IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
TEXAS STANDARD OIL COMPANY,	§	**Case No. 08-34031-H4-11**
	§	
Debtor.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ESTIMATION OF THE FOLLOWING CLAIMS: (1) PRE-PETITION CLAIM OF FOREST OIL CORPORATION; (2) PRE-PETITION CLAIM OF MARINER ENERGY, INC. AND MARINER ENERGY RESOURCES; AND (3) ADMINISTRATIVE CLAIM OF MARINER ENERGY, INC. AND MARINER ENERGY RESOURCES
[Docket No. 177]

I. PROCEDURAL BACKGROUND

On January 22, 2009, this Court issued an order entitled: "Order Setting Hearing and Procedures to Estimate the Following Claims Objected to by the Debtor: (1) Proof of Claim No. 6 Filing by Forest Oil Corporation; (2) Proof of Claim No. 7 Filing by Mariner Energy, Inc. and Mariner Energy Resources; and (3) Administrative Expense Claim Filed by Forest Oil Corporation, Mariner Energy, Inc., and Mariner Energy Resources" (the Order). [Docket No. 177]. Pursuant to the Order, this Court held a hearing on March 2, 3, 4, 5, and 6, 2009 (the Hearing) for the purpose of estimating the claims of Forest Oil Corporation (Forest) and Mariner Energy, Inc. and Mariner Energy Resources (collectively, Mariner). The Court scheduled this hearing pursuant to the Order so that this Court could hold a timely confirmation hearing on April 2, 2009—i.e. so that there would not be the inevitable substantial delay in this case while the parties fully litigated, for months if not years, the amount of the claims to a final judgment.

The specific claims that this Court decided to estimate pursuant to the Order are: (1) Forest's pre-petition claim; (2) Mariner's pre-petition claim; and (3) Mariner's administrative expense claim.

At the Hearing, this Court heard testimony from the following witnesses: (1) Dan Tinkler (Tinkler), a landman employed by Mariner; (2) Ken Clarkson (Clarkson), a manager of JIBs[1] at Mariner; (3) Matt McDaniel (McDaniel), a principal consultant at Nova Consulting who has a degree in petroleum engineering and has several years of experience in procurement, construction, installation, and plugging and abandonment of oil and gas wells and the decommissioning of platforms associated therewith. McDaniel has been working with Mariner in various capacities, including the plugging and abandonment of certain wells located on the West Delta and High Island properties, and also the decommissioning of the platforms associated with these wells; (4) Jeff Nobles (Nobles), an attorney in Houston, Texas who has extensive experience in prosecuting appeals at both the state court and federal court level; (5) Brad DeLuca (DeLuca), counsel for Forest and Mariner; and (6) Rick Carson (Carson), an expert witness called by the Debtor who has approximately 37 years experience in the oil and gas business, with particular emphasis on oil and gas accounting. The Court finds that the testimony of all of these witnesses was, for the most part, credible.

At the Hearing, the Court also admitted the following exhibits: (a) Joint Exhibits 1–53 (to which all parties stipulated); (b) Debtor's Exhibits 1–16; and (c) Forest and Mariner's Exhibits 2–5.

On March 17, 2009, the Court announced its ruling on the record concerning its estimate of the three claims for plan confirmation purposes. The Court also made some oral findings of fact and conclusions of law. The Court now memorializes these oral findings of fact and conclusions of law with the written findings of fact and conclusions of law set forth herein. To the extent that the oral findings of fact and conclusions of law conflict, or are inconsistent with, any of the written findings

[1] The initials "JIB" refers to "joint interest billing."

of fact and conclusions of law set forth herein, the latter shall govern. Further, to the extent that the written findings of fact and conclusions of law set forth herein do not memorialize all of the oral findings of fact and conclusions of law, then those oral findings of fact and conclusions of law not memorialized herein are incorporated herein as if fully set forth in writing so long as they do not conflict, or are inconsistent, with the written findings of fact and conclusions of law.

The Court makes these findings of fact and conclusions of law pursuant to Federal Bankruptcy Rules 7052 and 9014. To the extent that any finding of fact is construed as a conclusion of law, it is adopted as such. Moreover, to the extent that any conclusion of law is construed as a finding of fact, it is adopted as such. The Court reserves its right to make additional findings of fact and conclusions of law as it deems appropriate or as may be requested by any of the parties.

II. FINDINGS OF FACT

Mariner and the Debtor are owners of certain mineral interests located in the Gulf Coast.[2] Mariner is the operator of certain wells and therefore is responsible for, among other things, sending JIBs to the other mineral interest owners—including the Debtor. Mariner is also responsible for the plugging and abandonment (P&A) of various wells and for the decommissioning of the platforms associated with those wells.

Prior to the filing of the Debtor's Chapter 11 petition, the Debtor filed suit against Mariner and Forest, among others, in the United States District Court for the Southern District of Texas. The Honorable David Hittner was assigned to adjudicate this suit. Mariner and Forest filed counterclaims against the Debtor seeking reimbursement of expenses pursuant to JIBs that Mariner

[2] Mariner is an operating company and also owns 50% of the mineral interests. Forest is the predecessor operating company to Mariner and no longer holds any mineral interest.

and Forest had sent to the Debtor prior to the filing of the suit. Judge Hittner granted summary judgment for Mariner and Forest, and against the Debtor, on all of the Debtor's claims. A jury trial was then held on the counterclaims brought by Mariner and Forest; and, after trial, judgment was entered granting relief to Forest and Mariner (the Judgment). Judge Hittner signed the Judgment on February 22, 2008. All parties appealed the Judgment, and this appeal is presently pending in the United States Court of Appeals for the Fifth Circuit. Meanwhile on June 26, 2008, the Debtor filed a voluntary Chapter 11 petition. [Docket No. 1.]

After the filing of the Debtor's Chapter 11 petition, Forest timely filed a proof of claim for $878,153.43; Mariner also timely filed a proof of claim and thereafter filed an amended proof of claim for $897,653.68. The Debtor filed objections to these proofs of claim and requested that this Court completely disallow these claims. [Docket Nos. 163, 164, & 165.]

Not surprisingly, the major bone of contention between the parties is the amount that the Debtor owes to Forest and Mariner by virtue of the Debtor's percentage ownership of a mineral interest in two wells for which Forest was, and Mariner presently is, the operator. The Judgment and other orders signed by Judge Hittner reflect that the following amounts were awarded to Forest and Mariner:

(1) To Forest:

(a) $24,103.00, representing the Debtor's share of JIB expenses; and

(b) $7,904.22, representing costs of court.

(2) To Mariner:

(a) $428,316.00, representing the Debtor's share of JIB expenses.

As noted above, all parties have appealed the Judgment. Forest has appealed on the grounds

that it believes it should have been awarded additional JIB expenses of $56,292.00 and attorneys' fees of $782,000.00. Mariner has appealed on the grounds that it believes it should have been awarded additional JIB expenses of $390,408.00. The Debtor has appealed on several grounds, including the following: (1) that the Judgment regarding the amount of damages awarded and the denial of attorney's fees should be affirmed; and (2) that the District Court's summary judgment rulings concerning multiple operations and forfeiture should be reversed and judgment rendered granting the Debtor's motion for partial summary judgment on those issues. [Joint Exhibit No. 24., p. 26]

The proofs of claim filed by Forest and Mariner reflect that they seek to recover the following amounts from the Debtor's estate:

(1) Forest's Proof of Claim:

(a) $24,103.00
(b) 7,904.22
(c) 56,242.00
(d) 782,000.00
$878,153.43

(2) Mariner's Amended Proof of Claim:

(a) $428,316.00
(b) 390,408.00
(c) 78,929.68
$897,653.68

It is important to note that the last amount sought by Mariner—$78,929.28—was *not* sought at the trial in Judge Hittner's court. This is because at the time of the trial, those expenses had not yet been incurred. They were, however, incurred prior to the filing of the Debtor's Chapter 11 petition on June 26, 2008. Specifically, they accrued between January 1, 2008 and June 26, 2008.

This amount is the only pre-petition amount that was not actually adjudicated in Judge Hittner's court.

Finally, aside from its pre-petition claim, Mariner seeks to recover from the Debtor's estate an administrative expense claim of $1,874,262.20. This figure represents the Debtor's percentage of both JIB and P&A expenses that have been incurred since the filing of the Debtor's petition (i.e. since June 26, 2008) up to the present. The Debtor vehemently disputes that it owes this amount to Mariner.

As noted in the Order, a lengthy trial, with substantial time for discovery, will be required to adjudicate the Debtor's objections to Forest's proof of claim, Mariner's amended proof of claim, and Mariner's motion for administrative claim. [Docket No. 111.] Accordingly, in order to hold a timely confirmation hearing on April 2, 2009, this Court decided to estimate these three claims. The Hearing was held for this sole purpose.

III. Issues Relating to the Estimation of the Three Claims

A. Issues Concerning Forest's Pre-petition Claim

In its brief filed on February 25, 2009 [Docket No. 204], the Debtor, in paragraph 13, asserts that two components of Forest's claim—the claim for JIBs totaling $56,242.00 and the claim for attorneys' fees totaling $782,000.00—should be estimated at zero. By implication, therefore, the Debtor is willing to concede that, at a minimum, the other two components of Forest's claim—$24,103.00 and $7,904.22—should be estimated at their face amounts.[3] Thus, at a minimum, Forest's estimated pre-petition claim is $32,007.22. The issue is whether this figure should be increased by all, or some, of the two components which the Debtor does challenge. Stated

[3] Counsel for the Debtor conceded as much during the course of the Hearing.

differently, should Forest's pre-petition claim be estimated in an amount exceeding $32,007.22?

B. Issues Concerning Mariner's Pre-petition Claim

In its brief filed on February 25, 2009 [Docket No. 204], the Debtor, in paragraph 13, asserts that one component of Mariner's claim—the claim for JIBs totaling $390,408.00—should be estimated at zero. By implication, therefore, the Debtor is willing to concede that the other two components of Mariner's claim—$428,316.00 and $78,929.68—should be estimated at their face amounts. However, at the Hearing, the Debtor clarified that it does not concede that Mariner is entitled to the $78,929.68.[4] Thus, at a minimum, by implication, the Debtor is willing to concede that Mariner's estimated pre-petition claim is $428,316.00. The issue is whether this figure should be increased by all, or a part of, the remaining components of $390,408.00 or $83,612.88 which the Debtor does challenge. Stated differently, should Mariner's pre-petition claim be estimated in an amount exceeding $428,316.00?

C. Issues Concerning Mariner's Administrative Expense Claim

The parties have an extreme disagreement over the estimated amount of Mariner's administrative expense claim. Mariner asserts that the claim is $1,874,262.20; whereas the Debtor asserts not only that it is zero but that the Debtor is entitled to a credit of $5,878.40.

IV. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This contested

[4] In his closing argument, based upon the testimony adduced and exhibits introduced at the Hearing, counsel for Mariner argued that Mariner's pre-petition claim for the first six months of 2008 is $83,612.88 rather than the $78,929.68 set forth in Mariner's amended proof of claim. The $83,612.88 represents the sum of $70,053.34 (JIB expenses) plus $13,559.54 (P&A expenses). For purposes of estimating Mariner's pre-petition claim for this six-month period, the Court will use the $83,612.88 figure.

matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (L), and (O). Additionally, this matter is a core proceeding under the general "catch-all" language of 28 U.S.C. § 157(b)(2). *See In re Southmark Corp.*, 163 F.3d 925, 930 (5th Cir. 1999) ("[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."); *In re Ginther Trusts*, No. 06-3556, 2006 WL 3805670, at *19 (Bankr. S.D. Tex. Dec. 22, 2006) (holding that a matter may constitute a core proceeding under 28 U.S.C. § 157(b)(2) "even though the laundry list of core proceedings under § 157(b)(2) does not specifically name this particular circumstance"). Venue is proper pursuant to 28 U.S.C. § 1408.

B. Forest does have standing in this Chapter 11 case.

At the Hearing, prior to addressing the merits, the Debtor argued that Forest's claim should be estimated at zero due to lack of standing. The Court disagrees that Forest lacks standing.

Section 1109(b) sets forth who has standing to participate in a Chapter 11 case.[5] That section states that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). Thus, the initial inquiry is whether Forest comes within any of the seven enumerated categories set forth in this section. If the answer is in the affirmative, then Forest is a party-in-interest and, accordingly, would have standing in this case.

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[5] Any reference herein to "the Code" refers to the United States Bankruptcy Code. Further, reference to any section (i.e. §) refers to a section in 11 U.S.C., which is the United States Bankruptcy Code. Reference to a "Rule" or "Bankruptcy Rule" refers to the Federal Rules of Bankruptcy Procedure.

Given the facts in this case, the only category into which Forest could conceivably fit is that of a "creditor." Because 11 U.S.C. § 101(10) defines "creditor," this particular provision governs. Section 101(10) expressly sets forth that an entity is a "creditor" if one of three conditions exist. First, under § 101(10)(A), an entity is a "creditor" if it "has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Here, it is undisputed that prior to the filing of the Debtor's Chapter 11 petition, Forest obtained the Judgment. Accordingly, Forest is a "creditor" under § 101(10)(A). As such, Forest is a party-in-interest under § 1109(b) who may participate in this case, which participation includes filing a proof of claim—which is exactly what Forest has done.

C. Administrative Claims May Be Estimated

The Debtor also contends that administrative claims—including Mariner's administrative claim—may not be estimated under any circumstances. This Court disagrees.

The Debtor argues that § 502 provides for estimation of only pre-petition claims and cites *In re Indian Motorcycle Co., Inc.*, 261 B.R. 800 (B.A.P. 1st Cir. 2001) in support of this position. However, *Indian Motorcycle* does not stand for the Shermanesque proposition that administrative claims may never be estimated. A close reading of this opinion indicates that administrative claims should not be estimated "where to do so would defeat the legitimate ends of other provisions of the Bankruptcy Code." *Id.* at 809-10. Specifically, the *Indian Motorcycle* court expressed concern that using estimation to determine the "outer limit of a claimant's right of recovery," as with a pre-petition claim, would jeopardize due process rights of the holder of an administrative claim. *Id.* at 810.

In the case at bar, there is no due process issue at stake. At a hearing held on January 20,

2009, counsel for Mariner expressly stipulated on the record that Mariner wants this Court to hold the confirmation hearing on the Debtor's proposed plan in late March or early April rather than delay holding the confirmation hearing for six or seven months so that the parties could conduct extensive discovery and so that this Court could thereafter hold a full-blown hearing in late summer to render a final order on the amount of the administrative claim (which this Court eventually must do as requested in Mariner's motion for administrative claim). Thus, necessarily, Mariner has stipulated that for purposes of the confirmation hearing—which this Court has scheduled for April 2, 2009—Mariner will accept this Court's estimation of its administrative claim and will not argue that the proposed plan may not be confirmed because the administrative claim has not yet been fully and finally determined. Thus, the concern expressed in *Indian Motorcycle* is not present in the case at bar because Mariner has made an informed decision, and a stipulation on the record, that it is willing to risk, for purposes of holding a plan confirmation hearing sooner rather than later, that this Court will estimate its administrative claim in an amount less than Mariner seeks and in an amount less than this Court might eventually decide after holding a full-blown hearing several months later in the year.

With no due process problem at issue in this case, this Court believes that it must estimate Mariner's administrative claim. In *In re MacDonald*, 128 B.R. 161 (Bankr. W.D. Tex. 1991), the court aptly explained both why it is necessary to estimate administrative claims and what the legal basis is for doing so:

> The estimation of an unliquidated or contingent administrative claim such as the post-petition tort claim is essential prior to the hearing on confirmation of a plan, in order for the court to evaluate the feasibility of the plan without unduly delaying the confirmation process. This is so because any finding of feasibility that failed to take into account the possibility of the allowance of administrative claim that would

> have to paid in full would be clearly erroneous. A court must therefore have some idea of the allowed amount of the claim of a kind specified in Section 507(a)(1). By the same token, the same reasons that justify estimation of pre-petition claims for plan purposes (avoiding delay in the confirmation of process) also warrant estimation of post-petition administrative expense for plan purposes.
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> Section 502(c) immediately commends itself as the appropriate vehicle for estimating post-petition claims such as the one here under discussion. However, the section facially applies only to *pre-petition* claims. Post-petition claims and their allowance are governed by Section 503. *See* 11 U.S.C. § 503(a), (b), and discussion *supra*. Courts have nonetheless assumed that the estimation process in Section 502(c) may be equally employed for estimating post-petition claims, when necessary to avoid delaying the administration of the bankruptcy case (especially when it comes to the confirmation process).
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> Given that the Bankruptcy Rules offer no guidance on how even the *allowance* of administrative expense claims are to be handled, much less their estimation for plan purposes, courts must fashion their own procedures, under the general authority conferred by Rule 16 of the Federal Rules of Procedure (made applicable to contested matters in bankruptcy by Bankruptcy Rules 7016 and 9014). This court concurs with the foregoing authorities that the Section 502(c) estimation process may be adapted to the handling of contingent or unliquidated administrative claims when the full-blown allowance process under Section 503(b) would unduly delay the administration of the bankruptcy case, as it undoubtedly would here.

Id. at 164-65 (internal marks, citations, and footnotes omitted).

The *MacDonald* court's main point is this: in order to avoid a lengthy delay in the bankruptcy plan confirmation process, it is necessary to estimate claims, including administrative claims, so that votes can be counted, which in turn assists the plan proponent (in this case, the Debtor) in preparing for the confirmation hearing and helps the Court determine whether the plan is feasible and should be confirmed. Other courts have agreed with *MacDonald*. *See, e.g.*, *In re Adelphia Business Solutions, Inc.*, 341 B.R. 415, 423 (Bankr. S.D.N.Y. 2003) ("Although § 502(c) on its face applies to pre-petition claims, courts have nonetheless assumed that the estimation process in section 502(c) may be equally employed for estimating post-petition claims, when necessary to avoid delaying the administration of the bankruptcy case (especially when it comes to the confirmation process)."

(internal marks and citations omitted)). Accordingly, this Court concludes that it must estimate Mariner's administrative claim.

D. Methodology for Estimating the Three Claims

The Fifth Circuit has stated that "[i]n estimating a claim, the bankruptcy court should use whatever method is best suited to the circumstances." *Addison v. Langston (In re Brints Cotton Marketing, Inc.)*, 737 F.2d 1338, 1341 (5th Cir. 1984). "The methods used by courts have run the gamut from summary trials to full-blown evidentiary hearings to a mere review of pleadings, briefs, and a one-day hearing involving oral argument of counsel." *In re Wallace's Bookstores, Inc.*, 317 B.R. 720, 725 (Bankr. E.D. Ky. 2004). In the case at bar, this Court held an evidentiary hearing because: (1) the claims asserted by Forest and Mariner are substantial and, if allowed in their entirety, will in all likelihood, give these claimants veto power over the Debtor's proposed plan; (2) the parties have been at each other's throats for a long time and there is virtually no chance for a settlement to occur; (3) the claims are based upon JIBs arising from the operation, plugging and abandonment of certain oil and gas wells, and the decommissioning of platforms associated therewith, and the documentation underlying these claims is both voluminous and relatively complex; and (4) both parties had informed the Court that they wanted to adduce testimony from expert witnesses concerning several issues.

"As for the standard for estimation, it has been held that . . . the estimation process should take into account the likelihood that the claimant would prevail on the merits and apply that probability to the amount of damage." *In re Wallace's Bookstores, Inc.*, 317 B.R. at 726. Accordingly, this Court, after listening to the testimony, reviewing the exhibits, and considering closing arguments, will, for each of the three claims at issue, estimate each claim by multiplying the

estimated amount of damage by a certain percentage—with the latter figure representing what the Court has found is the probability of success of that estimated damage amount becoming the actual amount set forth in a final order after a full-blown trial is eventually held.

In the case at bar, evaluating the probability of success with respect to the pre-petition claims is most appropriately done in a bifurcated fashion. This is so because a full-blown jury trial has already been held concerning the amount of damage incurred by Mariner and Forest for the time period prior to January 1, 2008, and all parties have appealed the Judgment that resulted from that trial. This Court, therefore, should assess the probability of that judgment being overturned by the Fifth Circuit.

However, with respect to the pre-petition damages claims by Mariner for the period from January 1, 2008 to the date of the filing of the Debtor's petition—i.e. June 26, 2008—there is no judgment from a prior trial. Accordingly, this Court must assess the probability of whether Mariner's asserted damage figure for this six-month period will stand after a full-blown trial is subsequently held in this Court.[6]

Finally, with respect to the administrative expense claim asserted by Mariner, this Court will make the same probability analysis as with the pre-petition damages for the six-month period ending June 30, 2008. This is so because, once again, there is no judgment from a prior trial.

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[6] All parties have agreed that although the Debtor filed its petition on June 26, 2008, this Court, for purposes of ease and convenience, should focus on the six-month period ending on June 30, 2008. Because this is a claims estimating hearing, the Court accepts this approach, particularly because the documentation introduced at the Hearing is done on a monthly basis in the ordinary course of Mariner's business.

E. Estimation of Claims

1. Mariner's Administrative Claim

The Debtor argues that even if this Court may, as a matter of law, estimate an administrative claim, this Court should estimate Mariner's administrative claim at zero. The Debtor articulates three arguments in support of its position. First, the Debtor asserts that any JIB and P&A reimbursements that it owes Mariner constitute pre-petition obligations because these obligations arose out of pre-petition contracts—namely, the two Offshore Operating Agreements. [Joint Exhibits 1 & 2.] Second, the Debtor argues that the only instance in which it could conceivably owe an administrative claim in the context of an oil and gas case is if: (a) the Debtor itself were the operator under the Offshore Operating Agreements; and (b) some governmental authority itself paid for the plugging and abandonment, and then sought reimbursement from the Debtor under its police regulatory powers. Third, the Debtor argues that Mariner's documentation is inadequate to support the amount of the administrative claim that it seeks and that some of this documentation reflects shabby practices which do not comport with the standards and customs of the oil and gas industry. Not surprisingly, Mariner disagrees with all of these arguments. The Court addresses each of these arguments in turn.

a. The Debtor's First and Second Arguments

The administrative claim which Mariner seeks totals $1,874,262.20. Of this amount, $1,811,903.30 represents P&A expenses. The remaining $62,358.90 represents JIB expenses. Thus, the P&A expenses represent the lion's share (96.7%) of the total administrative claim sought by Mariner.

The Fifth Circuit has, to a certain extent, spoken on whether an operator's post-petition P&A

expenditures constitute an administrative claim when the operator's agreement with the non-operator Debtor is a pre-petition contract. In *In re H.L.S. Energy Co., Inc.*, 151 F.3d 434, 439 (5th Cir 1998), the Fifth Circuit stated that "[b]ecause the plugging requirement here accrued post-petition, we need not reach the question whether post-petition expenses for the remediation of pre-petition environmental liabilities would likewise constitute an administrative expense." Three years later, in *In re Grimland, Inc.,* 243 F.3d 228, 232 n.5 (5th Cir. 2001), the Fifth Circuit, referring to *H.L.S.*, once again expressly stated that "Whether Parker's [i.e. the claimant's] claim is truly an administrative claim or arises at least in part from pre-bankruptcy liabilities of Grimland [i.e. the Debtor] is not resolved here. *See Texas v. Lowe (In re H.L.S. Energy Co., Inc)*, 151 F.3d 434, 439 (5th Cir. 1998) (finding expenses for clean-up of post-petition environmental liabilities to be administrative expenses; not reaching the issue of whether post-petition expenses for remediation of pre-petition environmental liabilities are administrative expenses)." Thus, the Fifth Circuit has expressly reserved this issue for a later day.

In *In re American Coastal Energy, Inc.*, No. 08-33160, 2009 WL 137493, at *8 (Bankr. S.D. Jan. 15, 2009), the Honorable Marvin Isgur made note of the Fifth Circuit's reservation of this issue. In *American Coastal*, the Debtor, an oil and gas operator, contended that the Texas Railroad Commission (the TRC), which was seeking an administrative claim for funds expended by the TRC to remediate environmental risks for which the Debtor had ongoing responsibility, was not entitled to an administrative claim because the P&A liability arose pre-petition. Judge Isgur was skeptical of this argument: "Indeed, if the Fifth Circuit had held that § 503(b)(1)(A) only applies to post-petition liabilities, then the *H.L.S.* and *Grimland* Courts would not have found it necessary to note that it remains an open issue as to whether a post-petition expenditure for pre-petition environmental

liability qualifies as an § 503(b)(1)(A) administrative expense." *Id.*

Likewise, this Court is skeptical of such an argument. Plugging and abandonment is necessary in order to minimize environmental damage; and preserving the environment is an extremely important objective in today's society. *See In re Commonwealth Oil Refining Co., Inc.*, 805 F.2d 1175, 1187 n.13 (5th Cir. 1986) ("The legislative history . . . indicates that the enforcement of an injunction ordering compliance with environmental laws is more important than the debtor's right to have a breathing spell from its creditors or than the creditors' rights to an orderly administration of the estate. . . ." (quoting *United States v. ILCO, Inc.*, 48 B.R. 1016, 1023 (N.D. Ala. 1985))). Accordingly, this Court can easily discern why the Fifth Circuit, if and when it ever addresses the specific issue which it reserved in *H.L.S.* and *Grimland*, might well conclude that post-petition expenditures to protect the environment arising from the Debtor's pre-petition conduct constitute an administrative claim. As Judge Isgur aptly noted:

> Environmental claims arising from a pre-petition liability do not fit within the same framework as trade-creditor claims arising from pre-petition liabilities. Because the debtor-in-possession is required to operate the estate in accordance with state law, post-petition expenditures necessary to bring the estate into compliance with the law are necessary for the debtor's rehabilitation. The need to bring the estate into compliance with the state environmental and safety laws is no less significant than the need to maintain commercial relations with trade-creditors that provide the raw materials of the debtor's business. A debtor cannot operate an estate in violation of environmental and safety laws.

In re American Coastal Energy, Inc., 2009 WL 137493, at *9.

Thus, this Court believes that the Fifth Circuit might rule that P&A expenses in the case at bar constitute an administrative claim even though the liability arose pre-petition.

At the hearing, counsel for the Debtor pointed out that the *American Coastal* case involved a debtor who was the operator; whereas, in the case at bar, the Debtor is not the operator, but rather

is a non-operator mineral interest owner. According to counsel for the Debtor, this is an important distinction because it is the operator whom the governmental authorities will pursue if the plugging and abandonment is not done such that the environment is exposed to damage. Were this in fact the case, the Court might accept this argument. However, it is not.

In Texas, the Natural Resources Code expressly states that "If the operator cannot be found or is no longer in existence or has no assets with which to properly plug the well, the commission shall order the nonoperator to plug the well according to the rules of the commission in effect at the time the order is issued." Tex. Nat. Res. Code Ann. § 89.042(b) (Vernon 2009). At the federal level, the Code of Federal Regulations makes it eminently clear that if the operator fails to fulfill its duties, then the Minerals Management Service (MMS) will look to the non-operators to carry out these responsibilities:

> (a) When you are not the sole lessee, you and your co-lessee(s) are jointly and severally responsible for fulfilling your obligations under the provisions of 30 CFR parts 250 through 282, unless otherwise provided in these regulations.
>
> (b) If your designated operator fails to fulfill any of your obligations under 30 CFR parts 250 through 282 , the Regional Supervisor may require you or any or all of your co-lessees to fulfill those obligations under the Act, the lease, or the regulations.

30 C.F.R. § 250.146(a)-(b).[7]

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[7] It is also worth noting that on the website for the Department of the Interior, Minerals Management Service, it is set forth that

> Should the operator be unable to perform the lesseee's obligations to plug and abandon wells, remove platforms and other facilities, and clear the seafloor of obstructions, MMS will normally require any or all of the lessee(s) to perform the activities necessary to bring about compliance. If there is no lessee able to perform, MMS will require prior lessees who held the lease during or after the time when the facilities were installed or the obstructions created to perform those functions.

Notice to Lessees and Operators (NTL) of Federal Oil, Gas, and Sulphur Leases in the Outer Continental Shelf, Liability of Assignors, Assignees, and Co-Lessees for Plugging of Wells and Removal of Property on Termination of an Outer Continental Shelf Oil and Gas Lease, *available at* http://www.mms.gov/ntls/Attachments/ntl93-2n.htm.

Additionally, a news release from the MMS in 1997 states that:

> At the end of operations, lessees must plug and abandon wells, remove platforms and other

Because the state and federal authorities have the right to seek reimbursement from non-operators, it follows that any non-operator who has filed for Chapter 11 nevertheless has exposure to liability in the event the operator fails to undertake plugging and abandonment. Thus, the bankruptcy estate of a non-operator is contingently liable to the governmental authorities and must be prepared to reimburse for P&A expenses expended by the governmental agency. Accordingly, in the case at bar, if Mariner had failed to undertake the plugging and abandonment that it has already done, and if Mariner refuses to undertake further plugging and abandonment, the MMS would have the right to look to the Debtor's estate for reimbursement. The Court therefore rejects the Debtor's argument that because the Debtor is a non-operator, Mariner has no administrative claim. Mariner's plugging and abandonment of wells prevents MMS from ever looking to the Debtor's estate for reimbursement of expenses.

The Court's rejection of this argument does not mean, however, that the Court believes without doubt that Mariner, as a matter of law, definitely has an administrative claim. Just the contrary. While this Court has already noted the comments made by Judge Isgur in *American Coastal*, the Court also gives credence to the argument that there can be no administrative claim when the obligation arose pre-petition. The Court is sympathetic to this argument because there is authority that "[o]bligations which arise out of prepetition contracts, but are due postpetition, are prepetition debts." *In re East Texas Steel Facilities, Inc.*, 117 B.R. 235, 242-43 (Bankr. N.D. Tex. 1990); *see In re Gibson*, 308 B.R. 763, 767-68 (Bankr. N.D. Tex. 2002); *see also In re Young*, 144

> facilities, and clear the lease site sea floor. The rule clarifies MMS's position that co-lessees and operating rights owners are liable for compliance with the terms and conditions of their OCS [i.e. Outer Continental Shelf] oil and gas or sulphur leases.

Dept. of the Interior: Minerals management Service, News Release, May 21, 1997, Surety Bond Requirements Amended MMS Issues Final Rule, *available at* 1997 WL 281344 (D.O.I.).

B.R. 45, 47 (Bankr. N.D. Tex. 1992). Thus, there is certainly room for argument that the claims of trade creditors who provided pre-petition goods and services to a debtor's business should not be subordinate to the reimbursement claims of an operator (like Mariner) whose contractual relationship with the Debtor arose pre-petition.

Indeed, one very recent decision by a Texas appellate court has even held that where the claimant is a governmental agency acting on behalf of the State of Texas and the claim arose from conduct that occurred pre-petition, the claim is a pre-petition claim that may be discharged. *Strata Resources v. State of Texas*, 264 S.W.3d 832 (Tex. Civ. App.—Austin 2008, no pet.) In *Strata Resources*, Steven Epps (Epps), one of two partners of Strata Resources (Strata), filed a Chapter 13 petition, which he subsequently converted to a Chapter 7 case. Thereafter, he received a discharge. Meanwhile, prior to his filing for bankruptcy, the TRC plugged five oil and gas wells for which Strata was the operator. Thereafter, the TRC (on behalf of the State of Texas) brought suit against Strata, Epps, and the other partner of Strata seeking, among other things, reimbursement for well plugging costs. It was during the pendency of this suit that Epps filed his Chapter 13 petition. After he converted from Chapter 13 to Chapter 7, Epps received his discharge on December 27, 2004. The trial in state district court occurred on December 15, 2005, and judgment was entered against all defendants, including Epps, for, among other things, plugging expenses of $36,863.20.

At trial, Epps had raised the affirmative defense of discharge in bankruptcy. The trial court rejected this defense. Epps appealed, and the court of appeals then reviewed this issue.

The court of appeals concluded that TRC's claim was a pre-petition claim because the TRC issued orders prior to the filing of Epps' Chapter 13 petition (i.e. prior to August 3, 2003) for Strata to plug the wells. *Id.* at 841-42. When Strata failed to comply with these orders thirty days after they

were issued, the TRC automatically acquired a contingent claim against Strata (and its partners, including Epps) under the Texas Natural Resources Code. *Id.* TRC acquired this contingent claim well before the filing of Epps' Chapter 13 petition on August 3, 2003. *Id.* The court of appeals, noting that the definition of "claim" under 11 U.S.C. § 101(5) includes a right to payment as of the date of the filing of the bankruptcy petition, regardless of whether or not such right is unliquidated, held that TRC's claim was a pre-petition claim that was discharged in Epps' Chapter 7 case. *Id.*

In the case at bar, counsel for the Debtor vigorously argued that Mariner's P&A obligations began in February 2007, which was approximately sixteen months prior to the filing of the Debtor's Chapter 11 petition. Under the reasoning set forth in *Strata Resources*, there is merit to the argument that Mariner's reimbursement claim for P&A expenses arising after June 26, 2008 (i.e. the filing date) is entirely a pre-petition claim.

All in all, based upon the discussion of all of the authorities above, cogent arguments can be made that with respect to P&A expenses incurred after June 26, 2008, Mariner has an administrative claim; or that Mariner has no administrative claim, but rather holds only a pre-petition claim. Because there are sound arguments going both ways, this Court concludes that if and when the Fifth Circuit ever rules on this specific issue, there is a fifty percent chance that the Fifth Circuit would hold that Mariner has an administrative claim, and there is a fifty percent chance that the Fifth Circuit would hold that Mariner has solely a pre-petition claim.

Finally, with respect to the administrative claim for $62,358.90 that Mariner asserts arises from JIB expenses on the West Delta well, the Court sees no reason not to use the same reasoning that it has adopted with respect to Mariner's administrative claim for P&A expenses. That is, this Court believes that the Fifth Circuit would view JIB expenses in the same fashion that it would view

P&A expenses when assessing the issue as to whether such post-petition expenses constitute an administrative claim. Maintenance of an operating well protects the environment in a fashion similar to the plugging and abandonment of a well that has ceased producing in paying quantities. Thus, this Court concludes that if and when the Fifth Circuit ever rules on this specific issue, there is a fifty percent chance that the Fifth Circuit would hold that Mariner has an administrative claim for these JIB expenses, and there is a fifty percent chance that the Fifth Circuit would hold that Mariner has solely a pre-petition claim for these expenses.

b. The Debtor's Third Argument

The Debtor also argues that even if this Court, as a matter of law, may estimate Mariner's administrative claim, the evidence introduced at the Hearing reveals shoddy practices and faulty documentation that do not justify the amount of the claim sought by Mariner. The Court, to a certain extent, agrees with the Debtor. For example, Clarkson testified that expenditures relating to boat trips to the platform was based upon "bumps" (i.e. the number of platforms where the boat actually traveled) as opposed to the actual time spent at each platform. Thus, if a boat traveled to four platforms (one of which the Debtor had an interest in), the Debtor was automatically assessed 25% of the expenses—even though it may well have been that the actual time of activity at the Debtor's platform was minuscule compared to the actual time of activity spent at the three platforms in which the Debtor has no interest (and therefore no obligation for reimbursement). The Court finds that it is much fairer and more equitable to apportion the reimbursement obligation based upon actual time of activity at the platform rather than based upon the number of platforms visited. Indeed, Clarkson himself conceded that Mariner had changed this apportionment policy in November of 2008.

By way of another example, Carson testified that Mariner's records reflect that with respect

to helicopter visits to the platforms, the Debtor was once again assessed its portion of reimbursable expenses based upon the total number of platforms visited, as opposed to the actual amount of time that the helicopter spent on the platform in which the Debtor has an interest. Again, this Court finds that Mariner's "bump" approach is not as fair as the "time of activity" approach. Thus, just as with the expenses allocated to the Debtor relating to boat trips, the Court finds that the expenses allocated to the Debtor relating to the helicopter trips are higher than they should be.

Clarkson also conceded that there have been some errors in Mariner's record keeping and that since he joined Mariner in November of 2008, he has made efforts to ensure that Mariner's books and records are properly kept in every respect.

All in all, the Debtor introduced evidence that leads this Court to conclude that Mariner is not entitled to the full amount of the administrative claim that it seeks.

Conversely, Mariner introduced substantial evidence that its JIB and P&A documentation satisfies the standards of the oil and gas industry. Indeed, the Debtor's expert witness, Carson, conceded that under the standards of the oil and gas industry, when an operator sends a JIB, the non-operator mineral interest owner is supposed to pay its share of expenses and then, if the non-operator disputes the amount that has been paid, thereafter bring the matter to the operator's attention in an effort to resolve the dispute or, if the dispute cannot be resolved, to request an audit. Thus, to the extent that the Debtor wanted to convince this Court that Mariner's administrative expense claim is based upon unusual or extraordinary practices not normal for an oil and gas operator, the Debtor has failed. The Court finds that Mariner's JIBs statements and Mariner's documentation concerning P&A expenses are very much representative of what any experienced operator in the oil and gas industry would maintain and send to non-operator mineral interest holders.

Carson also gave testimony on a very important point. He testified that there is documentation evidencing that the Debtor itself was taking $10,000.00 credits relating to the platform on West Delta 34. Indeed, he testified that the Debtor had taken a total credit of $72,400.00. He pointed out that for the Debtor to have taken these credits, the Debtor cannot deny an ownership interest in the platform, and therefore cannot deny that it has responsibility to reimburse Mariner for P&A expenses associated with this platform. Indeed, there was testimony that the Debtor has never transferred its mineral interest, which would be the only way for the Debtor to escape its obligation to pay its share of P&A expenses. *See In re American Coastal Energy, Inc.*, 2009 WL 137493, at *9 n.5. The Court finds this testimony to be compelling. Accordingly, the Court finds that with respect to P&A expenses, Mariner has an administrative claim which must be estimated.

As noted above, because there was evidence introduced that some of Mariner's apportionment practices are questionable and that some of Mariner's record keeping has contained errors, this Court will not estimate Mariner's administrative claim for P&A expenses in the amount that Mariner seeks. Rather, this Court will estimate this claim at a lower figure. How much lower to estimate this claim is, to be charitable, an inexact process. This Court is entitled to base its estimation upon what some other court or arbitrator has determined. *In re Enron Corp.*, No. 01-16034, 2006 WL 544463, at *6 (Bankr. S.D.N.Y. Jan. 17, 2006). In the trial before Judge Hittner, the jury awarded Mariner $428,316.00 of JIB expenses out of the $818,724.00 that Mariner sought. Indeed, Mariner has appealed to the Fifth Circuit seeking to recover the remaining $390,408.00. Thus, the jury awarded Mariner approximately 52% of the JIB expenses that Mariner sought to recover. Given the Court's review of all of the evidence introduced at the Hearing, and given the

Court's comments about this evidence as set forth above—namely, that both the Debtor and Mariner have made good arguments—this Court finds that it should adopt the same percentage used by the jury. Accordingly, the Court estimates that Mariner's administrative claim for P&A expenses is calculated as follows: 52% times the total amount claimed by Mariner (i.e. $1,811,903.30) times 50% (which is the percentage of likelihood that the Fifth Circuit will someday hold that post-petition expenses for the remediation of pre-petition environmental liabilities constitute an administrative claim). When this calculation is done, the result is $471,094.85. Accordingly, this Court estimates that Mariner's administrative claim is $471,094.85 with respect to plugging and administrative expenses.

With respect to the administrative claim of $62,358.90 that Mariner seeks for JIB expenses, the Court sees no reason why it should not estimate this claim using the same procedure. Accordingly, the Court estimates that Mariner's administrative claim for JIB expenses is calculated as follows: 52% times the total amount claimed by Mariner (i.e. $62,358.90) times 50% (which is the percentage of likelihood that the Fifth Circuit will someday hold that post-petition expenses for the remediation of pre-petition environmental liabilities constitute an administrative expense. When this calculation is done, the result is $16,213.31. Accordingly, this Court estimates that Mariner's administrative claim for JIB expenses is $16,213.31.

The sum of $471,094.85 and $16,213.31 is $487,308.16. It is this figure which represents this Court's estimation of Mariner's administrative claim.

2. Forest's Pre-petition Claim (which is based entirely upon the Judgment)

a. Expenses—Forest obtained a judgment for $24,103.00 in JIB expenses. For purposes of estimation, the Debtor does not dispute this figure. However, Forest claims that

it is owed JIB expenses of $80,345.00 because it believes that the jury made an incorrect finding at the trial in the District Court and should have awarded another $56,242.00 in JIB expenses. After considering this issue, the Court concludes that it should accept the jury's findings because at the Hearing in this Court, both sides presented cogent arguments (as already reviewed in the section on Mariner's administrative claim). Moreover, Nobles, an expert witness for Forest, testified orally and opined in writing that he cannot conclude that Forest will prevail on appeal on this issue. [Creditors' Exhibit No. 4.] His candid opinion is a further reason that this Court chooses not to disturb the jury's findings when estimating Forest's claim. Accordingly, the Court estimates Forest's pre-petition claim for JIB expenses to be $24,103.00.[8]

b. Costs—Forest obtained a judgment for $7,904.22 in costs. For purposes of estimation, the Debtor does not dispute this figure. Nor does Forest. Accordingly, the Court estimates the amount of costs to be $7,904.22.

c. Attorneys' Fees—Forest sought attorneys' fees at trial, but the jury awarded nothing. Forest asserts that it is entitled, as part of its claim in this case, to attorneys' fees in the amount of $782,000.00. Not surprisingly, the Debtor takes the position that in this case, no part of Forest's claim should include attorneys' fees because the jury awarded none.

At the Hearing, Forest adduced testimony from its expert witness Nobles, an

[8] In other words, the Court finds that there is a one-hundred percent probability that this amount will be upheld on appeal.

experienced attorney whose area of expertise is in appellate law. Indeed, Nobles testified that he has been involved in over 100 appeals in Texas state courts and approximately 25 appeals at the Fifth Circuit. It may well be that because Nobles is so experienced in appellate law, he was unwilling to state his opinion as to what the percentage is for Forest to obtain reversal of the Judgment awarding no attorneys' fees. When counsel for Mariner inquired as to success for Forest on this issue, Nobles responded that "I thought this was a very good issue." This response is hardly a ringing endorsement that Nobles believes Forest will prevail on appeal. Granted, his written report states that he believes that there is a "high likelihood" that Forest will prevail [Creditors' Exhibit No. 4], but while this phrase has a nice ring to it, it is fairly nebulous. The percentage of successful appeals is very low to begin with, and therefore it is not clear to this Court what Nobles meant by use of the phrase "high likelihood." Arguably, the phrase "high likelihood" could mean that there is, say, a 20% chance of a successful appeal given that, on the whole, the chances of a successful appeal are much less than 20%. While this Court has no doubt that Nobles is an exceptional attorney, it finds neither his testimony nor his written report so convincing that this Court should estimate attorneys' fees to be anything greater than zero.

Moreover, there is another point on which this Court focuses in arriving at this conclusion. The trial was presided over by the Honorable David Hittner, an experienced and outstanding jurist who is renowned for not only presiding over trials for more than three decades, but for also giving extensive speeches at continuing

legal education seminars regarding issues that arise at trial. For the undersigned judge to estimate Forest's attorneys' fees in an amount greater than the amount determined in Judge Hittner's court, Forest would have needed to introduce much more compelling evidence. By way of one example only, if Forest had introduced a transcript of the trial indicating that Judge Hittner had stated on the record that the issue concerning attorneys' fees was a close call on which he might be reversed, then this Court might estimate the fee figure at some amount greater than zero. Accordingly, the Court concludes that the attorneys' fees portion of Forest's pre-petition claim should be estimated at zero.

The sum of $24,103.00 plus $7,904.00 plus $0 (representing this Court's estimation of Forest's claim for JIB expenses of $56,242.00) plus $0 (representing this Court's estimation of Forest's claim for attorneys' fees) equals $32,007.00. It is this figure which represents this Court's estimation of the entire pre-petition claim held by Forest, subject to further reduction as discussed in the Conclusion. *See infra* Part V.

3. **Mariner's Pre-petition Claim (which is based not only upon the Judgment, but also upon the claimed JIB expenses for the first half of 2008, a six-month period which was not litigated at the trial presided over by Judge Hittner)**

a. JIB Expenses from the Trial—Mariner obtained a judgment for $428,316.00 in JIB expenses. For purposes of estimation, the Debtor does not dispute this figure. However, Mariner asserts that it is entitled to JIB expenses of $818,724.00 because Mariner believes that the jury made an incorrect finding at the trial in the District Court and should have awarded another $390,408.00 in JIB expenses. After

considering this issue, the Court concludes that it should accept the jury's findings because at the Hearing in this Court, both sides presented cogent arguments (as already reviewed in the section on Mariner's administrative claim). Moreover, Nobles, an expert witness for Mariner, testified orally and opined in writing that he cannot conclude that Mariner will prevail on appeal on this issue. [Creditors' Exhibit No. 4.] His candid opinion is a further reason that this Court chooses not to disturb the jury's findings when estimating Mariner's claim. Accordingly, the Court estimates Mariner's pre-petition claim for JIB expenses to be $428,316.00.[9]

b. JIB Expenses for January 1, 2008 through June 30, 2008 (which were not adjudicated at trial)—Mariner asserts that the JIB expenses for the first half of 2008 were $83,612.88, representing JIB expenses of $70,053.34 and P&A expenses of $13,559.54. For its part, the Debtor asserts that the total of these combined expenses is $3,224.57, a figure which this Court rejects as unconvincingly too low based upon the voluminous and credible JIBs introduced by Mariner and also based upon the testimony of Clarkson and Carson. As already noted, this Court "may estimate a claim based upon the ruling of another court or a non-binding arbitral decision." *In re Enron Corp.*, No. 01-16034, 2006 WL 544463, at *6 (Bankr. S.D.N.Y. Jan. 17, 2006). After considering this issue, the Court concludes that Mariner's claim for JIB and P&A expenses for the first half of 2008 should be estimated by multiplying 52% times $83,612.88. As already noted in the section on administrative expenses, both

[9] In other words, the Court finds that there is a one-hundred percent probability that this amount will be upheld on appeal.

sides made good arguments at the Hearing in this Court; and the Court sees no reason why it should not use the same percentage that the jury effectively found in the trial presided over by Judge Hittner. Accordingly, Mariner's pre-petition claim for JIB and P&A expenses for the first six months of 2008 is estimated at $43,478.70.

The sum of $428,316.00 plus $43,478.70 is $471,794.70. It is this figure which represents this Court's estimation of the entire pre-petition claim held by Mariner, subject to further reduction as discussed in the Conclusion. *See infra* Part V.

V. CONCLUSION

In *MacDonald*, the court noted that in a claims estimation hearing, the burdens of both persuasion and of going forward with respect to the estimation of the claim lies with the party asserting the claim. *In re MacDonald*, 128 B.R. at 166. This Court finds that Mariner and Forest have met these burdens with respect to all three of the claims discussed herein. Granted, the Debtor has brought out certain weaknesses which have caused this Court to estimate the claims at figures lower than the amounts sought by Mariner and Forest. Nevertheless, this Court concludes that Mariner and Forest do definitely have claims in this case. Based upon the discussion set forth above, this Court estimates Forest's pre-petition claim to be $32,007.00; Mariner's pre-petition claim to be $471,794.70; and Mariner's administrative expense claim to be $487,308.16.

There is one final adjustment to make. At the Hearing, counsel for the Debtor pointed out that counsel for Forest and Mariner had failed to comply with Bankruptcy Rule 2019. The Court agrees: the docket sheet reflects that DeLuca did not file a Rule 2019 disclosure. This rule requires that "every person purporting to represent more than one creditor in a chapter 11 reorganization case file a verified statement setting forth the names and addresses of the creditors, the nature and amount

of the claims and the relevant facts and circumstances surrounding employment of the 'agent'." *In re Elec. Theatre Rests. Corp.*, 57 B.R. 147, 148-49 (Bankr. N.D. Ohio 1986); s*ee also In re Baldwin-United Corp.*, 52 B.R. 146, 148 (Bankr. S.D. Ohio 1985) (same); *In re Southland Corp.*, 124 B.R. 211, 226 (Bankr. N.D. Tex. 1991) ("Bankruptcy Rule 2019 requires the filing by every entity representing more than one creditor or equity security holder of a verified statement with the Court setting forth specific facts concerning the representation, and the names of the parties represented."). Specifically, Bankruptcy Rule 2019(a) provides:

> In a . . . chapter 11 reorganization case . . . every entity or committee representing more than one creditor . . . shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid thereof, and any sales or other disposition thereof.

Fed. R. Bankr. P. 2019(a).

Bankruptcy Rule 2019(a) also requires that the entity (which includes persons) representing multiple creditors provide "a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors." *Id.*; *see also In re CF Holding*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992) ("The respondents shall file a copy of any instrument empowering the respondents to act on behalf of the listed entities."); *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 851-52 (Bankr. S.D.N.Y. 1989) ("Bankruptcy Rule 2019 requires that an entity must file an instrument which empowers the entity to act on behalf of the creditors . . . absent such consent

an agent may not legitimately represent the interests of the individuals."). Normally, "this includes an executed power of attorney authorizing counsel to file a proof of claim." *Id.* at 853.

"The purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure during the business reorganization process, and was designed to cover entities which, during the bankruptcy case, act in a fiduciary capacity to those they represent, but are not otherwise subject to the control of the court." *In re CF Holding*, 145 B.R. at 126 (citing 8 Collier on Bankruptcy ¶ 2019.03 at 2019-4 (15th ed. 1992)); *see also City of Lafayette, Colorado v. Okla. P.A.C. First Ltd. P'ship. (In re Okla. P.A.C. First Ltd. P'ship)*, 122 B.R. 387, 393 (Bankr. D. Ariz. 1990) ("It is part of the Chapter 11 reorganization process that all matters should be done openly and subject to scrutiny, whether it is the proposal of a plan of reorganization, representation of the debtor, or representation of numerous creditors—secured or unsecured."). Additionally, a properly executed and timely filed 2019 application provides "a strong indicator of agent status for service of initial process." *The Muralo Co., Inc. v. All Defendants Listed On Exhibits A Through D to Complaint (In re Muralo)*, 295 B.R. 512, 524 (Bankr. D.N.J. 2003).

The consequences of a purported agent's failure to comply with Bankruptcy Rule 2019 are largely a matter for the bankruptcy court's discretion. *In re Mandalay Shores Coop. Hous. Ass'n, Inc.*, 63 B.R. 842, 853 (N.D. Ill. 1986). Given that the matter before this Court is a claims estimation hearing, this Court has decided to reduce the amounts of the estimated claims due to the failure of counsel for Forest and Mariner to comply with Rule 2019. Accordingly, the estimated pre-petition claim of Forest is reduced from $32,007.00 to $30,000.00; the estimated pre-petition claim of Mariner is reduced from $471,794.70 to $440,000.00; and the estimated administrative expense claim of Mariner is reduced from $487,308.16 to $456,000.00.

In sum, for purposes of the plan confirmation hearing to be held on April 2, 2009, Forest's pre-petition claim is $30,000.00; Mariner's pre-petition claim is $440,000.00; and Mariner's administrative expense claim is $456,000.00.[10]

An order consistent with these Findings of Fact and Conclusions of Law will be entered on the docket simultaneously with the entry of these Findings and Conclusions.

Signed on this 18th day of March, 2009.

Jeff Bohm
United States Bankruptcy Judge

[10] After this Court announced its ruling at the hearing on March 17, 2009, there was discussion on the record with both counsel for the Debtor and counsel for Forest and Mariner about whether this Court was making a determination that the pre-petition claims of Forest and Mariner are unsecured or secured. The Court noted that this particular issue was not adjudicated at the Hearing and further noted that because the proofs of claim filed by Forest and Mariner attach abstracts of the Judgment, at this point—because these proofs of claim have not been invalidated—they are deemed valid. *In re Kilroy*, 354 B.R. 476, 488 (Bankr. S.D. Tex. 2006). Accordingly, at this point, the pre-petition claims of Forest and Mariner are secured claims, and should be treated as such under the Debtor's proposed plan at the confirmation hearing to be held on April 2, 2009.