (DIP) financing and the highly unusual replacement DIP loan. Prior to the filing, Ms. Coleman also led the team of finance lawyers that successfully relied on a sui generis "desecuritization" provision in the loan documentation to restructure Solutia's bank debt. The desecuritization was challenged and then upheld in Solutia's subsequent bankruptcy case.

Special Committees

- Special Committees of the Boards of Jagged Peak, Inc. and TradeGlobal North America Holdings, Inc. in connection with their chapter 11 cases.

DIP Lenders/Acquirers/Plan Sponsors

- Paxion Capital: DIP Lender and plan sponsor in the Lolli & Pops chapter 11 case in Delaware.
- The Madison Square Garden Company: In connection with the acquisition of a majority stake in nightclub operator Tao Group.
- Scout Media, Inc.: Stalking horse bidder and successful purchaser of assets of Scout Media in its chapter 11 case.
- Freedom Communications: Purchaser in hotly contested purchase of the Orange County Register out of the Freedom Communications chapter 11 case.
- Blackbird Capital I: Issuer in an $800 million aircraft lease ABS securitization, the proceeds of which will be used by Blackbird to acquire a portfolio of 19 aircraft.
- Boston Semi Equipment: Acquisition of MVTS Technologies.
- NE Opco, Inc.: Purchaser in complex private sale of certain assets of debtor NE Opco, Inc. When a former employee sought to collaterally attack the sale order and pursue claims against her client for its conduct in negotiating the sale, Ms. Coleman successfully invoked the protections included in the 363 order.
- MSR Resorts: Stalking horse bidder and successful purchaser of the Doral resort in Miami, Florida.
- National Envelope Corporation: Represented Cenveo, the Debtors' largest competitor, in bidding for substantially all the assets of National Envelope, the largest envelope manufacturer in the United States.

- Atrium Corporation: Existing equity holder in acquiring ownership of reorganized chapter 11 debtor via "new value" plan of reorganization. The debtor and its affiliates manufacture residential windows and patio doors.
- Nortel Networks Inc.: Ms. Coleman represented a bidder for Nortel's enterprise solutions business involving operations in the United States, Canada, Europe, the Middle East, and Africa.

Selected Creditors and Defendants

- Delta Air Lines: Ms. Coleman represents Delta in connection with the Aeromexico chapter 11 case in the United States
- Air France/KLM: Ms. Coleman represents Air France and KLM in asserting their claims in the LATAM chapter 11 cases pending in the United States
- Aircraft Lessor: Ms. Coleman represents the lender to an aircraft company in loan enforcement, workout and restructuring efforts.
- Dewey & LeBoeuf LLP (Former Management): Ms. Coleman represented Dewey's former Executive Director and Chief Financial Officer in connection with the firm's chapter 11 case and related litigation.
- Out-of-Court Workouts: In addition to the above publicly disclosable matters, Ms. Coleman led the legal team in negotiating and documenting numerous out-of-court workouts, representing both borrowers and lenders for borrowers in industries including alternative energy, online gaming, windpower, home products, automotive parts suppliers, real estate development, office products, retail, and agriculture. Ms. Coleman structured and negotiated innovative intercreditor arrangements and U.K. ringfencing schemes in the context of some of these transactions. In connection with a recent representation of a truck lighting manufacturer, Ms. Coleman crafted a strategy that led to a consensual rightsizing of the capital structure, an opportunity for the client to restructure obligations, and equity retaining its ownership stake, without the need for a chapter 11.

Litigation

- Trade Secret Misappropriation: Lead defense counsel for company president accused of misappropriating trade secrets; defeated wide-ranging injunction sought against client.
- RICO: Lead defense counsel for group of affiliated companies and individuals defending a RICO action alleging poaching of employees and trade secret misappropriation.
- Fraudulent Transfer/Clawback: Defended the former CFO of Dewey & LeBoeuf LLP in a $22 million clawback suit brought by the liquidating trustee of the Dewey estate.
- Securities Fraud: Defended the former CFO of Dewey & LeBoeuf LLP in a securities fraud action pending in federal district court, and obtained a full stay of the action.

Highlighted Publications

- "Blocking the Use of 'Blocking Rights'," XXXIX *ABI Journal* 7 (July 2020)

- "Bankruptcy Wildcatting: Challenging Midstream Contracts in the Wake of Sabine," *New York Law Journal* (December 2016)
- "Rounding the Square Peg: Clarifying the Jurisprudence of the Sale Model of Chapter 11," XXXV *ABI Journal* 6, 22-23, 43 (June 2016)
- "Halting the Race to the Courthouse: Limits of Post-Petition Lien Filings," XXXI *ABI Journal* 5 (June 2012)
- "Credit Bidding Under the Bankruptcy Code: Recent Developments, Case Study, and Suggested Strategies for the Secured Creditor," published in *Creditor's Rights in Chapter 11 Cases* (2012)
- Authored a chapter in "A Practitioner's Guide to Pre-packaged Bankruptcy: A Primer," published by the *American Bankruptcy Institute* (2011)
- "The European Traveler's Guide to Chapter 11," *Bankruptcy Law 360*, May 5, 2010
- "Recent Developments in Business Bankruptcy 2005," 28 *California Bankruptcy Journal* 3 (2006)
- "Selling an Operating Business in Bankruptcy," 33 *UCC Law Journal* 387 (2001)
- "Unexpected Allies: The Bankruptcy Judge and Debtor's Counsel," 112 *The Banking Law Journal* (1995)

Recent Speaking Engagements

- "Restructuring for 2020 and Beyond," Rees Draper Wright, Webinar, July 2020
- "Health Care Business Restructuring," ABI's Complex Financial Restructuring Program, Las Vegas, February 2020
- "Current Developments in Executory Contracts," PLI Current Developments in Bankruptcy, New York, December 2019
- "Hit 'Em Below The Belt (And In The Wallet): Professional Fees and Leverage Post-ASARCO, ABI Winter Leadership Conference, December 2019
- "The Party's Over, Now Who's Cleaning Up?: The Post-Apocalyptic Landscape Following A 363 Sale," ABI Winter Leadership Conference, December 2019
- "What Does The Future Hold?," ABI Annual Meeting, Washington D.C., April 2019
- "Restructuring An Operating Company," ABI Complex Financial Restructuring Program, Las Vegas, February 2019
- "Executory Contracts," "Plan Disclosure and Confirmation Issues," PLI Current Developments in Bankruptcy, New York, December 2018
- "VALCON Talks: What I'd Change About the Corporate Bankruptcy System," VALCON, Las Vegas, May 2018
- "Liquidating In and Out of Chapter 11," American Bankruptcy Institute, New York City Bankruptcy Conference, May 2017

- "Bankruptcy & Reorganizations 2016: Current Developments," Practicing Law Institute, Webinar, April 2016
- "Valuation of Middle Market Companies," VALCON, Las Vegas, March 2016
- "Old Equity Chessboard: Option Value and Game Theory," M&A Advisor Distressed Investing Summit, Palm Beach, January 2016
- "Executory Contracts," Practising Law Institute, New York, December 2015
- Complex Financial Restructuring Program, American Bankruptcy Institute, The Wharton School, Philadelphia, November 2015
- "Being Secured Just Ain't What It Used to Be," AIRA Annual Conference, Philadelphia, June 2015
- "GM And Its Progeny," American Bankruptcy Institute New York Conference, May 2015
- "The Future of Asset Sales," American Bankruptcy Institute Winter Leadership Conference, Palm Springs, December 2014
- Complex Financial Restructuring Program, American Bankruptcy Institute, The Wharton School, Philadelphia, November 2014
- "Issues In Cross-Border Insolvencies," American Bankruptcy Institute New York Conference, May 2014
- "Equitable Subordination, Recharacterization, Designation of Votes, And Other Punishments," Practising Law Institute, New York, April 2014
- "Identifying Investing Opportunities in the US and Getting to Closing: Opportunities and Pitfalls," Deloitte, Beijing, March 2014
- "Coaching DIPs Around Insider Power Plays in Plans of Reorganization," American Bankruptcy Institute Rocky Mountain Conference, Denver, January 2014
- "Distressed Investing in Oil and Gas Assets," Energy M&A and Financing Forum, Denver, January 2014
- Basics of Bankruptcy Reorganization, Practising Law Institute, New York, December 2013
- Complex Financial Restructuring Program, American Bankruptcy Institute, Philadelphia, November 2013
- "Shoulda Coulda Woulda" – Lessons In How Things Got Out Of Hand And What We Could Have Done Differently," American Bankruptcy Institute Southwest Conference, Lake Tahoe, CA August 2013
- "Selected Topics in Ethics," American Bankruptcy Institute New York Conference, New York, May 2013
- "Nuts and Bolts of Bankruptcy," American Bankruptcy Institute, New York, May 2013
- "Best Practices of the Best Dealmakers," M&A Advisor Distressed Investing Summit, Palm Beach, March 2013

- Panelist, Energy M&A and Financing Forum, Denver, February 2013
- "Issues in Corporate Governance and Plan of Reorganization Issues," Practising Law Institute, New York, January 2013

Professional Activities

- Board of Directors and Audit Committee of MGM Growth Properties (MGP)
- Board of Directors of the American Bankruptcy Institute (2014-2020)
- Co-chair of the American Bankruptcy Institute's annual Complex Financial Restructuring Program
- Steering Committee of the NYC Bankruptcy Assistance Project

Court Admissions

- United States Supreme Court
- United States Court of Appeals for the Fifth Circuit
- United States Court of Appeals for the Ninth Circuit
- United States District Court for the Southern District of New York
- United States District Court for the Eastern District of New York
- United States District Court for the Southern District of California
- United States District Court for the Central District of California
- United States District Court for the Northern District of California
- United States District Court for the Eastern District of California
- United States District Court for the Southern District of Texas