THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	Chapter 11
WALTER ENERGY, INC., *et al*.	)	Case No. 15-02741-TOM11
Debtors.[1]	)	(Jointly Administered)
DOMINION RESOURCES BLACK WARRIOR TRUST, by and through its TRUSTEE, SOUTHWEST BANK,	)	Adversary No. 15-00102-TOM
Plaintiff,	)	
VS.	)	
WALTER BLACK WATER BASIN LLC, Defendant.	)	

STEERING COMMITTEE'S OBJECTION TO THE TRUST'S VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW, the Steering Committee,[2] by and through its undersigned counsel, and hereby files this objection (this "Objection")[3] to *Plaintiff's Verified Application for Temporary*

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Walter Energy, Inc. (9953); Atlantic Development and Capital, LLC (8121); Atlantic Leaseco LLC (5308); Blue Creek Coal Sales, Inc. (6986); Blue Creek Energy, Inc. (0986); J.W. Walter, Inc. (0648); Jefferson Warrior Railroad Company, Inc. (3200); Jim Walter Homes, LLC (4589); Jim Walter Resources, Inc. (1186); Maple Coal Co. LLC (6791); Sloss-Sheffield Steel & Iron Company (4884); SP Machine, Inc. (9945); Taft Coal Sales & Associates, Inc. (8731); Tuscaloosa Resources, Inc. (4869); V Manufacturing Company (9790); Walter Black Warrior Basin LLC (5973); Walter Coke, Inc. (9791); Walter Energy Holdings, LLC (1596); Walter Exploration & Production LLC (5786); Walter Home Improvement, Inc. (1633); Walter Land Company (7709); Walter Minerals, Inc. (9714); and Walter Natural Gas, LLC (1198).

[2] The "Steering Committee" means the informal group of certain unaffiliated (i) lenders under the Credit Agreement, dated as of April 1, 2011 (as amended, restated, amended and restated, waived, supplemented or otherwise modified from time to time, the "Credit Agreement"), by and among Walter Energy, Inc. ("Walter Energy"), as U.S. borrower, Western Coal Corp. and Walter Energy Canada Holdings, Inc., as Canadian borrowers, the lenders from time to time party thereto, and Morgan Stanley Senior Funding, Inc., as administrative agent, and (ii) holders of the 9.50% Senior Secured Notes due 2019 (the "First Lien Notes") under the Indenture dated as of September 27, 2013 (as amended, waived, supplemented or otherwise modified from time to time) by and among Walter Energy, as issuer, the guarantors from time to time parties thereto, and Wilmington Trust, National

Restraining Order (the "TRO Application") [Docket No. 239] filed by Dominion Black Warrior Trust (the "Trust"). In furtherance of this Objection, the Steering Committee states as follows:

I. SUMMARY OF POSITION[4]

The Trust has no rights to any gas in the ground or upon its production, due both to Alabama law and the terms of the Payment Agreement. Under Alabama law, there is no right of ownership of gas in the ground; one can only hold a right to explore and extract. Under the terms of the Payment Agreement, upon extraction the Trust has no rights in the gas, including no production rights and no rights with respect to a sale of WBWB's interest. The Trust has only a contractual right to receive 65% of the gross revenues from the sales of the gas, which is nothing more than an ordinary unsecured right to payment like any other general unsecured creditor. The Trust is simply an unsecured creditor with no special rights. Since the Trust cannot demonstrate any of the elements required for a temporary restraining order ("TRO"), the TRO Application should be denied.

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over this Response pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b).

Association, as successor trustee and collateral agent to Union Bank, N.A., further denominated as the "First Lien Secured Parties" under the Cash Collateral Order (defined below).

[3] In order to preserve its right to object to Dominion's TRO Motion and participate in all other aspects of this Adversary Proceeding, the Steering Committee has filed concurrently with this Objection a motion to intervene in the Adversary Proceeding. [Adversary Docket No. 25].

[4] All capitalized terms used in this section are defined below.

III. RELEVANT FACTS

A. History of the Payment Agreement.

2. Dominion Black Warrior Basin, Inc. ("DOM Basin") held an interest in various oil, gas and mineral leases covering lands located in the Black Warrior Basin in Tuscaloosa County, Alabama (as used herein, and as defined in the Payment Agreement (as defined below), the "Leased Land"). DOM Basin also owned certain utilization, pooling and operating agreements, and orders relating to those leases (such interests are referred to in the Payment Agreement (defined below), as the "Company Interests"). DOM Basin contracted to sell such natural gas to Sonat Marketing Company pursuant to that certain Gas Purchase Agreement dated May 3, 1994 (the "Sonat Agreement").

3. On May 31, 1994, DOM Basin established the Trust pursuant to that certain Trust Agreement dated May 31, 1994 (the "Trust Agreement") by and among DOM Basin, Dominion Resources, Inc. (an indirect parent of DOM Basin ("DOM Resources")), Mellon Bank (DE) National Association, and NationsBank of Texas, N.A. A copy of the Trust Agreement is attached hereto as Exhibit A and incorporated herein by reference. Pursuant to that certain Overriding Royalty Conveyance dated as of June 1, 1994 and recorded in the Office of the Judge of Probate of Tuscaloosa County, Alabama on June 30, 1994 (the "Payment Agreement"), by and among DOM Basin and the trustees of the Trust, the Trust was transferred the Royalty Interest (as defined in the Payment Agreement). A copy of the Payment Agreement is attached hereto as Exhibit B and incorporated herein by reference.

4. In July 2007, as part of a larger acquisition, HighMount Alabama, LLC, and its subsidiary HighMount Black Warrior Basin, LLC, acquired the assets of DOM Basin.

5. In May 2010, Walter Natural Gas, LLC, acquired the ownership interests in HighMount Alabama, LLC. HighMount Alabama, LLC changed its name to Walter Exploration

& Production, LLC ("WE&P") and HighMount Black Warrior Basin, LLC changed its name to Walter Black Warrior Basin, LLC ("WBWB"). With respect to the Payment Agreement and the Trust Agreement, WBWB is the successor in interest to DOM Basin and WE&P is the successor in interest to DOM Resources.

B. Terms of the Payment Agreement.

6. The Company Interests as defined in the Payment Agreement include the leasehold interests in approximately 407 leases identified on Part II of Schedule A to the Payment Agreement. Some of the leases are titled "Oil, Gas, and Mineral Lease" and others are titled "Assignment." *See, e.g.*, Gas Leases (as defined below). Attached hereto as Exhibits C through F and incorporated by reference are four examples of such leases (collectively, the "Examples Leases"), which are described in more detail below:

Example Lease	Granting Language	Term of lease
Oil, Gas, and Mineral Lease between Perry J. Bates and Dominion Black Warrior Basin, Inc. dated October 5, 1990 ("Example Lease 1")	The lessor "does hereby grant, lease and let unto lessee the land covered hereby for the purposes and with the exclusive right of exploring, drilling, mining and operating for, producing and owning oil, gas, sulphur and all other minerals (whether or not similar to those mentioned), together with the right to make surveys on said land, lay pipe lines, establish and utilize facilities for surface or subsurface disposal of salt water, construct roads and bridges, dig canals, build tanks, power stations, power lines, telephone lines, employee houses and other structures on said land, necessary or useful in lessee's operations in exploring, drilling for, producing, treating, storing and transporting minerals produced from the land covered hereby or any other land adjacent thereto." *See* Example Lease 1, ¶ 1.	"[T]hree (3) years from the date hereof, hereinafter called 'primary term', and as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days." *See id.* at ¶ 2.

Example Lease	Granting Language	Term of lease
Assignment between Taurus Exploration, Inc. and The River Gas Corporation dated December 21, 1990 ("Example Lease 2").	The assignor does "hereby grant, sell, assign and convey . . . all of Assignor's interest in and to the Lease Acreage detailed in Exhibit 'A' insofar and only insofar as said lease covers occluded natural gas or methane found in coal seams in, or under the lands described in said lease, to a depth of 100 feet below the base of the Pottsville Formation." *See* Example Lease 2, p.1.	"[F]orever, in accordance with the terms of the assigned Lease Acreage and the terms hereof." *See id.* at p.2.
Oil, Gas and Coal Gas Agreement between Ramsey-McCormack Land Company, Inc. and DE-GAS, Inc. dated October 1, 1979 ("Example Lease 3")	The lessor "hereby grants and leases unto Lessee for the purposes of exploring, drilling, producing, recovering and storing for market and marketing oil and gas, petroleum and petroleum products, coal gas, elemental sulphur and helium (together with such rights and privileges as are vested in Lessor to construct and maintain pipe lines, tanks, roads, bridges, or other facilities and structures reasonable or necessary for the above stated purpose) all of the rights, title and interest vested in Lessor in and to the property in Tuscaloosa County, State of Alabama, consisting of 3,026 acres, more or less, and more particularly described as Exhibit 'A' attached hereto and made a part hereof." *See* Example Lease 3, ¶ 1.	"[F]or a term of five years from this date (called 'Primary Term') and as long thereafter as oil, gas or coal gas (called 'products') are produced from said lands or drilling or reworking operations are conducted on said lands, as hereinafter provided." *See id.* at ¶ 2.
Oil, Gas and Occluded Natural Gas Lease dated Coal Gas Agreement between the Stuart West Stedman Trust, the Lynn Stedman Trust and the Clare Stedman Trust and TRW, Inc. dated September 5, 1985 ("Example Lease 4,")	The lessor "grants, leases, and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling for and producing oil, gas and occluded natural gas to the base of the strata known as the Potsville [sic] Interval . . . provided, however, Lessee shall have the right to use the surface of the leased premises only to the extent to which Lessor has such right." *See* Example Lease 4, ¶ 1	"[S]hall be for a term of ten (10) years from this date (called 'primary term'), and as long thereafter as oil, gas or occluded natural gas is produced by Lessee in paying quantities from the leased premises or this lease is continued in force by any other provisions hereof." *See id.* at ¶ 2.

The Example Leases, together with the other leases comprising the Company Interests under the Payment Agreement, are hereinafter referred to in this Objection as the "Gas Leases."

Upon information and belief, WBWB is the holder of the lessee rights and obligations under the Gas Leases, and WBWB does not own a fee simple absolute interest in any of the real property on which the gas wells are located.[5]

7. The Payment Agreement purports to grant the Trust an "overriding royalty interest . . . equal to and consisting of an undivided sixty-five percent (65%) interest in and to the Subject Gas, including, subject to the provisions of Section 7.02 hereof, that share of revenue from each Proration Unit . . . set forth in the 'Royalty Interests' columns on Schedule A hereto." *See* Payment Agreement, p.1. The Payment Agreement defines Subject Gas as "all Gas in and under, and that may be produced from, and that shall be attributable to, the Company Interests from and after the Effective Time and Effective Date, subject to the qualifications set forth in Section 3.04(a)." *See* Payment Agreement, p.6. Section 3.04(a) of the Payment Agreement sets forth certain parameters of what may and may not be included in Subject Gas for the purposes of the Payment Agreement. By its express definition, Subject Gas is specifically tied to gas attributable to and produced from the Company Interests, which, also by express definition, are limited to WBWB's interests in the leasehold estates in the Leased Land and pursuant to the Gas Leases.

8. As set forth in Article VI of the Payment Agreement, the Trust is not entitled to take any action with respect to the Subject Gas. Additionally, the Trust is not entitled to any portion of the proceeds from a sale of WBWB's interests (e.g., the Company Interests). Section 9.01 of the Payment Agreement provides that WBWB may "assign, sell, transfer, convey,

[5] Even if some of the Gas Leases conveyed more than a leasehold interest to WBWB, the ownership of the gas is still not vested in WBWB because Alabama is a "nonownership theory" state, as discussed in more detail below. *See NCNB Texas Nat. Bank, N.A. v. West*, 631 So.2d 212, 223 (Ala. 1993) (noting that Alabama determines oil and gas under the nonownership theory). Notably, in the TRO Application, the Trust relies extensively on non-Alabama case-law from "ownership theory" jurisdictions.

mortgage or pledge the Company Interests, or any part thereof" and Section 3.04(b) provides that "[a]ny cash consideration or other thing of value received by [WBWB] for any sale of the Company Interests . . . shall not be included in the Gross Proceeds."

C. The Proceeds and the Debtors' Cash Management System.

9. Per the terms of the Base Contract for Sale and Purchase of Natural Gas dated August 1, 2010 (the "Alagasco Contract") by and between Alabama Gas Corporation ("Alagasco") and WBWB, Alagasco purchases all, or almost all, of the natural gas produced from the Leased Land. WBWB invoices Alagasco for the natural gas delivered in the preceding month, with payment to be made on or around the 25th day of the month following the delivery month. The Alagasco Contract covers some 1,500 wells, of which about 550 are subject to the Payment Agreement. Alagasco makes one collective payment to WBWB for the natural gas delivered each month, which includes payment for the gas from all 1,500 wells; the monthly payment is not divided in any way based on who may have an interest in the proceeds of the sale of the natural gas.

10. On July 15, 2015, WBWB and the affiliated debtors filed *The Debtors' Motion for an Order (A) (I) Approving Continued Use of the Debtors' Existing Cash Management System, (II) Authorizing Use of Existing Bank Accounts and Checks, (III) Waiving the Requirements of 11 U.S.C. § 345(b), (IV) Granting Administrative Expense Status to Certain Postpetition Intercompany Claims, and (V) Authorizing the Continuation of Certain Intercompany Transactions; and (B) Granting Related Relief* (the "Cash Management Motion") [Docket No. 38], which describes in detail WBWB and Walter Energy, Inc.'s ("Walter Energy") prepetition practices and procedures regarding its cash management system. As described in the Cash Management Motion, WBWB generally issues invoices in its own name, but receipts are collected into Walter Energy's "Master Concentration Account." *See* Cash Management

Motion, ¶ 13. Besides funds from the deposit accounts, monies from third parties are also deposited into the Master Concentration Account. The funds in the Master Concentration Account are then invested or used to pay disbursements. *See id.* at ¶ 15. Funds are transferred to Walter Energy's main concentration account and ACH account or to the subsidiary's disbursement account at Regions Bank in order to pay operating disbursements. *Id.*

11. On July 15, 2015, the Court entered its *Order Pursuant to 11 U.S.C. §§ 102 and 105(a) and Bankruptcy Rules 2002(M) and 9007 Implementing Certain Notice and Case Management Procedures* (the "Cash Management Order") [Docket No. 60], which permitted WBWB and Walter Energy to continue operating under their prepetition cash management system.

12. Pursuant to the Alagasco Contract, on July 25, 2015, Alagasco made a payment to WBWB for the gas delivered in June 2015. In accordance with its usual business practice, the June Proceeds were deposited into Walter Energy's deposit account.[6] All production proceeds paid by Alagasco on July 25, 2015 are referred to herein as the "June Proceeds," and the portion of the June Proceeds that would have been attributable to the Payment Agreement prepetition are referred to herein as the "Trust June Proceeds." On or around July 25, 2015, the June Proceeds were then swept from the deposit account into the Master Concentration Account.

13. Subsequent to the entry of the Cash Management Order, WBWB and Walter Energy continued to operate under their prepetition cash management system. The Cash Management Order did not provide for any changes to the cash management system that would have in any way differently impacted the treatment or handling of proceeds, including the June

[6] Walter Energy maintains deposit accounts at Bank of America ("BofA") and at JPMorgan Chase Bank, N.A. ("JPMorgan"). Regardless of whether the June Proceeds were deposited into the deposit accounts at BofA or JPMorgan, the amounts in the deposit accounts at each bank are swept, either automatically or manually, each day into the Master Concentration Account at such bank. *See* Cash Management Motion, ¶ 13.

Proceeds, that were received postpetition. Nor have there been any changes in the first-lien creditors' liens on the cash in the Master Concentration Account. Such cash was subject to the first-lien creditors' first priority liens prepetition, and it remains subject to those superior liens.

IV. ARGUMENT

14. The Royalty Interest is a part of WBWB's bankruptcy estate. The Trust cannot show that the Trust holds anything other than a contractual right to payment with respect to the Royalty Interest. Since the Trust cannot make such a showing, the Trust fails to meet its threshold burden for a TRO because the Trust cannot show a reasonable likelihood of success on the merits. Furthermore, the Trust cannot meet its burden to demonstrate the other three elements necessary for a TRO. Therefore, the TRO Application should be denied.

A. The Trust Must Satisfy a High Burden to Obtain a TRO—an "Extraordinary and Drastic Remedy."

15. TROs and preliminary injunctions are extraordinary remedies that are never awarded as of right, and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 20, 24 (2008). The purpose of a TRO, which is adjudicated on an emergency basis, is to preserve the status quo of the subject matter of the litigation and prevent irreparable harm until a hearing can be held on a preliminary injunction. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974); *United States v. Kaley*, 579 F.3d 1246, 1264 (11th Cir. 2009) (Tjoflat, J., concurring). The status quo is the last actual, peaceable, noncontested status that precedes the controversy. *E.g.*, *LaRouche v. Kezer*, 20 F.3d 68, 74 n.7 (2d Cir. 1994).

16. A plaintiff seeking a TRO or preliminary injunction must carry the burden of persuasion on each of four equitable factors to obtain injunctive relief: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm without injunctive relief, (3) that the

balance of equities that tips in favor of the plaintiff, and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 22; *Zardui-Quitana v. Richard*, 768 F.2d 1213,1216 (11th Cir. 1985); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225–26 (11th Cir. 2005). Furthermore, the 11th Circuit holds that this "extraordinary and drastic remedy" may not be granted unless the movant "clearly establishes the 'burden of persuasion'" on each of these four factors. *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citing *All Care Nursing Serv. Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)) (emphasis added); *see Winter*, 555 U.S. at 20, 22, 24.

17. The Trust bears a particularly heavy burden here because it seeks to *alter* the status quo, not to preserve it. *See* TRO Application ¶ 1 (seeking order requiring segregation of proceeds, preventing encumbrance of certain proceeds, and requiring distributions).[7] *See U.S. Bank Nat. Ass'n v. Turquoise Properties Gulf, Inc.*, No. CIV.A. 10-0204, 2010 WL 2594866, at *3 (S.D. Ala. June 18, 2010) (noting that "mandatory preliminary injunctions" *i.e.,* an injunction that requires the nonmoving party to take affirmative action and goes beyond preservation of the status quo, are "traditionally disfavored" and "courts should be especially cautious" in issuing them); *see also Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (noting that under Second Circuit law, the "burden is even higher on a party . . . that seeks a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo") (internal quotations and citations omitted).

[7] Because the request for relief in the TRO Application is phrased in an unclear way, we interpret the request for relief in light of the preliminary injunction requested. *See* TRO Application ¶ 4.

B. The Trust Will Not Succeed on the Merits of Its Claims.

18. The first element that the Trust must establish to be entitled to a TRO is a substantial likelihood of success on the merits. *See Zardui-Quitana*, 768 F.2d at 1216; *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1474 (11th Cir. 1985) ("As is the case with a temporary restraining order, a party seeking a preliminary injunction must show a substantial likelihood of success on the merits."). Thus, in order to carry its burden on the first element, the Trust must establish a likelihood of success as to each allegation made in the *Original Complaint and Application for Preliminary and Permanent Injunction* (the "Complaint") [Docket No. 1].

1. The Trust Only Has a Contractual Right to Payment, and Is Therefore a General Unsecured Creditor.

19. The Trust claims that it has a real property ownership interest in gas wells operated by WBWB, and that such ownership interest entitles it to segregation and payment of the Trust June Proceeds and any additional proceeds received on a going-forward basis.[8] However, WBWB never had a real property ownership interest in or to the gas and cannot have conveyed any such interest to the Trust.

a. WBWB Does Not Have a Real Property Interest, and Therefore Could Not Have Transferred a Real Property Interest to the Trust.

20. Under the Gas Leases, the landowners have leased to WBWB their respective properties with the express right to explore, drill, mine, and operate thereon for the purpose of

[8] To support this assertion, the Trust cites to non-Alabama law, such as *Ferguson v. Coronado Oil Co*., 884 P.2d 971, 978 (Wyo. 1994). However, aside from being the law of another jurisdiction, *Ferguson* does not support the Trust's position. The court in *Ferguson* merely held that, under Wyoming law, the Royalty Payment Act unambiguously requires the party who has the legal obligation to pay proceeds from the production of an oil or gas well to make the payments in accordance with either the time set out in the statute or within a time frame established by a agreement between the parties. With respect to the net profit interests at issue in that case, the Ferguson court explicitly noted that "its nature is determined from the instrument creating the interest." *Id.* at 976. *Ferguson* therefore reaffirms that a party's property rights are defined by the Payment Agreement instrument. What is more, the court in *Ferguson* ultimately concluded that the interests at issue were *personal property* interests.

producing and owning oil, gas, sulphur, and other minerals. The granting language of the Gas Leases generally provides that the landowner "does hereby grant, lease and let unto lessee the land covered hereby." *See generally* the Gas Leases.

21. In Alabama, due to the migratory nature of oil and gas (as opposed to other minerals), an oil and gas lease "does not grant the ownership of the oil and other minerals, but grants and leases to [lessee] the land described for the purpose of investigating, exploring, prospecting, drilling, mining for and producing oil and other minerals." *Sun Oil Co. v. Oswell*, 62 So. 2d 783, 789 (Ala. 1953). This concept of non-ownership was affirmed forty years later in *NCNB v. Texas National Bank, N.A. v. West*, where the court cautioned the parties from quoting a case from an ownership theory state, noting that "[o]ne must, however, bear in mind that it is not the gas that is owned in Alabama, but the right to reduce the gas to possession." 631 So. 2d 212, 223 (Ala. 1993) ("Alabama determines ownership of oil and gas under the nonownership theory, which recognizes the migratory nature of oil and gas and requires actual possession to establish ownership."). Since gas cannot be owned in Alabama, the construction of an oil and gas lease and the nature of the interest transferred thereby depends upon its terms. *See Pawnee Const. Co., Inc. v. Pavelec*, 383 So. 2d 835 (Ala. 1980) ("Mineral rights and interests may be transferred by contracts of sale, deeds, leases or licenses, but the intention of the parties is to be sought, and each instrument is to be considered in light of its own provisions."); *Moorer v. Bethlehem Baptist Church*, 130 So. 2d 367 (Ala. 1961) (finding that the nature of the lessee's interest must be determined by the terms of the lease and not by one particular rule).[9]

[9] The Trust cites to *Borden v. Case*, 118 So.2d 751, 753 (Ala. 1960) for the proposition that an oil and gas lease is a conveyance of real property under Alabama law, however *Borden* does not stand for that proposition. In *Borden*, the court explicitly declined to decide whether an oil and gas lease is a conveyance of real property, stating "[o]ur answers to the two propositions are in the negative. We treat them in order, assuming without deciding that an oil, gas, and mineral lease is a conveyance of an interest in real property within the purview of the statute of frauds." Id. at 753 (emphasis added).

22. In *Sun Oil*, the lease provided for an interest for "a term of ten years from this date, called primary terms, and as long thereafter as oil and other mineral is produced from said land, and as long thereafter as said lessee shall conduct drilling or reworking operations thereon with no cessation of more than sixty consecutive days until production results, and if production results, so long as any such mineral is produced." *Sun Oil*, 62 So. 2d at 788. The court determined that the lease did not grant ownership of the oil and other minerals. *Id*.

23. Similarly, a typical lease with WBWB provides "unless sooner terminated or longer kept in force under other provisions, hereof, this lease shall remain in force for a term of five (5) years from the date hereof, hereinafter called 'primary term,' and as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days." *See generally* the Gas Leases. The terms of WBWB's leases are generally almost identical to the terms discussed in *Sun Oil*. Accordingly, as in *Sun Oil*, WBWB does not own the Subject Gas, but rather has a leasehold right for the purpose of finding and producing the gas. *See also Cont'l Res. of Ill., Inc. v. Ill. Methane, LLC*, 847 N.E. 2d 897 (Ill. App. 2006) (noting that Illinois is a nonownership theory state); *In re Johnson*, 513 B.R. 333, 338 (Bankr. S.D. Ill. 2014) (applying Illinois law, the court, held that the assignments to the debtor only gave him contractual rights to payments for oil extracted in the future, and these contractual rights to payments were personal property contract rights).

24. Since one cannot convey any greater interest than that which he possesses, *Chancy v. Chancy Lake Homeowners Ass'n, Inc.*, 55 So. 3d 287, 297 (Ala. Civ. App. 2010), the Trust's interest can never be any greater than WBWB's interest in the leasehold. *See Apache Corp. v. W & T Offshore, Inc.*, 626 F.3d 789, 797 (5th Cir. 2010) (plaintiff's working interest in offshore oil and gas lease only gave whatever rights plaintiff's predecessor had because party

cannot assign what it does not own, or convey any rights greater than that which it held); *see also See, e.g., Grace-Cajun Oil Co. v. F.D.I.C.,* 882 F.2d 1008, 1011 (5th Cir. 1989*)* (concluding relevant agreement was a pledge rather than assignment, the court analyzed the transferor's interests in the subject property under Louisiana's mineral code because the transferor "could transfer no greater right to [the transferee] than it had"). Since WBWB cannot have a real property interest in the gas (as discussed in ¶ 30 below), WBWB could not have transferred a real property interest to the Trust.

25. Additionally, under the terms of the Payment Agreement, the Royalty Interests are specifically tied to Subject Gas. Under Alabama law, the Company Interests (defined as WBWB's leasehold rights in the Gas Leases) are limited to the right to finding and producing the Subject Gas.

26. The Payment Agreement does not transfer any rights that WBWB itself did not have. Since WBWB (and its predecessors) was not conveyed (and could not have been conveyed) a real property ownership interest in the Subject Gas, it could not have granted any real property interest in the Subject Gas. *See Minnifield v. Ashcraft*, 903 So. 2d 818, 827 (Ala. Civ. App. 2004) ("Where no ambiguity exists, a court's only function is to interpret the meaning and intentions of the parties as found within the four corners of the document."). Therefore, the only interest that could have been transferred to the Trust is a personal property contractual right to be paid from the proceeds of the Subject Gas.[10]

[10] Furthermore, even if the Court finds that the Payment Agreement is tantamount to a lease because the Payment Agreement stems from WBWB's leasehold interests under the Gas Leases, the Payment Agreement would then be subject to rejection by WBWB under 11 U.S.C. § 365. *See In re Aurora Oil & Gas Corp.*, 439 B.R. 674 (Bankr. W.D. Mich. 2010 (finding that an oil and gas lease falls within the meaning of "lease" under § 365 and is therefore subject to rejection by a debtor).

b. The Royalty Interest Does Not Constitute an Overriding Royalty Interest and Only Gives the Trust a Contractual Right to Payment.

27. Since Alabama law is undecided on the nature of a royalty interest, the court must look to the terms of the Payment Agreement to determine what was actually given to the Trust. Indeed, "every distinct provision in a Payment Agreement is presumed to have been inserted for a purpose." *Howell Petroleum Corp. v. Holliman*, 504 So. 2d 277, 278 (Ala. 1987). Here, the terms of the Payment Agreement also show that the only right conveyed to the Trust is a right to payment from the proceeds of the sale of Subject Gas, which entitles the Trust to a claim against WBWB's estate and nothing more.

28. Under Alabama law, a royalty conveyed by a land owner to a third party is not definitively an interest in real property, personal property, or something in between. *See Dauphin Island Prop. Owners Ass'n v. Callon Institutional Royalty Investors I*, 519 So. 2d 948 (Ala. 1988). While the court in *Dauphin Island* noted that the overriding royalty at issue had some elements of a real property interest, it did "not find it necessary to hold that royalty interests are real property for all purposes." *Id*. at 951. Instead of being tied to an underlying lease, the royalty interest in *Dauphin Island* was carved out of the landowner's interest. *Id.* at 948–49. In this case, the Royalty Interest stems only from the underlying Gas Leases. Exactly six months after deciding *Dauphin Island*, the Supreme Court of Alabama found in *Pilcher v. Turner*, that a royalty interest conveyed in a deed to the grantee was a contractual right. 530 So. 2d 198, 200 (Ala. 1988).

29. Additionally, although the Payment Agreement calls the Royalty Interest given to the Trust an "overriding royalty," that term is misused. In this case, the Trust's Royalty Interest is not in fact an "overriding royalty." Whether the interest is an overriding royalty depends on the true nature of the particular Payment Agreement which gives rise to the interest. *See Delta*

Drilling Co. v. Simmons, 338 S.W.2d 143 (Tex. 1960). Since merely calling an interest an overriding royalty interest is not conclusive of its true status, *id*. at 147, the Court must consider the provisions relevant to the grant of the interest to determine whether it is an overriding royalty interest. *See Pawnee Const. Co., Inc. v. Pavelec*, 383 So. 2d 835 (Ala. 1980) ("Mineral rights and interests may be transferred by contracts of sale, deeds, leases or licenses, but the intention of the parties is to be sought, and each instrument is to be considered in light of its own provisions.").

30. Based on the terms of the Payment Agreement and the treatment therein of the Royalty Interest, the Royalty Interest is not an overriding royalty interest. Although the Trust argues that it has a real property interest in and to the gas wells, *see* TRO Application, ¶ 2, what the Trust actually received under the Payment Agreement was "an overriding royalty interest . . . equal to and consisting of an undivided sixty-five percent (65%) interest in and to the Subject Gas, including . . . that share of revenue from each Proration Unit . . . set forth in the 'Royalty Interests' columns." *See* Payment Agreement, p.1. Subject Gas, as that term is defined in the Payment Agreement, does not include gas that is under the land and not yet captured and produced. *See id.* at p.6; § 3.04(a). Rather, as set forth above, Subject Gas is defined to include "all Gas in and under, *and* that may be produced from, *and* that shall be attributable to, the Company Interests," as further limited by the exclusions of certain gas described in 3.04(a) of the Payment Agreement. *See id.* at p.6 (emphasis added).

31. Section 3.04(a) of the Payment Agreement excludes certain gas from being included in the definition of "Subject Gas," including: (i) gas attributable to nonconsent operations; (ii) gas unavoidably lost in production; and (iii) certain gas used in conformity with historical practices for compression in connection with gathering from the land to a central

delivery point. The definition of "Subject Gas" does not include gas in and under the Leased Land described in the Gas Leases, but is instead limited by the terms of the Payment Agreement. For the terms of the Payment Agreement to make sense together as a whole document, Subject Gas must refer to gas that has been produced only.

32. Sections 6.05 and 6.06 of the Payment Agreement make it clear that the Trust has no ownership interest, real or personal, in the gas itself. Pursuant to these sections, the Trust has no rights to take any actions with respect to the gas. As provided in Sections 6.05 and 6.06, the Trust has no right to any proceeds until the gas has been produced, and the Trust has no right to participate in any way in the production of the gas. In addition to not being able to determine how the gas is produced, the Trust cannot determine when the gas is produced, whether production may be entirely shut down, or whether any of the underlying Gas Leases giving WBWB the right to explore and produce the gas may be terminated. *See* Payment Agreement, §§ 6.05, 6.06. The Trust's inability to take any actions regarding the gas is inconsistent with its alleged interest in and ownership of the Subject Gas.

33. In *Pilcher*, the grantor of the property reserved the mineral rights of the property to himself, but conveyed to the grantee a right to receive "a sum equal to one-half (1/2) of the net proceeds" in the event minerals are produced from said lands. 530 So. 2d at 199. This right to receive payment set forth in the deed did not include a right to share in the proceeds from the sale of *unproduced* minerals because the grantors reserved the right to transfer their interest in the mineral rights by sale of the mineral estate. *Id*. at 200–01. The Supreme Court of Alabama, in affirming the trial court, held "we deem it unnecessary to denominate the [grantee's] rights under the deed as anything other than the label used by the parties in the deed: 'contract rights.'" *Id*. at 200. The parallels between the royalty interest in *Pilcher* and that of the Trust indicate that the

Royalty Interest, like that in *Pilcher*, is only a contractual right to payment: (i) the subject of both agreements is a right to a portion of the proceeds from the production; (ii) both agreements limit the rights of the royalty owner to the single right to receive payment (i.e. do not provide any other right related to the production of the gas and/or minerals); and (iii) neither agreement provides for a right of the royalty owner to share in the proceeds of the unproduced gas/minerals.[11] These provisions of the Payment Agreement make it clear that the Trust only has a right to payment, and nothing more.

34. Thus, based on the terms of the Payment Agreement, what remains of any *potential* right that is conveyed to the Trust under the Payment Agreement is simply a right to a percentage of the proceeds collected by WBWB on account of the produced Subject Gas - a personal property interest, termed in bankruptcy a prepetition general unsecured claim. *See In re Abercrombie*, 139 F.3d 755, 757 (9th Cir. 1998) (stating that "costs and expenses arising out of prepetition contracts are treated under the Bankruptcy Code as non-prioritized unsecured claims"); *Garfield v. True Oil Co.*, 667 F.2d 943 (10th Cir. 1982) (interest reserving fifty percent of the net profits realized from the production and marketing of oil and gas leases was purely contractual because plaintiffs had no ownership in the leasehold estate); *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 977 (Wyo. 1994) (interest in proceeds or net profits of oil and gas after it has been removed from the ground is a personal property interest).

35. The Trust has no right to take any action with respect to the Subject Gas, which is inconsistent with its alleged ownership interest. In addition to the restriction on the Trust's actions, the Trust has no remedy consistent with an ownership interest. The Trust cannot pursue

[11] Section 9.01 of the Payment Agreement provides that WBWB may "assign, sell, transfer, convey, mortgage or pledge the Company Interests, or any part thereof . . ." and Section 3.04(b) provides that "[a]ny cash consideration or other thing of value received by [WBWB] for any sale of the Company Interests . . . shall not be included in the Gross Proceeds."

real property remedies or personal property remedies with respect to the Subject Gas. All the Trust can do if WBWB does not pay proceeds from the Subject Gas is to sue WBWB and get a money judgment. All the Trust ever is entitled to is money. This is consistent with a right to payment, not with an ownership interest. Accordingly, all the Trust has by virtue of the Payment Agreement is a contractual right to payment, and nothing else.

36. For all these reasons, the Trust cannot show a substantial likelihood of success on the merits because it cannot show that the Royalty Interest is not a part of WBWB's estate, and therefore cannot show that it is entitled to segregation or payment of the Trust June Proceeds.

2. The Royalty Interest Does Not Fall Within Bankruptcy Code Section 541(b)(4)(B).

37. 11 U.S.C. § 541(b)(4)(B) provides an exception for property that might otherwise be property of a debtor's estate from being part of that estate. This exception does not apply to the Royalty Interest because the Royalty Interest does not give the Trust an interest in the Subject Gas and is not limited in time, quantity, or value realized.

38. Specifically, Section 541(b)(4)(B) provides that:

> (b) Property of the estate does not include— . . .
>
> > (4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that— . . .
> >
> > > (B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and
> > >
> > > (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title

A "production payment" is defined as "a term overriding royalty satisfiable in cash or in kind" that is "(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real

property; and (B) from a specified volume, or a specified value, from the liquid from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs." 11 U.S.C. § 101(42A). A "term overriding royalty" is defined as "an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized." *Id.* at § 101(56A).

39. Although there is "little, if any, case law interpreting these provisions," *In re Delta Petroleum Corp.*, No. 11-14006 (KJC), 2015 WL 1577990, at *17 (Bankr. D. Del. Apr. 2, 2015), the statutes are unambiguous in that the safe harbor provision of § 541(b)(4)(B) only applies to production payments fixed by volume, so-called "Volumetric Production Payments," (a "VPP"), or fixed by revenue, so-called "Dollar-Denominated Production Payments" (a "DDPP").

40. The Royalty Interest in this case is neither a VPP or a DDPP, because it is not tied to a specific volume of value. *See* ORRI, p.6; § 3.04. It also is not limited by time, but is instead indefinite in nature. *See id.* at § 10.01. Furthermore, a "term overriding royalty" is defined to mean an interest in the gas. As explained in detail below, the Trust does not have an interest in the Subject Gas. Since the Royalty Interest does not fall within the plain meaning of Section 541(b)(4)(B), the exception does not apply to the Royalty Interest and does not take the Royalty Interest outside WBWB's estate.

C. The Trust Will Not Suffer Irreparable Injury if the Relief It Seeks Is Not Granted.

41. The Trust cannot demonstrate that it will suffer imminent irreparable harm without a TRO. In *Winter*, the Supreme Court made clear that to fulfill the irreparable harm factor, there must be a showing of ***likely*** irreparable harm, not merely the possibility of

irreparable harm. *Winter*, 555 U.S. at 22. An "irreparable" injury is one that cannot be fully rectified or prevented by a money judgment after a trial on the merits—including if it is not accurately measurable or if money will not suffice to cure. *See Roland Mach. Co. v. Dresser Indus.*, 749 F2d 380, 386 (7th Cir. 1984). As a result, money loss, alone, is generally held as insufficient for injunctive relief. *CRP/Extell ParcelI, L.P. v. Cuomo*, 394 F.2d 779, 781 (2d Cir. 2010).

42. Further, to be "likely," an irreparable injury must be actual and imminent—not speculative or possible. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007); *see Winter*, 555 U.S. at 22; *see also Perley for Benefit of Tapscan, Inc. v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994); *Hill v. Rice*, 67 So. 2d 789 (Ala. 1953) (the injury must be of a type where there is no adequate remedy at law). To show that the injury is not speculative, it must be likely to occur before the court rules on the merits. *E.g.*, *Comprehensive Health of Planned Parenthood of Kan. v. Templeton*, 954 F.Supp. 2d 1205, 1217-18 (D. Kan. 2013) (citing cases); *see Winter*, 555 U.S. at 22.

43. The Trust cannot meet this burden because the Trust cannot show that it will in fact suffer any injury, much less imminent and actual injury, if a TRO is not granted. The TRO Application, instead, is full of "if"s and "could"s. In fact, the only imminent and actual harm the Trust even alleges is money loss. *See* TRO Application ¶ 2 (explaining that without the TRO, the Trust will not receive the $938,828 it would have been entitled to if WBWB had not filed bankruptcy). All other harms the Trust identifies are speculative, at best, and not imminent.

44. For example, the Trust speculates that irreparable injury "could" occur if it is not paid the Trust June Proceeds and that it "could be" delisted from the New York Stock Exchange ("NYSE") as a result if the share price falls below $1.00. *See* TRO Application, ¶ 22. However,

the Trust only speculates that this "could" happen and provides no details on the current share price or why and to what extent the share price would fall if it does not receive the Trust June Proceeds. *Id.* ("Dominion's beneficial interest could be delisted by the NYSE to the extent that the price of DOM falls below $1.00 and stays below $1.00 over a consecutive 30 trading-day period."). Indeed, even the Trust's affiant Ron E. Hooper does not mention delisting as a potential harm. *See* Declaration of Ron E. Hooper, *In re Walter Energy, Inc.*, Adv. No. 15-00102-TOM (N.D. Ala. Aug. 11, 2015), ECF No. 3. Therefore, there is no evidence to support this allegation. Speculation as to what "could" happen in the future is far from imminent and actual irreparable injury.

45. Similarly, the Trust also speculates that it may have to terminate if the proceeds are not paid, which "will likely cause irreparable harm" to the beneficiaries of the Trust. *See* TRO Application, ¶ 23. First, this claim is, on its face, pure speculation. Second, even if this speculation came to fruition, such termination would occur long down the road—not before a hearing could occur on the preliminary injunction and certainly not "imminently"—which is the only harm that justifies a TRO. Specifically, the TRO Application states that the Trust will be required to terminate if its cash ratio falls below a certain level for two consecutively quarterly periods. TRO Application ¶ 23. Such a result, therefore, will not happen for at least three more months, until a second quarterly period has passed. A speculative claim that certain events might occur months down the road is neither imminent (particularly in the context of fast-moving bankruptcy proceedings) nor actual irreparable harm justifying a TRO, the purpose of which is purely to preserve the status quo of the subject matter of the litigation and prevent irreparable harm until a hearing can be held on a preliminary injunction. *Sammy's of Mobile, Ltd. v. City of Mobile*, 928 F. Supp. 1116, 1119-20 (S.D. Ala. 1996) ("The purpose of a TRO is to maintain the

status quo between the parties and to prevent irreparable harm pending a trial on the merits of the case"); *Women's Emergency Network v. Bush*, 191 F. Supp. 2d 1356, 1362 (S.D. Fla. 2002) (finding that prospective distribution of funds "at least five months from realization" was "simply not imminent" under the circumstances).

46. Finally, to the extent that the Trust attempts to justify its TRO on irreparable injury resulting from the possibility that the Trust will not be able to receive the full compensation contractually due to it from the bankruptcy estate, *see* TRO Application ¶ 24, such argument wholly fails in the context of a bankruptcy case. As established above, the Trust has a prepetition contractual right to payment of the amounts due under the Payment Agreement. The Trust is now an unsecured creditor for the payments due under the Gas Leases. And while it is true that the Trust may not eventually recover all money due to it under the Gas Lease, a similar result will occur as to all unsecured creditors. That is how the bankruptcy process works—the Bankruptcy Code does not entitle creditors to "adequate compensation." *See Id.*

47. In attempting to satisfy the imminent irreparable harm requirement, the Trust attempts to pile speculative inference-upon-inference. The truth is the Trust cannot show that immediate and irreparable harm likely will occur without the TRO. The Trust thus cannot meet its burden to show imminent and actual irreparable harm.

D. The Harm to WBWB from the Relief the Trust Seeks Outweighs Any Alleged Injury to the Trust.

48. Where a TRO is sought, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation omitted). In other words, the question is whether the injury a party faces outweighs the injury that would be sustained by the defendant as a result of the injunctive relief. *Id.*

49. The Trust gives short shrift to the balance of hardships, stating WBWB has not identified any harm it would suffer if the TRO Application is not granted. *See* TRO Application, ¶ 25. However, if WBWB is required to segregate and/or pay the June Proceeds to the Trust prior to a final determination on the merits, which WBWB is due to win in any event, WBWB would have less cash with which to operate—cash that is diminishing rapidly.

50. Moreover, the first-lien creditors hold a first priority lien on the Debtors' rapidly diminishing cash—including the June Proceeds the Trust seeks here. Thus, the June Proceeds, once deposited into the deposit account, became subject to the first-lien creditors' security interest, and the first-lien creditors reasonably rely upon their security interest. If the TRO Application is granted, the Trust would take priority over secured creditors in violation of secured creditors' rights under applicable law and the Cash Collateral Order. Thus, the first-lien creditors would be substantially harmed if the Trust were permitted to inequitably jump ahead and seize the first-lien creditors' collateral.

51. Additionally, the Debtors sought, and obtained, permission to use the first-lien creditors' cash collateral by agreeing to provide adequate protection liens to the first-lien secured creditors. *See* [Docket No. 42] (Cash Collateral Motion); [Docket No. 59] (Interim Cash Collateral Order). The first-lien secured creditors relied upon these adequate protection liens in consenting to the Debtors' use of the first-lien creditors' cash collateral. Indeed, under the Bankruptcy Code and the Court's Interim Cash Collateral Order, the first-lien creditors were entitled to rely upon their adequate protection liens to include certain collateral. Stripping away the adequate protection liens on the same proceeds would threaten the adequate protection that the first-lien creditors reasonably relied upon here. The potentially far-reaching and harmful consequences of up-ending the adequate protection in connection with the Cash Collateral Order

and the first-lien secured creditors' priority rights to the Debtors' cash significantly outweigh the minimal hardship imposed on the Trust by requiring it to present its arguments respecting liens in approximately two weeks' time.

52. In sum, granting the TRO would alter the status quo, including by inequitably altering the first-lien creditors' rights under the First Lien Debt Documents and under the Court's Interim Cash Collateral Order. Moreover, the Trust has articulated no imminent and irreparable harm that will occur if the TRO is not granted prior to the preliminary injunction hearing. Thus, the Trust cannot meet its burden of showing that the alleged injury to the Trust outweighs the potential harm to WBWB from a TRO.

E. <u>The Relief the Trust Seeks Will Not Serve the Public Interest.</u>

53. Requiring WBWB to segregate and/or pay out the Trust June Proceeds through a TRO will not serve the public interest. The relief requested by the Trust will significantly harm all creditors of the Debtors, especially secured creditors, and waste judicial and administrative resources.

54. It is well settled that before a preliminary injunction may issue, the moving party must show that "an injunction would not disserve the public interest." *Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1207 (N.D. Ala. 2009) (*quoting N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008)); *Yakus v. United States*, 321 U.S. 414, 440 (1944) ("[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief . . . .").

55. In this situation, the "public interest" includes the creditors, and all other stakeholders, of WBWB and all Debtors whose receipts were either deposited into the account to which the June Proceeds were deposited or whose receipts were subsequently swept into the

Master Concentration Account. Permitting the Trust to have priority over these creditors who may have an interest in the funds in those accounts does not serve the creditors' interests.

56. In addition, the first-lien creditors have a first-priority lien on all cash that is deposited into the deposit accounts. The Steering Committee does not believe it would be equitable or consistent with applicable law or the Cash Collateral Order to grant the TRO. If the TRO Application is granted, the Trust, an unsecured creditor, would take priority over secured creditors. The public interest is not served by allowing an unsecured creditor to jump ahead of first-lien creditors, a result contrary to applicable law and the Bankruptcy Code's priority scheme.

57. Finally, as previously established, the Trust will not succeed on the merits. Issuing a TRO when the Trust cannot prove its claims is an unnecessary use of judicial resources and the Debtors' administrative resources (including an efficient use of professionals). The relief that the Trust seeks will not serve the public interest.

F. If the Trust Prevails, Which It Should Not, The Trust Must Post A Substantial Bond Before A TRO May Be Granted

58. In the midst of a complex bankruptcy proceeding, with numerous stakeholders, the Trust seeks to alter, on an emergency basis and prior to the preliminary injunction hearing, the existing Cash Collateral Order, Cash Management Order, the Debtors' available liquidity, and the secured creditors' collateral. This will have ripple effects throughout the Debtors' estates and will reduce the assets available for the Debtor to operate and to provide as adequate protection for the use of the secured creditors' cash collateral. Under Federal Rule of Civil Procedure 65(c), the court must require the Trust to give "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c). The Trust, however, offers only

$500 bond as security for their requested relief to segregate and distribute $983,828 and to forbid liens on Production Proceeds. *See* TRO Application ¶¶ 1, 27.

59. The Trust attempts to justify the *de minimis* bond amount by arguing that it does not have surplus funds and by assuming the Trust will prevail on the merits of their claim in any event. *See id.* ¶ 27. But it is clear that the bond requirement cannot be set at a nominal amount simply to accommodate the Trust's purported ability to pay. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 297 F.R.D. 633, 636 (N.D. Ala. 2014) ("There is not a hint of a suggestion in the language of Rule 65(c) that a bond can be set at a nominal amount or that the bond can be waived entirely in cases like this one where the damages that may be sustained would be enormous, and/or where the plaintiffs are financially incapable of posting a fair and realistic bond, as in this case."). And, as set forth, *supra*, the Trust's assumption that "the Production Proceeds . . . will, eventually, have to be paid to Dominion" (*see* TRO Application ¶ 27) is misplaced.

60. Therefore, if the Trust prevails and obtains a TRO, it should be required to place a bond of at least $1,229,785 (125% of the June Proceeds requested by Dominion). This amount is exceedingly reasonable. The Trust alleges that it does not have sufficient funds to operate for a prolonged period of time, and has "virtually no assets outside of the [Payment Agreement]." TRO App. ¶ 23. Thus, if the Trust ultimately loses on its claim (which it should), the first-lien creditors must have a bond sufficient to replenish the collateral they lost for a period of time to the Trust and other collateral damages.

V. CONCLUSION

61. All that the Trust holds under the Payment Agreement is a contractual right to payment from the proceeds of the produced Subject Gas. The Trust cannot have any other right or greater interest. WBWB has no real property interest in or to the gas, and therefore no real

property interest could have been transferred to the Trust. Additionally, the terms of the Payment Agreement show that the Trust was not granted any interest in the Subject Gas itself, as shown by the restriction against the Trust receiving the Subject Gas or taking any action with respect to the Subject Gas. The Royalty Interest is also not exempted from being property of WBWB's estate by virtue of § 541(b)(4)(B) because it does not fall within the language of that section.

62. The Trust will not succeed on the merits. The Trust cannot show that it will suffer imminent and actual irreparable harm if the TRO Application is not granted. The Trust cannot show that the speculative harm that could happen to the Trust outweighs the harm to WBWB if the TRO Application is granted. The Trust cannot show that the requested relief serves the public interest. Since the Trust cannot meet its burden in showing these elements, the TRO Application should be denied.

Dated this the 17th day of August, 2015.

Respectfully submitted,

/s/ Michael Leo Hall

Michael Leo Hall
D. Christopher Carson
Hanna Lahr

BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, AL 35203
Phone: (205) 251-3000
Fax: (205) 458-5100
Email: mhall@burr.com
ccarson@burr.com
hlahr@burr.com

and

AKIN GUMP STRAUSS HAUER & FELD LLP
Ira S. Dizengoff, Esq. (*pro hac vice*)
Marty L. Brimmage, Jr., Esq. (*pro hac vice*)
Kristine G. Manoukian, Esq. (*pro hac vice*)
One Bryant Park
Bank of America Tower
New York, NY 10036-6745
Phone: (212) 872-1000
Fax: (212) 872-1002
Email: idizengoff@akingump.com
lbeckerman@akingump.com
mbrimmage@akingump.com
kmanoukian@akingump.com

AKIN GUMP STRAUSS HAUER & FELD LLP
James Savin, Esq. (*pro hac vice*)
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
Phone: (202) 887-4000
Fax: (202) 887-4288
Email: jsavin@akingump.com

Attorneys for the Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document via ECF, which provides notice to all interested parties who have made an ECF appearance in this case, on this the 17th day of August, 2015.

/s/ Michael Leo Hall
OF COUNSEL