

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:

WESTMORELAND COAL COMPANY et al.,¹
Debtors.

Chapter 11

Case No. 18-35672 (DRJ)
(Jointly Administered)

AGREED MOTION FOR ORDER AUTHORIZING
DEBTOR WCC TO PROSECUTE CLAIM

If you object to the relief requested, you must respond in writing. Unless otherwise directed by the Court, you must file your response electronically at <https://ecf.txsb.uscourts.gov/> within twenty-one days from the date this motion was filed. If you do not have electronic filing privileges, you must file a written objection that is actually received by the clerk within twenty-one days from the date this motion was filed. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

Debtor Westmoreland Coal Company (“WCC”), by and through Jeffrey S. Stein, the WLB Plan Administrator for the WLB Liquidating Trust, with the consent of Westmoreland Mining LLC (“New Westmoreland”), moves for the entry of an order, pursuant to 11 U.S.C. §§ 1142(b) and 105(a) authorizing WCC to prosecute the NAFTA Claim, as described below.

INTRODUCTION

1. Under the terms of the confirmed Plan in the WLB cases, and the transactions contemplated by the plan, WCC was to transfer certain claims, including what is known as the NAFTA Claim (a claim against Canada), to New Westmoreland. However, when New

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 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.

Westmoreland attempted to prosecute the NAFTA Claim, Canada argued that the claim could not be transferred to New Westmoreland, and that New Westmoreland did not have standing to assert the NAFTA Claim, as a matter of international law. Award ¶¶ 209, 215, 220, 230, attached as Ex.

1. The international arbitration tribunal, before whom the NAFTA Claim was brought, agreed with Canada and held that New Westmoreland had no standing to bring the NAFTA Claim.

2. Consequently, to effect the intent of the Debtors under the Plan to ensure that the NAFTA Claim, valued at approximately CAD 470 million (US\$374 million), can be prosecuted, and the Plan can be consummated, WCC, with the agreement and consent of New Westmoreland, seeks an order pursuant to 11 U.S.C. §§ 1142(b) and 105(a), recognizing that WCC retains the NAFTA Claim and authorizing WCC, at the expense of New Westmoreland, to prosecute the claim for the benefit of New Westmoreland.

BACKGROUND

A. WCC's Chapter 11 Case and Asset Sale to New Westmoreland

3. On October 9, 2018 (the "Petition Date"), WCC and certain of its affiliates (collectively, the "WLB Debtors")² filed these cases. As 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], following an extensive prepetition financing process and series of negotiations with certain stakeholders of the Debtors, on the Petition Date,

² The term "WLB Debtors" means, collectively, WCC, Absaloka Coal, LLC, Basin Resources, Inc., Buckingham Coal Company, LLC, Dakota Westmoreland Corporation, Haystack Coal Company, San Juan Coal Company, San Juan Transportation Company, Texas Westmoreland Coal Company, WCC Land Holding Company, Inc., WEI-Roanoke Valley, Inc., Western Energy Company, Westmoreland Coal Company Asset Corp., Westmoreland Coal Sales Company, Inc., Westmoreland Energy Services New York, Inc., Westmoreland Energy Services, Inc., Westmoreland Energy, LLC, Westmoreland Mining LLC, Westmoreland North Carolina Power LLC, Westmoreland Partners, Westmoreland Power, Inc., Westmoreland Resources Inc., Westmoreland San Juan Holdings, Inc., Westmoreland San Juan, LLC, Westmoreland Savage Corporation, Westmoreland Texas Jewett Coal Company, Westmoreland-Roanoke Valley, LP, and WRI Partners, Inc., and for the avoidance of doubt, does not include any of the WMLP Debtors. *See* Plan, Art. I. A. 241.

the WLB Debtors and certain consenting stakeholders executed a Restructuring Support Agreement, which contemplated the Sale Transaction (as defined below).

4. On March 2, 2019, the Court entered its *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* (the “Confirmation Order”) [Docket No. 1561], thus confirming the chapter 11 plan (the “Plan”).

5. The Plan provided, among other things, for the sale of substantially all the assets of the WLB Debtors (the “Sale Transaction”) in accordance with the terms and conditions set forth in a Stalking Horse Purchase Agreement (*see* Disclosure Statement, Ex. B) and related documents. *See* Disclosure Statement [Docket No. 789] § I.C; Plan Art. IV.C.1(a). The Sale Transaction contemplated that the WLB Debtors would transfer certain “Transferred Assets,” including all “Transferred Causes of Action,” to a purchaser pursuant to sections 363, 365, and/or 1123 of the Bankruptcy Code, the Plan, and an order confirming the Plan. Plan Art. IV.C.1(a).

6. The Transferred Causes of Action included all claims, causes of action, defenses, counterclaims, and other rights relating to any of the Transferred Assets and certain other litigation to which the WLB Debtors were a party as set forth in a schedule of Transferred Causes of Action to be included in a supplement to the Plan (the “Plan Supplement”). *See* Plan Arts. I.167, I.220. On March 15, 2019, the Debtors filed an amended Plan Supplement, which included a schedule of Transferred Causes of Action specifically identifying the “NAFTA Claim” as a Transferred Cause of Action. *See* 5th Am. to Plan Supplement [Docket No. 1605], Ex. J, at ECF pp. 134-35 (the “Schedule of Transferred Causes of Action”).³

³ For the avoidance of doubt, pursuant to the Confirmation Order, “the documents contained in the Plan Supplement, and in the exhibits to the Plan are integral to the Plan and are approved by the Bankruptcy Court, and the WLB Debtors, the Plan Administrator, the Claims Administrator, and the Purchaser are authorized to take all actions required or appropriate under the Plan and the Plan Supplement documents to effectuate the Plan and the Restructuring Transactions, including, for the avoidance of doubt, the consummation of the Sale Transaction and implementation of the Intercompany Settlement Term Sheet.” *See* Confirmation Order [Docket No. 1561] ¶ 3.

7. The NAFTA Claim is a claim held by WCC against the Canadian government under the North American Free Trade Agreement. The Claim relates to Canada's discrimination and unfair and inequitable treatment of WCC and its investments in connection with a policy to phase out coal-powered electricity. Canada compensated three Canadian companies approximately \$1.4 billion as part of this phase-out but did not provide any compensation to WCC or its investments in Canada.⁴ WCC was the only other company—and the only American—affected by Canada's measures. Canada acted in breach of its obligations under NAFTA to provide treatment no less favorable to American investors in Canada and to accord fair and equitable treatment. The NAFTA claim is valued at approximately CAD 470 million (US\$374 million).

8. On March 15, 2019, the Debtors entered into an execution version of the Stalking Horse Purchase Agreement with New Westmoreland as Purchaser (the "Purchase Agreement"). *See* 6th Am. to Plan Supplement [Docket No. 1621], Ex. H-6, at ECF pp. 122-238. The Purchase Agreement provided further descriptions of the Causes of Action to be transferred and specifically identified the NAFTA Claim, as defined therein, as a Transferred Cause of Action that WCC would "sell, convey, transfer, assign and deliver" to New Westmoreland.⁵ *See id.* § 2.01, at ECF pp. 149-50. The Purchase Agreement provides that the Purchaser's consideration for the Transferred Assets included a "credit bid" of \$390,125,429.40, plus assumption by the Purchaser of all Assumed Liabilities under the Purchase Agreement. *See id.* §§ 2.04, 2.07, at ECF pp. 157-99, 165-66.

⁴ WCC invested in the coalmines at issue in the NAFTA Claim through its ownership and control of Westmoreland Canada Holdings Inc., an Albertan holding company. That company directly owned Prairie Mines & Royalty ULC, the Canadian corporate enterprise that operated the relevant coalmines in Alberta.

⁵ The Purchase Agreement defined the "NAFTA Claim" as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by WCC 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)." Purchase Agreement § 1.01.

9. Pursuant to the Purchase Agreement, WCC represented and warranted that it had “good and marketable title in and to or a valid leasehold interest in, all Purchased US Assets [which include the NAFTA Claim]” and that the Buyer “will have acquired good and marketable title in and to, or a valid leasehold interest in, each of the Purchased US Assets.” *See id.* § 3.10, at ECF p. 182. WCC also made assurances that it would take necessary steps post-closing to transfer the Transferred Assets and to implement and make effective the Sale Transaction.⁶

10. With respect to Transferred Causes of Action, the Plan provides that “[a]s of the Plan Effective Date, the WLB Debtors shall assign and transfer to the Purchaser all of the Transferred Causes of Action pursuant to the Sale Transaction Document[s],” and “the Retained Causes of Action shall vest in the WLB Debtors on the Plan Effective Date.” Plan Arts. IV.D, IV.S. The “Retained Causes of Action” included only certain specifically identified claims and causes of action that were not included among the “Transferred Causes of Action.” Plan Supplement [Docket No. 1102], Ex. K, at ECF p. 147; *see also* Plan Arts. I.167, I.192. Moreover, the Plan provides that the WLB Debtors shall remain in existence and active so long “as necessary to satisfy their obligations under the Sale Transaction Documentation.” Plan Art. IV.N.

11. The Plan provided for the formation of the WLB Liquidating Trust to implement the wind down and dissolution of the WLB Debtors’ Estates, including liquidation of the Retained Assets and Causes of Action and other assets of the WLB Debtors not sold or transferred before

⁶ *See, e.g.*, Purchase Agreement § 2.14 (“As reasonably requested by a Party in order to effectuate the Transaction, each Party shall . . . execute and deliver . . . such other assignments, bills of sale, certificates of title and other documents or instruments, and shall take such other commercially reasonable actions, as are necessary or appropriate, to transfer the Transferred Assets to Buyer . . . and otherwise implement and make effective the Transaction, including preparing and filing as promptly as practicable all documents necessary to transfer the Transferred Causes of Action (including the NAFTA Claim) from Sellers to Buyer”); *id.* § 7.01 (“[T]he Sellers and Buyer shall use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under Applicable Law to consummate the Transaction, including . . . obtaining and maintaining all approvals, consents, registrations, Permits, authorizations and other confirmations required to be obtained or notices required to be delivered to or from any Governmental Authority or other third party that are necessary, proper or advisable to consummate the Transaction, in each case, after giving effect to the Confirmation Order.”).

the Plan Effective Date, including certain Excluded Assets as defined in the Sale Transaction Documentation. *See* Plan Arts. IV.U, I.A.135.

12. The Plan also designated the WLB Plan Administrator to wind down the WLB Debtors' businesses and affairs, administer the Plan, reconcile and pay certain claims against the WLB Debtors, and to liquidate the Retained Assets. *See* Plan Art. VII.A. The WLB Plan Administrator was to "be the exclusive trustee of the Retained Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the WLB Debtors' Estates appointed pursuant to Bankruptcy Code § 1123(b)(3)(B)." *See* Plan Art. VII.A.1.

13. The WLB Plan Administrator is also the trustee of the WLB Liquidating Trust and has all the rights and powers granted to the WLB Debtors as well as those set forth in the Liquidating Trust Agreement ([Docket No. 1621], Ex. I, at ECF pp. 603-30). Plan Art. IV.U. Further, the WLB Plan Administrator is responsible for "liquidating, receiving, holding, and investing, supervising, and protecting the Retained Assets" and "exercising such other powers as may be vested in it pursuant to order of the Bankruptcy Court or pursuant to the Plan, or as it reasonably deems to be necessary and proper to carry out the provisions of the Plan." *Id.* The WLB Plan Administrator is to act in a fiduciary capacity for the WLB Debtors on and after the Effective Date and a representative of the WLB Plan Administrator was to be appointed as the sole manager and sole officer of the WLB Debtors to succeed to the power of the WLB Debtors' prior managers, directors, and officers and to administer the WLB Debtors' Estates. Plan Art. IV.I.

14. As soon as practicable after the Effective Date, the WLB Plan Administrator was to "cause the Remaining WLB Debtors to comply with, and abide by, the terms of the Sale Transaction Documentation" and "take any actions necessary to wind down the Remaining WLB Debtors' Estates; *provided that* the Remaining WLB Debtors shall not be dissolved until

satisfaction of the conditions precedent to such dissolution in [Section] VII.E” of the Plan (including entry of a final decree closing the last of the WLB Debtors’ Chapter 11 Cases); and “take such other actions as the Plan Administrator may determine to be necessary or desirable to carry out the purposes of the Plan.” Plan Art. VII.B.

15. Pursuant to the Plan, upon entry of the Confirmation Order, the WLB Debtors, the WLB Plan Administrator, and the Purchaser were “authorized, without further order of the Bankruptcy Court, to take all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Restructuring Transactions and the Sale Transaction,” and the “Confirmation Order [was] and [was] deemed to, pursuant to sections 363 and 1123 of the Bankruptcy Code, authorize, among other things, all actions as may be necessary or appropriate to effect any transaction described in, approved by, or necessary to effectuate the Plan.” Plan Art. IV.C.6.

16. On March 15, 2019, the effective date of the WLBP Plan occurred (the “Effective Date”) [Docket No. 1608].

B. NAFTA Tribunal Proceedings

17. To hold Canada accountable for its wrongful conduct, WCC commenced NAFTA arbitration on November 19, 2018. Award ¶ 85, attached as Ex. 1. Following the attempted transfer of WCC’s NAFTA Claim to New Westmoreland pursuant to WCC’s reorganization, WCC requested Canada’s agreement that New Westmoreland be substituted for WCC in the existing NAFTA arbitration. Canada refused to agree. Canada demanded that New Westmoreland file a new arbitration and that WCC withdraw its NAFTA Claim. *Id.* ¶¶ 7, 91-92. Accordingly, on July

23, 2019, WCC withdrew its NAFTA Claim. Shortly thereafter, New Westmoreland filed a new NAFTA claim seeking the same relief as WCC. *See id.* ¶¶ 91-92.⁷

18. Canada then moved to dismiss New Westmoreland's NAFTA claim. Canada argued that the NAFTA Claim was incapable of transfer to New Westmoreland and thus New Westmoreland lacked standing. Whether the claim was capable of transfer, according to Canada, is determined by "NAFTA and applicable rules of international law." Canada's Memorial on Jurisdiction ¶ 92, attached as Ex. 2. Canada argued that because "there is no mechanism in NAFTA to allow one 'disputing investor' to transfer or sell its claim to another investor of a Party," the NAFTA Claim was never validly transferred to New Westmoreland, "[n]otwithstanding how a legal claim might have been treated under U.S. law in the context of a bankruptcy process." *Id.* As Canada summed up: "the claims advanced by WCC cannot be sold to the Claimant [New Westmoreland] because they are specific to WCC" Canada's Reply on Jurisdiction ¶ 131, attached as Ex. 3. Significantly, Canada conceded that WCC could still bring the NAFTA Claim today.⁸

19. New Westmoreland responded that it had standing because it had purchased the NAFTA Claim from WCC and NAFTA nowhere expressly prevents the transfer of a NAFTA claim that would have otherwise rendered the transfer invalid. In support of its argument, New

⁷ NAFTA requires a 90-day notice period prior to commencing arbitration. NAFTA Art. 1119. Canada agreed to accept Debtor's Notice of Arbitration, filed on November 19, 2018, as New Westmoreland's notice, triggering the 90-day notice period. In an abundance of caution, WCC intends to issue a second Notice of Arbitration to Canada.

⁸ At the Hearing on Jurisdiction, due to "Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law," the Tribunal asked Canada whether WCC has "any residual rights to bring a treaty claim." Canada replied a claim would "not [be] preclude[d]... on their own behalf." Hr'g. Tr. (Day 2) 278:12-19, attached as Ex. 4; *see also id.* at 280:2-4 ("WCC could still be in a position to bring a claim on its own behalf.").

Westmoreland adduced expert testimony from Professor Jan Paulsson, a renowned practitioner, scholar, and leader in international arbitration.⁹ Award ¶ 147. *See generally id.* ¶¶ 144-190, 208.

20. The Tribunal recognized that “whether under NAFTA Chapter Eleven, a NAFTA claim can be transferred together with the underlying investment when the investment is transferred or whether it remains with the party which owned or controlled it at the time of the alleged treaty breach” was an issue of first impression in NAFTA jurisprudence. *Id.* ¶¶ 195, 209. Indeed, the Tribunal observed that “none of the cases cited by the Parties is directly on point in respect of the issue in dispute in this case, in particular, whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced.” *Id.* ¶ 195.

21. The Tribunal held that a NAFTA claim may only be transferred to a legal successor, and that New Westmoreland was *not* WCC’s legal successor. Award ¶¶ 195, 217, 220, 230. According to the Tribunal, the NAFTA Claim was not validly transferred to New Westmoreland under international law. As the Tribunal explained:

[New] Westmoreland is not the legal successor of WCC but is a separate company to which the NAFTA claim was purportedly transferred after the alleged Treaty breaches. In reaching this decision, the Tribunal emphasises that its analysis is founded on the specific process by which [New] Westmoreland came into being. This was not a corporate restructuring pursuant to which [New] Westmoreland emerged from WCC’s ashes. [New] Westmoreland was not spun out of WCC nor was there any internal reorganisation or change in form. The first-tier lien holders put into motion a process by which they were able to purchase certain of WCC’s assets, including the Canadian Enterprises, in an arm’s-length transaction, with no successor liability such that it cannot be said that [New] Westmoreland is WCC’s successor.

⁹ Prof. Paulsson is a former partner of Freshfields Bruckhaus Deringer LLP and a founding partner of Three Crowns LLP. In addition, he has held the top positions at preeminent international arbitral institutions, including President of the International Council for Commercial Arbitration (ICC) and President of the London Court of International Arbitration.

Award ¶ 230.

22. The Tribunal observed that the good faith of the parties in attempting to transfer the NAFTA Claim is irrelevant, as well as whether WCC “could have been restructured in a way that preserved [New] Westmoreland’s NAFTA claim.” Award ¶ 218.¹⁰ Thus, the Award conclusively determined, as to the parties in that arbitration, that the NAFTA Claim did not validly transfer to New Westmoreland.

23. WCC requests this Court enter an order to confirm that WCC retains the NAFTA Claim, consistent with the Tribunal’s award, and to authorize WCC to prosecute, in its name but at New Westmoreland’s expense, the NAFTA Claim so that the full terms, conditions, and allocation of value contemplated by the Plan can be effectuated. WCC has conferred with New Westmoreland, which agrees to and consents to the relief sought.

ARGUMENT

24. As reflected throughout the record of these chapter 11 cases, the WLB Debtors and New Westmoreland unquestionably intended, and all parties in interest were on notice, that pursuant to the Purchase Agreement and the Sale Transaction, New Westmoreland would obtain all rights and interests in the NAFTA Claim. The Purchase Agreement, the Schedule of Transferred Causes of Action, and the Confirmation Order all refer to the NAFTA Claim in the context of, or in providing for, its transfer to New Westmoreland. *See* Purchase Agreement [Docket No. 1621] § 2.01(l), at ECF p. 152 (stating the NAFTA Claim is a Transferred Cause of Action); Plan Supplement Ex. J (listing in Schedule of Transferred Causes of Action the “NAFTA Claim” against the Governments of Canada, Alberta, and Saskatchewan); Confirmation Order ¶ 64 (“[T]he

¹⁰ For completion, the Tribunal also held that New Westmoreland could not pursue the claim in its own name because it suffered no harm independent of WCC. Award ¶¶ 232-235.

NAFTA Claim (as defined in the [Purchase Agreement]) is not being released and any party against whom the NAFTA Claim is, was or may be asserted is not a Released Party for purposes of the NAFTA Claim.”).

25. However, the NAFTA Tribunal determined the NAFTA Claim was not transferrable to New Westmoreland as a matter of international law.¹¹ Thus, on the Plan Effective Date, instead of the NAFTA Claim vesting in New Westmoreland as provided in the Purchase Agreement and the Plan, it remained with WCC. WCC continues to possess and hold title to it today.¹² Under applicable law as interpreted by the Tribunal, the NAFTA Claim could *only* ever belong to the injured party itself. WCC’s conveyance of the NAFTA Claim to New Westmoreland as intended was impossible.

26. Notwithstanding the fact the NAFTA Claim was not transferred to New Westmoreland, all parties agree that the economic interest in the NAFTA Claim was intended for New Westmoreland pursuant to the Purchase Agreement. It was a key component of the Sale Transaction. The intended transfer is evidenced by its specific enumeration in the documents and by both WCC’s and New Westmoreland’s valuations of the claim at approximately CAD 470 million (US\$374 million) in their respective Notices of Arbitration, as compared to the aggregate consideration of approximately \$500 million (plus assumption of liabilities) pursuant to the Purchase Agreement. *See* WCC Notice of Arbitration ¶ 105, attached Ex. 5; New Westmoreland Notice of Arbitration ¶ 111, attached as Ex. 6; Purchase Agreement [Docket No. 1621] § 2.07(a), at ECF pp. 165-66, (providing that Purchase Price is equal to Credit Bid Amount in the amount of

¹¹ *See supra* ¶¶ 20-21.

¹² Certain claims, each defined as a “Retained Cause of Action” under the Plan and other related documents, were specifically intended to be retained by WCC and administered by the Liquidating Trustee. The NAFTA Claim, however, was not, and never was intended to be, a Retained Cause of Action.

\$390,125,429.40 plus the assumption by Buyer of Assumed Liabilities); *id.* § 2.04(d), at ECF p. 158, (listing all liabilities relating to the DIP Facility as an Assumed Liability); *id.* § 1.01, at ECF p. 134 (defining “DIP Facility” as having “an aggregate principal amount of up to \$110,000,000”).

27. The transfer of the economic benefit of the NAFTA Claim to New Westmoreland was an essential element of the Sale Transaction. Achieving that result furthers both the terms and the purpose of the Sale Transaction and the Plan. Indeed, reflecting the importance of the economic bargain, WCC represented and warranted to New Westmoreland that it was transferring good and marketable title to the NAFTA Claim. *See id.* § 3.10, at ECF p. 182.

28. To ensure that the parties’ intentions are carried out notwithstanding the Tribunal’s decision on the non-transferability of the NAFTA Claim, the parties seek an order, pursuant to § 1142, permitting WCC to initiate and prosecute the NAFTA Claim for New Westmoreland’s benefit.

29. Section 1142(a) of the Bankruptcy Code provides that “[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.” Section 1142(b) authorizes the Court to “direct the debtor and any other necessary party to execute or deliver . . . any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the consummation of the plan.” Section 1142 thus “empowers the bankruptcy court to enforce the unperformed terms of a confirmed plan.” *In re J & B Haldeman Holdings, LLC*, 517 B.R. 910, 917 (Bankr. W.D. Wis. 2014) (quoting *Village of Rosemont v. Jaffe*, 482 F.3d 926, 935 (7th Cir. 2007)).

30. Because the NAFTA Claim—representing potentially a majority of the total value of assets at issue in the Plan—failed to transfer to New Westmoreland as intended and required under the Plan, the Court is authorized under section 1142 to enter an order to further the consummation of the Plan. *J&B Haldeman*, 517 B.R. at 919 (citing *In re Goldblatt Bros., Inc.*, 132 B.R. 736, 741 (Bankr. N.D. Ill. 1991)) (“[T]he scope of the authority granted to the Court under section 1142(b) is broad, and is commonly invoked to order the execution of bills of sale, the transfer of deeds to property, stock transfers, and other instruments related to title to property in the reorganized debtor”).

31. The Court has jurisdiction to address the disposition and ownership of the NAFTA Claim. Bankruptcy courts have “exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of [its] case, and of property of the estate.” 28 U.S.C. § 1334(e). Given that the NAFTA Claim failed to transfer to New Westmoreland under the Plan, this Court has the exclusive jurisdiction to address this remaining asset of the estate. Section 1142(b) proceedings “arise in” a case under the Bankruptcy Code, and are thus “core” proceedings. *In re U.S. Brass Corp.*, 301 F.3d 296, 303-04 (5th Cir. 2002).

32. Moreover, pursuant to Section XIII of the Plan, notwithstanding the entry of the Confirmation Order and the occurrence of the Plan Effective Date, on and after the Effective Date, the Court retains exclusive jurisdiction over the chapter 11 cases and all matters arising out of or related to the cases and the Plan, including to “[e]nsure that distributions to Holders of Allowed Claims . . . are accomplished pursuant to the provisions of the Plan,” to “adjudicate, decide, or resolve any and all matters related to Causes of Action,” and to “consider any modifications of the Plan, to cure any defect or omission, or to reconcile any inconsistency in any Bankruptcy Court order, including the Confirmation Order.” Indeed, post-confirmation, the focus of a bankruptcy

court's jurisdiction is on "ensuring that reorganization plans are implemented, and protecting estate assets devoted to implement the confirmed Plan." *J&B Haldeman*, 517 B.R. at 916 (citations omitted). Bankruptcy courts also may interpret and enforce their own prior orders, particularly when such orders contain provisions that explicitly retain the court's jurisdiction for enforcement purposes. *Id.* (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 (2009)).

33. Additionally, section 105 of the Bankruptcy Code empowers a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." "As courts of equity, bankruptcy courts enjoy broad authority to modify creditor-debtor relationships within the scope of their jurisdiction." *Beal Bank, S.S.B. v. Jack's Marine, Inc.*, 201 B.R. 376, 379 (Bankr. E.D. Pa. 1996) (citing *United States v. Energy Res. Co.*, 495 U.S. 545 (1990)). In acting through their equitable powers, bankruptcy courts "may sift the circumstances surrounding any claim in order to ascertain that injustice or unfairness is not accomplished in the administration of the debtor's estate, and in so doing may adopt that remedy which it deems most appropriate under the circumstances." *In re Stirling Homex Corp.*, 591 F.2d 148, 155-56 (2d Cir. 1978).

34. To accomplish its purpose and intent, the Plan can also be modified pursuant to section 1127 of the Bankruptcy Code. Due to the failed transfer of the NAFTA Claim, which accounted for a substantial component of the Transferred Assets and the consideration paid by the Purchaser under the Purchase Agreement, the Plan has not been substantially consummated. *See* 11 U.S.C. § 1101(2) (defining "substantial consummation" to require, among other things, that "[a]ll or substantially all of the property proposed by the plan to be transferred has been transferred"); *see also, e.g., In re Modern Steel Treating Co.*, 130 B.R. 60, 64 (Bankr. N.D. Ill.

1991) (explaining that plan is not substantially consummated where a contemplated transfer of property has not occurred), *aff'd*, No. 91-cv-5747, 1992 WL 82966 (N.D. Ill. Apr. 1, 1992).

CONCLUSION

35. The NAFTA Claim represents potentially a majority of the entire value of assets transferred under and pursuant to the Plan. Under the Tribunal's ruling, the NAFTA Claim failed to transfer to New Westmoreland as the parties intended and as required under the Plan. To remedy that failure, WCC requests, with New Westmoreland's agreement and consent, that the Court enter the proposed order: (a) finding that WCC retains title to the NAFTA Claim to the same extent it did prior to the Effective Date, (b) authorizing WCC to pursue the NAFTA Claim to the extent permitted under applicable law for the benefit of New Westmoreland, and (c) granting such other and further relief as the Court determines is necessary or appropriate.

Dated: June 17, 2022
Houston, Texas

/s/ Jennifer F. Wertz

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Certificate of Service

I certify that on June 17, 2022, 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/ Jennifer F. Wertz _____

Jennifer F. Wertz