

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

**DEBTORS' MOTION FOR ENTRY OF AN
ORDER AUTHORIZING AND APPROVING THE
DEBTORS' PROPOSED VALUED EMPLOYEE PROGRAM**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

A HEARING WILL BE HELD ON THIS MATTER ON DECEMBER 18, 2018, AT 2:00 P.M. BEFORE THE HONORABLE DAVID R. JONES, 515 RUSK STREET, COURTROOM 400, HOUSTON, TEXAS 77002.

The above-captioned debtors and debtors in possession (collectively, the "Debtors")² respectfully state the following in support of this motion (this "Motion").

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

² A detailed description of the Debtors' businesses and the reasons for commencing the chapter 11 cases is set forth in the *Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 54] (the "First Day Declaration").

Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as Exhibit A, authorizing and approving the Debtors' proposed valued employee retention program (the “Valued Employee Program”) for certain employees that are not “insiders” (as such term is defined in section 101(31) of the Bankruptcy Code (as defined herein) (collectively, the “Valued Employees”). *For the avoidance of doubt, this Motion does not seek approval of an incentive or other compensation program with respect to any "insider" or non-insider employee, and any such relief shall be set forth in a separate motion.*

Jurisdiction and Venue

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

3. The bases for the relief requested herein are sections 105(a), 363(b), and 503(c)(3) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”).

Background

4. Westmoreland Coal Company (“WLB”) and its Debtor and non-Debtor affiliates operate the sixth-largest coal-mining enterprise in North America, including 19 coal mines in six

states and Canada. The Debtors primarily produce and sell thermal coal to investment grade power plants under long-term, cost-protected contracts, as well as to industrial customers and barbecue charcoal manufacturers. Headquartered in Englewood, Colorado, the Debtors and their non-Debtor subsidiaries employ approximately 2,971 individuals. The Debtors' revenue for the twelve-month period that ended August 31, 2018, totaled approximately \$850 million. As of the Petition Date, the Debtors' aggregate prepetition indebtedness totaled approximately \$1.1 billion.

5. On October 9, 2018 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On October 18, 2018, the United States Trustee appointed an official committee of unsecured creditors in the Debtors' bankruptcy cases [Docket No. 206]. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases.

The Debtors' Proposed Valued Employee Program³

I. The Debtors' Valued Employees.

6. The Debtors employ approximately 1,732 employees in the United States on a full-or part-time basis between their mines and their headquarters. As of the date hereof, the Debtors have identified approximately 243 of their employees⁴ as Valued Employees because such employees are critical to the Debtors' business operations, efforts to preserve and maximize

³ Capitalized terms used but not defined herein have the meanings ascribed to them in the First Day Declaration.

⁴ The Debtors respectfully submit that none of the Valued Employees are "insiders" (as such term is defined in section 101(31) of the Bankruptcy Code) of the Debtors. More specifically, as the Debtors will demonstrate at the hearing on this Motion, while certain Valued Employees were appointed to their positions by the Board of Directors of WLB and/or the boards of managers or directors of its Debtor subsidiaries, as applicable, no Valued Employee possesses control over the Debtors' major strategic business decisions or is subject to reporting requirements set forth in applicable securities laws.

stakeholder value, and ability to implement the Debtors' restructuring strategies.⁵ The Debtors rely on the Valued Employees' expertise in making day-to-day business decisions that drive the financial performance of the Debtors' business. Additionally, the Valued Employees are highly skilled and have an intimate understanding of various operational intricacies, leases, coal assets, customer relationships, and vendor contracts that would be difficult (if not impossible) to replace absent substantial costs and operational disruptions. As a result, the loss of even a limited number of Valued Employees would erode the Debtors' financial and operational results.

7. The Debtors believe that the risk of employee attrition is acute because of, among other things, the uncertainty arising from, and the Valued Employees' unfamiliarity with, the chapter 11 process and the Debtors' restructuring efforts. Indeed, since June 1, 2018, a week after WLB entered into its bridge financing facility that anticipated a future chapter 11 filing, over 100 employees have voluntarily left the Debtors' workforce. Attrition has increased following the Petition Date, as an additional 13 non-insider employees have resigned through November 9, 2018. The loss of key employees has disrupted and will continue to disrupt the Debtors' operations and deprive the Debtors of important institutional knowledge and customer and contract counterparty contacts. The Debtors believe that the loss of any additional Valued Employees at this critical juncture would require the Debtors to undertake significant efforts—at a significant financial

⁵ In conjunction with implementation of the Valued Employee Program, non-Debtor subsidiary Prairie Mines & Royalty ULC (together with its subsidiaries, collectively, "Westmoreland Canada"), an entity incorporated under the laws of Canada, intends to implement a retention program with respect to approximately 61 of its Canada-based employees. Westmoreland Canada's retention program, which is expected to cost roughly \$633,000 per quarter, is not expected to directly utilize any property of any Debtor's estate. However, because Westmoreland Canada is an indirect wholly owned subsidiary of WLB, Westmoreland Canada's retention program may require WLB's Board of Directors and certain of the Debtors' officers, directors, and/or professionals to take certain actions to implement such program. Accordingly, the Debtors request that the Court authorize the Debtors to take any action necessary to implement Westmoreland Canada's retention program. The Debtors are prepared to provide information related to Westmoreland Canada's retention program to the Court and the U.S. Trustee, and, subject to any applicable confidentiality arrangements, the advisors to the Committee, the advisors to WLB's postpetition DIP lenders, and the advisors to Westmoreland Resource Partners, LP's ("WMLP") prepetition secured term lenders.

cost—to identify, recruit, hire, and train new employees. The Debtors also expect that any replacement hires may seek relatively greater compensation given the pendency of these chapter 11 cases. The Debtors, therefore, seek approval of the Valued Employee Program to properly incentivize and retain the Valued Employees, all of whom possess expertise that is crucial for the Debtors to navigate these cases with minimal disruption to their operations or restructuring initiatives.

II. The Debtors' Sale Processes and Necessity of the Valued Employee Program.

8. As described in the First Day Declaration, the Debtors commenced these prearranged chapter 11 cases to accomplish a sale of substantially all of the WLB Debtors' and WMLP Debtors' respective assets. More specifically, following months of good-faith, arm's-length discussions with its secured creditors, WLB entered into a \$110-million bridge loan facility provided by an ad hoc group of its prepetition secured term lenders and secured noteholders (the "Ad Hoc Group") that provided WLB with liquidity necessary to avoid a precipitous, free-fall bankruptcy filing in May 2018. The bridge loan facility created significant runway for WLB to engage with the Ad Hoc Group regarding a holistic, consensual restructuring proposal. Those efforts resulted in the Restructuring Support Agreement, dated as of October 9, 2018, which contemplates a going-concern sale of substantially all of WLB's coal-mining assets pursuant to a chapter 11 plan. In conjunction with these efforts, WMLP commenced a prepetition marketing process pursuant to its sale protocol. WMLP initiated that marketing process on August 8, 2018; received first round bids on September 28, 2018; and received second round, definitive bids prior to Thanksgiving. WMLP expects to enter into a stalking horse purchase agreement on or before December 28, 2018, and then to seek Court approval of bidding procedures and a sale order.

9. In light of the Debtors' proposed restructuring strategies, the Debtors believe that there is a material risk of employee attrition. *First*, the Valued Employees recognize that they may

not be employed by the Debtors for the long term. For example, the Valued Employees do not yet know whether a purchaser of any of the Debtors' assets will extend offers of full-time employment to such Valued Employees. *Second*, the goal of effectuating a value-maximizing sale of substantially all of the Debtors' assets during these chapter 11 cases will place additional pressure on the Debtors' workforce. The Valued Employees have been called upon to undertake additional responsibilities and expend significantly more working hours than contemplated by the normal terms of their employment, without any corresponding increase in compensation. The Debtors cannot now afford to risk losing the Valued Employees, whose continued employment with the Debtors is crucial to their ongoing restructuring efforts. *Third*, the Valued Employee Program is particularly important here because the Valued Employees' historical compensation package included an annual cash-based award program for certain employees.⁶ Therefore, if the Debtors cannot continue to provide cash-based awards to their non-insider employees, the Valued Employees will lose a substantial portion of their total compensation.

10. Such an outcome would immediately result in significant attrition. Any such attrition would cause the Debtors to incur additional expenses to find appropriate and experienced replacements, and, at worst, would severely disrupt the Debtors' operations and potentially derail the Debtors' ability to consummate their proposed asset sales in a timely manner. Given the general uncertainty associated with the Debtors' chapter 11 restructuring process, the Debtors believe that implementation of the Valued Employee Program is necessary to mitigate attrition

⁶ The Debtors advised each Valued Employee that the employee would receive a Quarterly Payment with respect to the fourth fiscal quarter of 2018 in January 2019. Therefore, the Debtors respectfully submit that the failure to make such payments—or, for that matter, any other payment under the Valued Employee Program—would cause irreparable harm to the Debtors' estates and would likely lead to immediate mass attrition.

concerns and motivate the Valued Employees to remain with the Debtors throughout the pendency of these chapter 11 cases, which will inure to the benefit of all stakeholders.

11. Furthermore, as described in greater detail below, the relief requested does not implicate section 503(c)(1) of the Bankruptcy Code. More specifically, no Valued Employee plays any role in the management of the Debtors' sale processes and/or in the development of the Valued Employee Program. Nor does any Valued Employee play any role in setting the Debtors' company policies. Rather, the Valued Employees' roles are limited to ensuring that company policies are followed. In short, the Valued Employees are the "arms and legs" of the Debtors' operations, responsible for maintaining invaluable relationships with employees, customers, and vendors, and enforcing company policies. Certain Valued Employees oversee departments or other employees; however, no Valued Employee makes any high-level, strategic decisions that substantially affects the Debtors' enterprise or control their businesses in a meaningful way. As such, no Valued Employee is an insider (as that term is defined in section 101(31) of the Bankruptcy Code), and the proposed program, therefore, does not implicate section 503(c)(1) of the Bankruptcy Code.

III. Summary of the Valued Employee Program.

12. The Valued Employee Program will provide quarterly cash payments (each, a "Quarterly Payment") to each Valued Employee for the period commencing with the fourth fiscal quarter of 2018 through the applicable Debtor's emergence from chapter 11 or consummation of a sale of substantially all of its assets. Under the Valued Employee Program, each Quarterly Payment will be made as soon as practicable following the end of each fiscal quarter, subject to such Valued Employee's continued employment with the Debtors through the last day of each quarter, unless such Valued Employee is terminated by the Debtors prior to the end of such quarter, other than for cause. If the applicable Debtor emerges from chapter 11 or closes a sale of substantially all of its assets prior to the end of any fiscal quarter, each qualified

Valued Employee shall receive the full Quarterly Payment as soon as practicable thereafter. The details as of the date hereof of the proposed Valued Employee Program are summarized as follows:

Total Participants ⁷	Projected Average Quarterly Individual Award	Projected Maximum Quarterly Individual Award	Projected Total Quarterly Cost
243 non-insider employees ⁸	\$6,000	\$50,000	\$1,482,000 ⁹

Basis for Relief

13. The Debtors respectfully request that the Court grant this Motion for three reasons.

First, the Valued Employee Program should be permitted under section 363(c) of the Bankruptcy Code because it is a continuation of the Debtors' prepetition practices and thus is an ordinary course transaction entitled to significant deference from the Court. *Second*, to the extent that the Valued Employee Program implicates section 363(b) of the Bankruptcy Code, the Debtors submit

⁷ A schedule of the titles of Valued Employees as of November 26, 2018, is annexed hereto as **Exhibit B**.

⁸ As of November 26, 2018, approximately 58 of the Valued Employees provide services related to the operations of WMLP and its Debtor subsidiaries (collectively, the "WMLP Debtors"), and approximately 185 of the Valued Employees provide services related to the operations of WLB and its Debtor subsidiaries (other than the WMLP Debtors) (collectively, the "WLB Debtors").

⁹ As of November 26, 2018, the projected quarterly cost of the Valued Employee Program attributable to the WLB Debtors is approximately \$1,218,000, which is based on the actual payments projected for the 185 Valued Employees who provide services related to the operations of the WLB Debtors, and the projected quarterly cost of the Valued Employee Program attributable to the WMLP Debtors is approximately \$264,000, which is based on the actual payments projected for the 58 Valued Employees who provide services related to the operations of the WMLP Debtors. As described in the First Day Declaration, WMLP and Westmoreland Resources GP, LLC ("WMGP") (but not WLB or any other WLB Debtor) are parties to that certain administrative and operational services agreement, dated as of January 1, 2015 (as amended, restated, modified and supplemented from time to time in accordance with the terms thereof, the "Shared Services Agreement"). Under the Shared Services Agreement, WMGP provides services to WMLP and is reimbursed for related costs incurred on WMLP's behalf. Therefore, while each Valued Employee is an employee of WLB, to the extent that the costs of the Valued Employee Program are specifically incurred on behalf of one of WMLP's affiliates, those costs shall be billed directly to WMLP, and shall be allocated to WMLP in accordance with the Shared Services Agreement. As noted elsewhere in the Motion, the projected costs of the Valued Employee Program (including the projected costs attributable to the WLB Debtors or the WMLP Debtors) may vary based on employee attrition levels at the time that any payments under the Valued Employee Program is effectuated.

that the program is a reasonable exercise of the Debtors' business judgment and is also appropriate under section 363(b) of the Bankruptcy Code. ***Third***, the Valued Employee Program is not subject to section 503(c)(1) of the Bankruptcy Code because no insiders are participants in the program and the Valued Employee Program is justified by the "facts and circumstances" of these cases and is therefore authorized under section 503(c)(3) of the Bankruptcy Code.

I. The Valued Employee Program Is a Continuation of the Debtors' Prepetition Practices and Is an Ordinary Course Transaction Under Section 363(c) of the Bankruptcy Code.

14. Pursuant to section 363(c)(1) of the Bankruptcy Code, a debtor in possession may "enter into transactions . . . in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). The Bankruptcy Code does not define "ordinary course of business." In determining whether a transaction is in the ordinary course of business, courts in the Fifth Circuit apply a two-part test to determine whether a transaction is in the ordinary course of a debtor's business. The test analyzes the transaction on both a horizontal and a vertical basis—the horizontal inquiry focusing on whether the transaction is common to the debtor's industry and the vertical inquiry focusing on comparing the proposed transaction to the debtor's prepetition practices. *See In re Patriot Place, Ltd.*, 486 B.R. 773, 793 (Bankr. W.D. Tex. 2013) ("[U]nder the vertical test, courts look at whether the transaction subjects a hypothetical creditor to a different economic risk than existed when the creditor originally extended the credit. Under the horizontal test, courts generally look at whether the transaction was of the sort commonly undertaken by companies in the industry. The primary focus is on the debtor's pre-petition practices and conduct."); *In re Cowin*, No. 13-30984, 2014 WL 1168714, at *41–43 (Bankr. S.D. Tex. Mar. 21, 2014) (applying the "horizontal" and "vertical" prongs of the test).

15. Here, the Valued Employee Program is an ordinary course transaction because it is a continuation of the Debtors' prepetition compensation practices and the terms of the Valued Employee Program are consistent with historical and industry practice. The Debtors have historically offered their non-insider employees annual cash bonus plans to supplement employees' salary compensation. Indeed, as noted above, the Valued Employee Program's proposed awards for the fourth fiscal quarter of 2018 were announced prepetition. Like the Debtors' historical prepetition program, the Valued Employee Program participants is based on such participant's continued employment with the Debtors.

16. Additionally, the Valued Employee Program is in line with competitive practice. As the Debtors will demonstrate at the hearing on this Motion, the Debtors' and their advisors' analysis in connection with the Valued Employee Program determined that the consideration awarded to the Valued Employees, measured as a percentage of base salary, is reasonable compared to awards offered by other companies in the coal industry. Because the Valued Employee Program is a continuation of the Debtors' prepetition compensation practices and the terms of the Valued Employee Program are consistent with historical and industry practice, the Valued Employee Program is an ordinary course transaction and should be approved under section 363(c) of the Bankruptcy Code. *See In re Glob. Home Prods.*, 369 B.R. 778, 786 (Bankr. D. Del. March 6, 2007) (finding that the proposed compensation programs were "not 'new' compensation programs but, instead, [were] nearly identical to plans previously used, and approved by a compensation committee and board of directors").

II. Continuing the Valued Employee Program Is an Exercise of the Debtors' Sound Business Judgment and Is Authorized by Section 363(b) of the Bankruptcy Code.

17. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that debtors "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business,

property of the estate.” 11 U.S.C. § 363(b)(1). Under section 363(b)(1) of the Bankruptcy Code, courts require only that the debtor show that a sound business purpose justifies such actions. *See Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (noting that the criteria for approval of a transaction under 363(b) is whether the debtor has “an articulated business justification”); *see also In re Elpida Memory, Inc.*, No. 12-10947 (CSS), 2012 WL 6090194, at *5 (Bankr. D. Del. Nov. 20, 2012) (noting that it is “well-settled” that a debtor may use its assets outside the ordinary course where such use “represents the sound exercise of business judgment”); *In re Borders Grp., Inc.*, 453 B.R. 459, 473 (Bankr. S.D.N.Y. 2011) (stating that in approving transactions under section 363(b)(1) “courts consider whether the debtor exercised sound business judgment”). Moreover, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); *see also In re Commercial Mortg. & Fin. Co.*, 414 B.R. 389, 394 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession “has the discretionary authority to exercise his business judgment in operating the debtor’s business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation”).

18. The business judgment rule shields certain debtor decisions—such as the continuation of the Debtors’ prepetition compensation practices—from judicial second guessing. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (“More exacting scrutiny would slow the administration of the debtor’s estate and increase its cost, interfere with the Bankruptcy Code’s provision for private control of administration of the estate, and threaten the court’s ability to control a case impartially.”). Thus, if a debtor’s actions satisfy

the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

19. Even if the Court finds the Valued Employee Program to implicate section 363(b) of the Bankruptcy Code, the implementation of the Valued Employee Program is a sound exercise of the Debtors' business judgment and should thus be approved. The Valued Employees are intimately familiar with the Debtors' unique operations and many have skills that are difficult to replace. The loss of Valued Employees will negatively affect the Debtors because the Debtors will be required to incur costs associated with recruiting and training replacement personnel at a critical juncture of these chapter 11 cases. Retaining the Valued Employees will permit the Debtors to maintain operational stability and focus their efforts on driving operational performance and maximizing stakeholder value. The Debtors further believe the Valued Employee Program will improve employee morale and incentivize employees to remain with the Debtors throughout the restructuring process. In sum, the Debtors believe that the Valued Employee Program is vital to retaining the covered employees and protecting enterprise value. As such, the Valued Employee Program is a sound exercise of the Debtors' business judgment and is in the best interests of the Debtors' estates and all stakeholders in these chapter 11 cases.¹⁰

20. In addition, the Valued Employee Program is reasonable and market-based. The Debtors and their advisors assessed the reasonableness of the award opportunities under the Valued Employee Program as compared to the award opportunities offered by other companies in the coal industry. The Debtors and their advisors determined that the award amounts (as a percentage of

¹⁰ Because the Valued Employee Program is expressly terminable at the Debtors' discretion at any time, the Debtors submit that they may terminate the policy pursuant to section 363(c)(1) of the Bankruptcy Code in the ordinary course of business without Court approval. To the extent that termination of the Valued Employee Program implicates section 363(b) of the Bankruptcy Code, the Debtors submit that termination of the program represents a sound exercise of their business judgment.

base salary) were generally positioned at or below the market for retention payment opportunities for comparable positions. Based on this analysis, the Debtors believe that the Valued Employee Program was reasonable and appropriate in light of competitive market practice. Accordingly, the Debtors submit that the Valued Employee Program is reasonable and market-based and should be approved.

21. Courts have approved retention programs similar to the Valued Employee Program as reflecting a sound exercise of a debtor's business judgment. *See, e.g., In re EXCO Resources, Inc.*, No. 18-30155 (Bankr. S.D. Tex. Feb. 2, 2018) (MI) (approving key employee retention program for 144 employees for an award pool of approximately \$3.3 million in the aggregate); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Sept. 2, 2016) (approving key employee retention program for 56 employees with an average quarterly award of \$32,000 per employee); *In re Sherwin Alumina Co., LLC*, No. 16-20012 (Bankr. S.D. Tex. June 29, 2016) (approving key employee retention program for 142 employees with an average award of \$8,059 per employee); *In re Ultra Petroleum*, No. 16-32202 (MI) (Bankr. S.D. Tex. June 28, 2016) (approving key employee retention program for 103 employees with an average award of \$11,000 per employee); *In re Linn Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. June 27, 2016) (approving key employee retention program for 1,621 employees with an average award of \$19,456 per employee); *In re Autoseis, Inc.*, No. 14-20130 (RSS) (Bankr. S.D. Tex. May 5, 2014) (approving key employee retention plan for 43 employees with an average award of \$18,133 per employee).¹¹ Accordingly, the Debtors respectfully submit that the Court should authorize the Debtors to implement the Valued Employee Program as a valid exercise of business judgment.

¹¹ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this Motion. Copies of these orders are available upon request of the Debtors' proposed counsel.

III. The Valued Employee Program Satisfies the Requirements of Section 503(c) of the Bankruptcy Code.

22. Finally, the Valued Employee Program is permissible under section 503(c) of the Bankruptcy Code: (a) the Valued Employee Program is not subject to the requirements of section 503(c)(1) of the Bankruptcy Code because none of the Valued Employees is an insider; and (b) consistent with section 503(c)(3) of the Bankruptcy Code, the Valued Employee Program is “justified by the facts and circumstances” of these chapter 11 cases and should be approved.

A. The Valued Employee Program Is Not Subject to Section 503(c)(1) of the Bankruptcy Code Because No Participant Is an Insider.

23. Section 503(c)(1) of the Bankruptcy Code does not apply to the Valued Employee Program because no Valued Employee is an insider, as none of the Valued Employees hold senior management positions or otherwise control the Debtors’ corporate policies. Section 503(c)(1) of the Bankruptcy Code only restricts payments made to an “insider of the debtor for the purpose of inducing such person to remain with the debtor’s business”—i.e., those insider plans that are essentially “pay to stay” plans. See 11 U.S.C. § 503(c)(1) (emphasis added).

24. Although certain of the Valued Employees have job titles identifying such individuals as “vice president,” the Debtors respectfully submit that such titles are not dispositive of those individuals’ substantive role in the Debtors’ organization and that such titles do not implicate section 503(c)(1) of the Bankruptcy Code. In determining who is an insider, courts consider not only an employee’s job title but also the employee’s role with the debtor on a case-by-case basis. *See, e.g., In re Global Aviation Holdings, Inc.*, 478 B.R. 142, 148 (Bankr. E.D.N.Y. 2012) (“[T]itles such as ‘vice president’ are not determinative.”); *Borders Grp.*, 453 B.R. at 468–69 (holding that an individual’s title, by itself, is insufficient to establish insider status under section 101(31) of the Bankruptcy Code); *In re Foothills Texas, Inc.*, 408 B.R. 573, 583 (Bankr. D. Del. 2009) (noting that “the type of evidence that might support finding a person to be an

[insider] may vary from case to case based on the facts and circumstances surrounding the debtor’s business”); *see also In re Longview Aluminum, L.L.C.*, 419 B.R. 351, 355 (Bankr. N.D. Ill. 2009) (noting that an individual’s title alone as an “officer” or “director” is insufficient to establish that an individual is an insider).

25. The insider analysis focuses on whether the employee at issue has the authority to implement company policy or whether the employee reports directly to a company’s board of directors, *see Borders Grp.*, 453 B.R. at 469, such that there is a plausible concern that the employee could have gained “an unfair advantage” by virtue of their position, *see Foothills Texas*, 408 B.R. at 579. None of the Valued Employees (a) reports directly to the Debtors’ board of directors, (b) has a job title, such as “CEO, president, secretary, or treasurer,” *cf. Borders Grp.*, 453 B.R. at 468, (c) controls any of the Debtors, or (d) has any other responsibilities that should reasonably result in their treatment as an “insider” under the Bankruptcy Code. Further, the Valued Employee Program includes only employees with titles of vice president or below. Simply put, none of the Valued Employees is an insider. Although the Valued Employees are crucial to the Debtors’ operations, they do not have the type of broad responsibility or control to make company-wide strategic decisions, approve company policy, or develop employee compensation. As a result, any concerns that the Valued Employee Program awards result from “an unfair advantage” are not justified by the record here. Rather, the employees who are eligible to participate in the Valued Employee Program are the Debtors’ rank and file employees that are necessary for the Debtors to maintain their operations during these chapter 11 cases and maximize value for all stakeholders.

B. The Valued Employee Program Is Justified by the Facts and Circumstances of These Chapter 11 Cases and Satisfies Section 503(c)(3) of the Bankruptcy Code.

26. The Debtors believe that implementation of the Valued Employee Program is an ordinary course transaction and thus must merely satisfy the business judgment standard. Even if the Valued Employee Program is not determined to be in the ordinary course, however, the Debtors need show only that approval of the Valued Employee Program is justified by the facts and circumstances of these chapter 11 cases.

27. This standard is essentially the same as the business judgment standard that is applied under section 363(b) of the Bankruptcy Code. See *In re Velo Holdings, Inc.*, 472 B.R. 201, 212 (Bankr. S.D.N.Y. 2012) (“Courts have held that the ‘facts and circumstances’ language of section 503(c)(3) creates a standard no different than the business judgment standard under section 363(b).”); *In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) (finding that because the debtor’s postpetition incentive program was a refinement of historical practices, the proposed program was within the ordinary course); *Glob. Home Prods.*, 369 B.R. at 783 (“If [the proposed plans are] intended to incentivize management, the [section 503(c)(3)] analysis utilizes the more liberal business judgment review under § 363.”); *In re Mesa Air Grp.*, No. 10-10018 (MG), 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sept. 24, 2010). To the extent that section 503 of the Bankruptcy Code applies to the Valued Employee Program,¹² the Debtors believe that the Valued Employee Program satisfies section 503(c)(3) of the Bankruptcy Code.

28. The prospect of additional attrition of the Valued Employees is real, and any such attrition at this critical juncture of these chapter 11 cases would impair stakeholder value. Since

¹² Certain courts have recognized that section 503 of the Bankruptcy Code is inapplicable to post-confirmation payments. See, e.g., *In re Journal Register*, 407 B.R. 520, 536 (Bankr. S.D.N.Y. 2009) (“[C]ourts generally deny administrative claim status to expenses that become payable upon confirmation of a chapter 11 plan and not before.”) (internal citations omitted); *In re HNRC Dissolution Co.*, 343 B.R. 839, 843 (Bankr. E.D. Ky. 2006)

WLB entered into its bridge loan facility, roughly 113 employees have left the Debtors' workforce. Further personnel departures could have a cascade effect, unraveling their restructuring from the inside out. Additionally, the possible loss of any additional Valued Employees would interrupt the Debtors' operations and chill interest from potentially interested parties. *See In re Mesa Air Grp., Inc.*, No. 10-10018 (MG), 2010 WL 3810899, *4 (Bankr. S.D.N.Y. Sept. 24, 2010) (holding that a bonus payment was ““justified by the facts and circumstances of the case’ under section 503(c)(3) [where] they are within the ‘sound business judgment’ of the Debtors”). Because implementation of the Valued Employee Program is necessary to prevent attrition of the Valued Employees, the Valued Employee Program is justified by the facts and circumstances of these chapter 11 cases.

29. For these reasons, the Debtors respectfully submit that the Valued Employee Program is a proper exercise of the Debtors' business judgment, is justified by the facts and circumstances of these chapter 11 cases, and satisfies the requirements of section 503(c)(3) of the Bankruptcy Code. The Valued Employee Program will incentivize employees to continue working for the Debtors and achieve operational and financial results needed to successfully steer the Debtors through these chapter 11 cases. The Debtors believe that implementing the Valued Employee Program will motivate employees throughout the Debtors' organization to remain employed with the Debtors during the pendency of these chapter 11 cases and result in value maximization that will inure to the ultimate benefit of all parties in interest. Accordingly, the

(“Expenses incurred post-confirmation are not entitled to administrative expense priority treatment.”); *In re Dana Corp.*, 358 B.R. 567, 578 (Bankr. S.D.N.Y. 2006) (“The U.S. Trustee suggests that Congress meant to prevent debtors from providing any sort of compensation to executives of debtors in possession that might in any way be construed as retentive, however the language of section 503(c) is clear and unambiguous that *only administrative claims* are subject to section 503(c) restrictions.”) (emphasis added).

Debtors respectfully request that the Court issue an order approving and authorizing the Debtors to implement the Valued Employee Program.

IV. The Court Should Authorize the Debtors to Cause Westmoreland Canada to Implement Its Employee Retention Program.

30. Pursuant to section 105(a) of the Bankruptcy Code, “the Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code.” 11 U.S.C. § 105(a). The Debtors believe it is appropriate to cause Westmoreland Canada to implement its employee retention program. *First*, Westmoreland Canada’s employee retention program will be funded by non-Debtor assets and will have no direct costs to the Debtors’ estates. *Second*, the retention of Westmoreland Canada’s employees will preserve the value of Westmoreland Canada, which ultimately will inure to the benefit of the Debtors and their stakeholders. Specifically, the equity of Westmoreland Canada is proposed to be sold as part of the WLB Debtors’ sale process. Thus, preserving the value of Westmoreland Canada has a direct benefit to the WLB Debtors and their estates. Accordingly, the Debtors respectfully request authority to cause Westmoreland Canada to implement its employee retention program and effectuate any transactions related thereto.

Notice

31. The Debtors will provide notice of this Motion to the following parties or their respective counsel (collectively, the “Notice Parties”): (a) the Office of the United States Trustee for the Southern District of Texas; (b) the Committee; (c) the indenture trustee under the WLB Debtors’ 8.75% senior secured notes due 2022; (d) the ad hoc group of lenders under the WLB Debtors’ prepetition term loan facility due 2020 and the WLB Debtors’ 8.75% senior secured notes due 2022; (e) the administrative agent under the WLB Debtors’ prepetition term loan facility due 2020; (f) the administrative agent under the WLB Debtors’ debtor-in-possession financing facility;

(g) the lenders under the WLB Debtors' debtor-in-possession financing facility; (h) the administrative agent under the WLB Debtors' bridge loan facility due 2019; (i) the administrative agent under the WMLP Debtors' term loan facility due 2018; (j) the ad hoc committee of certain lenders under the WMLP Debtors' term loan facility due 2018; (k) the administrative agent under the WLB Debtors' proposed debtor-in-possession financing facility; (l) the lenders under the WLB Debtors' debtor-in-possession financing facility (m) any statutory committee appointed in these cases; (n) the United States Attorney's Office for the Southern District of Texas; (o) the Internal Revenue Service; (p) the Environmental Protection Agency and similar state environmental agencies for states in which the Debtors conduct business; (q) the offices of the attorneys general for the states in which the Debtors operate; (r) the Securities and Exchange Commission; (t) the Pension Benefit Guaranty Corporation; and (u) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

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WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas
November 26, 2018

/s/ Patricia B. Tomasco

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Certificate of Service

I certify that on November 26, 2018, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Patricia B. Tomasco

Patricia B. Tomasco