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

In re:	)	
	)	Chapter 11
	)	
WALTER ENERGY, INC.[1]	)	Case No. 15-02741 (TOM11)
	)	
Debtors.	)	(Jointly Administered)
	)	

OBJECTION OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST, THE UNITED MINE WORKERS OF AMERICA 2012 RETIREE BONUS ACCOUNT PLAN, THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN AND THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN TO (1) THE DEBTORS' MOTION FOR ORDER (A) AUTHORIZING THE DEBTORS TO ASSUME A RESTRUCTURING SUPPORT AGREEMENT AND (B) GRANTING RELATED RELIEF AND (2) THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS UNDER 11 U.S.C. §§ 105, 361, 362, 363, 507 AND 552, BANKRUPTCY RULES 2002, 4001, 6003, 6004 AND 9014 (A) (I) AUTHORIZING POSTPETITION USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, AND (III) SCHEDULING A FINAL HEARING; AND (B) GRANTING RELATED RELIEF

The United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan"), the United Mine Workers of America 2012 Retiree Bonus Account Plan (the "Account Plan"), the United Mine Workers of America Combined Benefit Fund (the "Combined Fund"), and the United Mine Workers of America 1992 Benefit Plan (the "1992 Plan," and together with the Combined Fund, the "Coal Act Funds" and the Coal Act Funds, together with the 1974 Pension Plan and the Account Plan, "UMWA Funds"), by and through their undersigned

[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). The location of the Debtors' corporate headquarters is 3000 Riverchase Galleria, Suite 1700, Birmingham, Alabama 35244-2359.

attorneys, hereby object to (1) the Debtors' Motion for an Order (A) Authorizing the Debtors to Assume a Restructuring Support Agreement (the "RSA Motion") and (B) Granting Related Relief; and (2) The Debtors' Motion for Entry of Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363, 507 and 552, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (A) (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Scheduling a Final Hearing; and (B) Granting Related Relief (the "Cash Collateral Motion"). In support of this Objection, the UMWA Funds respectfully state as follows:

PRELIMINARY STATEMENT

1. In the earliest days of these chapter 11 cases, the proposed Restructuring Support Agreement (the "RSA"), in combination with the Cash Collateral Motion, would toss the keys to one creditor class – the Debtors' first-lien creditor constituents that are parties to the RSA (the "First Lien Creditors"). Although the Debtors say they are pursuing a dual-track process, they are bound (with very limited discretion or flexibility) to adhere to the path dictated by their First Lien Creditors, who will have, among other things, a virtual veto power over matters related to the Debtors' collective bargaining negotiations. Should a "Triggering Event" occur, the Debtors, the Court, and all other parties in interest would be constrained by a predetermined timeline and process that sets the Debtors on an expedited sale process with the First Lien Creditors as stalking horse bidder with various privileges and protections.

2. Particularly problematic is the linkage of the RSA to the Debtors' ability to access cash collateral, essentially precluding their ability to pursue a restructuring or sale other than the course preferred by the First Lien Creditors as detailed in the RSA and related filings. Because the Debtors' ability to use their cash to fund these cases is impermissibly tied to the approval of

the RSA Motion and conditioned upon the Debtors' satisfaction of the milestones thereunder, once these motions are approved on a final basis, there will be very little room for the Debtors to go down any other road other than that mandated by the First Lien Creditors.

3. The infirmities of the RSA and Cash Collateral Motions are well articulated in the objections filed by the Official Committee of Unsecured Creditors (the "Committee"), of which the 1974 Pension Plan is a member, and the United Mine Workers of America ("UMWA"). The UMWA Funds join in those objections and write separately for the limited purposes of providing background as to their role in these cases and emphasizing certain issues with the RSA that are particularly problematic from the perspective of the UMWA Funds.

BACKGROUND

A. The Debtors' Cases

4. On July 15, 2015 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under the Bankruptcy Code.

5. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

6. On the Petition Date, the Debtors filed the RSA Motion and the Cash Collateral Motion. On the same date, this Court entered an interim order approving the use of cash collateral on the terms set forth therein (the "Interim Cash Collateral Order").

7. On August 12, 2015, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee"). The 1974 Pension Plan is a member of the Committee.

B. *The Funds*

8. The Coal Act Funds. Since 1950, signatory coal operators have been required under the terms of collectively bargained National Bituminous Coal Wage Agreements (each, an "NBCWA") between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association, to contribute to multiemployer trust funds that provide health benefits for mine workers and their eligible dependents. *See, e.g.*, *LTV Steel Company, Inc. v. Shalala* (*In re Chateaugay Corp*.), 53 F.3d 478, 481 (2d Cir. 1995), *cert. denied* 516 U.S. 913 (1995) (discussing history). In 1974, the UMWA and the BCOA negotiated a new collective bargaining agreement that, for the first time, guaranteed lifetime health benefits to retirees and their eligible surviving spouses. *Id*. at 482. To implement the nonpension requirements under the 1974 NBCWA, two trusts were created: the UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Plan") and the UMWA 1974 Benefit Plan and Trust (the "1974 Benefit Plan"). *Id*. Pursuant to the 1974 NBCWA, coal providers committed to fund the 1950 and 1974 Benefit Plans through premiums based on the numbers of hours worked by miners. *Id.* at 482. In 1978, the UMWA and the BCOA entered into a new NBCWA which obligated signatory coal operators to provide benefits for their active and retired employees through individual employer plans. *Id*. As a result, beneficiaries of the 1950 and 1974 Benefit Plans were limited to "orphaned retirees" whose employers had withdrawn from the NBCWAs or had left the coal mining industry and gone out of business. *Id*. at 482-83.

9. During the 1980s, a number of coal operators had gone out of business or left the industry. *Id*. at 484. The 1950 Benefit Plan and the 1974 Benefit Plan were forced to cover a growing number of retirees who had been abandoned by signatory operators seeking to shed their

health benefit obligations. *Id*. at 483-84. By the late 1980s, both the 1950 Benefit Plan and the 1974 Benefit Plan were in deep financial crisis, with each facing insolvency. *Id.*

10. The Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56, *codified at* 26 U.S.C. §§ 9701-9722 (the "Coal Act"), was enacted to ensure that certain retired coal miners and their eligible dependents would receive the retiree health benefits promised them in NBCWAs. *Id.* at 485. As part of the Coal Act, Congress created two new trust funds – the Combined Fund and the 1992 Plan – for the provision of health care benefits to retired miners and their survivors and dependents. Among other things, the Coal Act requires the Debtors to pay certain premiums to the Combined Fund and the 1992 Plan. These premiums are statutory, are non-negotiable, and are in the nature of taxes. *See, e.g.*, *United Mine Workers of America 1992 Benefit Plan v. Rushton* (*In re Sunnyside Coal Company*), 146 F.3d 1273, 1280 (10th Cir. 1998); *Adventure Res. v. Holland*, 137 F.3d 786, 795 (4th Cir. 1998); *In re Chateaugay Corp*., 53 F.3d at 498.

11. In the Coal Act, Congress required employers that were, as of February 1, 1993, maintaining individual employer plans covering their eligible retirees, survivors and dependents, to continue to provide health benefits coverage to those beneficiaries so long as the employer remains in business. 26 U.S.C. § 9711. Section 9711 of the Coal Act provides, in pertinent part:

> The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

26 U.S.C. § 9711(a). Thus, individual employer plans, funded directly by coal operators, are the

primary source of retiree health care for retirees covered by the Coal Act. Under section 9711(c) of the Coal Act, each related person to a last signatory operator is jointly and severally obligated to provide the health care coverage to eligible beneficiaries.

12. *The Combined Fund.* The Combined Fund was created by the merger of two former funds, the 1950 Benefit Trust and the 1974 Benefit Trust, *see* 26 U.S.C. § 9702(a)(2), and provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the 1950 Benefit Trust or the 1974 Benefit Trust. *See* 26 U.S.C. §§ 9703(a), (b), (e), (f). The Combined Fund is financed in part by an annual premium, assessed each October against "assigned operators." 26 U.S.C. § 9704. This premium is calculated based on the number of eligible beneficiaries assigned to a specific operator by the Commissioner of Social Security. 26 U.S.C. §§ 9704, 9706. The assigned operator and any related person are jointly and severally liable for the annual premium. 26 U.S.C. § 9704. Presently, the Debtors are obligated to the Combined Fund with respect to approximately 33 eligible beneficiaries, with an annual premium of approximately $172,000. The Debtors' premium obligations to the Combined Fund accrue in October of each year and are payable on a monthly basis.

13. *The 1992 Plan.* The Coal Act also created the 1992 Plan, which provides benefits to two separate categories of persons. First, under section 9712(b)(2)(A), benefits are provided to beneficiaries who, based on their age and service earned as of February 1, 1993, could have retired and received benefits from the 1950 Benefit Trust or the 1974 Benefit Trust had those trusts remained in existence, and who actually retired between July 20, 1992 and October 1, 1994. *See* 26 U.S.C. § 9712(b)(2)(A). Second, the 1992 Plan also provides benefits to coal miners who retired before October 1, 1994 and who should be covered by individual employer

plans under the Coal Act, *see* 26 U.S.C. § 9711(b), but whose employers and their related persons have failed to provide such coverage. *See* 26 U.S.C. § 9712(b)(2)(B). As described above, pursuant to the Coal Act, the Debtors have certain statutory, non-negotiable obligations to provide retiree health benefits to approximately 572 retired coal miners and their dependents through an individual employer plan, or IEP. 26 U.S.C. § 9711(a).

14. If the Debtors and their related persons cease providing the statutorily-mandated benefits through their IEP, then those Coal Act-eligible miners and their dependents would be eligible to receive benefits from the 1992 Plan, which will be obligated to provide and pay for these benefits. In this way, the 1992 Plan acts as a "backstop" plan – if an employer fails to provide an individual employer plan pursuant to section 9711 of the Coal Act, the retired coal miners will receive benefits through the 1992 Plan. These benefits are paid in part by monthly per beneficiary premiums from each operator. *See* 26 U.S.C. § 9712(d)(1)(A). In addition, signatory operators must also provide security (in the form of a bond, letter of credit, or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to such operator. *See* 26 U.S.C. § 9712(d)(1)(B).

15. The 1974 Pension Plan. The 1974 Pension Plan is an irrevocable trust established in accordance with section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). The 1974 Pension Plan is also a multiemployer, defined benefit pension plan under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (as amended, "ERISA"). *See* Section 3(37)(A) of ERISA, 29 U.S.C. § 1002(37)(A). The 1974 Pension Plan provides pension and death benefits to approximately 90,000 eligible beneficiaries who are

retired or disabled miners and their eligible surviving spouses.[2] The contribution obligations of contributing employers to the 1974 Pension Plan, benefit levels provided to the 1974 Pension Plan's beneficiaries and participants, and other substantive terms of the 1974 Pension Plan are established from time to time in NBCWAs.

16. Certain Debtors are "participating employers" in the 1974 Pension Plan pursuant to their collective bargaining agreements and are obligated with respect to: (a) monthly pension contributions that must be made for as long as the employer has operations covered by the 1974 Pension Plan and (b) "withdrawal liability" accruing upon a partial or complete withdrawal by the employer from participation in the 1974 Pension Plan. The Debtors that are "participating employers" in the 1974 Pension Plan made contributions to the 1974 Pension Plan over the last three plan years in approximately the following amounts: $21.1 million in 2012, $20.3 million in 2013, and $18.9 million in 2014. In 2014, the Debtors' contributions represented approximately 18% of the total contributions received by the 1974 Pension Plan from all contributing employers.

17. Withdrawal liability is imposed by federal statute and is based upon the portion of the 1974 Pension Plan's unfunded vested benefits attributable to the employer. *See* Section 4211 of ERISA, 29 U.S.C. §§ 1391. Under section 4201 of ERISA, 29 U.S.C. § 1381, upon its withdrawal from a multiemployer pension plan, a previously contributing employer is immediately liable for its proportionate share of the 1974 Pension Plan's unfunded vested pension liabilities.

18. In addition, each of the remaining Debtors is an "employer" within the meaning of section 3(5) of ERISA, 29 U.S.C. § 1002(5). Under section 4001(b)(1) of ERISA, 29 U.S.C. §

[2] These participants and beneficiaries include individuals eligible under the 1974 Pension Plan and the UMWA 1950 Pension Plan, which merged into the 1974 Pension Plan effective June 30, 2007.

1301(b)(1), the participating Debtors, and all trades or businesses under common control with them, constitute a single employer participating in the 1974 Pension Plan. Each Debtor, therefore, is jointly and severally liable for any withdrawal liability incurred by any employer in its controlled group. As of July 29, 2015, the Debtors' potential withdrawal liability obligation totals approximately $904 million.

19. The Account Plan. The Account Plan is a benefit plan established by the NBCWA of 2011 to make annual one-time single sum payments to eligible beneficiaries on November 1, 2014, November 1, 2015 and November 1, 2016. Similar payments were previously made from the 1974 Pension Plan to eligible beneficiaries, until, in connection with the 2011 NBCWA negotiations, the UMWA and the BCOA determined that the financial condition of the 1974 Pension Plan required elimination of the annual single sum payments from the 1974 Pension Plan, and the establishment of the Account Plan, which signatory employers fund separately. Under the terms of the Account Plan, single sum payments to eligible beneficiaries are projected to be $455 or $580, depending upon the type of pension the individual receives under the 1974 Pension Plan. If the Account Plan's assets are insufficient to make payments in these projected amounts, the Account Plan makes payments to eligible beneficiaries in a base amount that is calculated based on the financial condition of the Plan. Signatory employers are obligated to make up the difference between this base amount and the projected amount in "differential payments" to their own eligible pensioners whose last signatory employment was with the employer or related entities in the same controlled group of companies that includes the signatory employer. Beneficiaries of the Account Plan whose last signatory employer is no longer operating, however, only receive the base amount.

20. On or about November 1, 2014, the Account Plan made individual payments to approximately 78,000 eligible beneficiaries, ranging from $397 to $506, depending upon the beneficiary's pension type. Single sum payments in the amounts of $385 and $490 are estimated for 2015. The Debtors that are signatory employers made contributions to the Account Plan over the last three plan years in approximately the following amounts: $5.2 million in 2012, $5.6 million in 2013, and $5.1 million in 2014. Because the 2014 base amounts were less than the projected amounts of $455 and $580, the Debtors that are signatory employers paid $147,416 in differential payments to their eligible beneficiaries in 2014.

OBJECTION

21. The UMWA Funds object to the RSA Motion to the extent the RSA violates – or attempts an end-run around – sections 1113 and 1114 of the Bankruptcy Code.[3] Section 1113 controls the rejection of collective bargaining agreements in bankruptcy proceedings. *New York Typographical Union No. 6 v. Maxwell Newspapers, Inc.* (*In re Maxwell Newspapers, Inc.),* 981 F.2d 85, 89 (2d Cir. 1992) (quoting *In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2d Cir. 1986), *cert. denied,* 479 U.S. 949 (1986)). Cases determining requests for relief under sections 1113 and 1114 typically apply a nine-point test to motions to reject a debtor's collectively-bargained obligations.[4] *See, e.g., In re Bruno's Supermarkets, LLC,* 2009 Bankr. LEXIS 1366

[3] The Plan contemplated by the RSA also has numerous problems, including the treatment of obligations of the Debtors to the UMWA Funds, which are more appropriately the subject of a confirmation objection and as to which all rights are reserved.

[4] The nine factors are: (i) the debtor in possession must make a proposal to the union to modify the collective bargaining agreement; (ii) the proposal must be based on the most complete and reliable information available at the time of the proposal; (iii) the proposed modifications must be necessary to permit the reorganization of the debtor; (iv) the proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably; (v) the debtor must provide to the Union such relevant information as is necessary to evaluate the proposal; (vi) between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union; (vii) at the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement; (viii) the union must have refused to accept the proposal without good cause;

(Bankr. N.D. Ala. April 27, 2009) (finding that union had good cause to reject proposal, and denying section 1113 relief, where union would not agree to modify successorship clause to remove assumption requirement, but had agreed instead to require buyer to negotiate a new agreement with the union); *see also In re Alabama Symphony Ass'n*, 155 B.R. 556 (Bankr. N.D. Ala. 1993) (rev'd on other grounds). Among other requirements, the Debtors must "assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably," and "confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement." *In re Bruno's Supermarkets, LLC*, 2009 Bankr. LEXIS 1366, *9-12 (Bankr. N.D. Ala. April 27, 2009); *see also In re Agripac, Inc.*, Bankr. Case No. 699-60001-fra11 (Bankr. D. Or. Apr. 2, 1999), at 13 ("Bankruptcy Code [section] 1113 requires that the [d]ebtor-in-[p]ossession bargain in good faith with the [u]nion prior to rejecting the [c]ollective [b]argaining [a]greement").

22. The UMWA Coal Act Funds object to the RSA Motion to the extent the Debtors attempt to use section 1114 of the Bankruptcy Code to modify their obligations under federal law to provide health benefits to certain retirees and their dependents, and to modify their obligation to make ongoing payments to the Coal Act Funds. The Coal Act is unique and its statutory obligations to provide retiree health benefits to eligible beneficiaries and to make payments cannot be altered through negotiation, and cannot be modified under section 1114, which applies to negotiable and contractual retiree benefits. The ongoing payments to the Coal Act Funds are in the nature of non-negotiable taxes, and the obligations to make those payments arise and are incurred periodically. *See In re Sunnyside Coal Co.*, 146 F.3d at 1280; *Buckner v. Westmoreland Coal Co.* (*In re Westmoreland Coal Co.*), 213 B.R. 1, 18-19 (Bankr. D. Colo. 1997).

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and (ix) the balance of the equities must clearly favor rejection of the collective bargaining agreement. *See In re Bruno's Supermarkets, LLC*, 2009 Bankr. LEXIS 1366, *11-12 (Bankr. N.D. Ala. April 27, 2009).

23. The UMWA Funds also object to the linking of the Debtors' continued use of cash collateral to the approval of the RSA and the satisfaction of the terms thereof.

24. Finally, the UMWA Funds object to the substantive terms of the Restructuring Term Sheet, attached to the RSA as Exhibit B, to the extent they dictate treatment of the UMWA Funds' claims that are either inconsistent with, or have not been determined by, the courts of the Eleventh Circuit. Specifically, neither the courts of the Northern District of Alabama nor the Eleventh Circuit has ruled upon (i) the nature, extent, and priority of the Debtors' pre-petition Coal Act obligations, or (ii) whether, and to what extent, the 1974 Pension Plan is entitled to administrative expense treatment of all or any portion of the withdrawal liability obligation that the Debtors would incur upon a withdrawal from the 1974 Pension Fund.

A. *The Plan Process Under the RSA May Preclude the Debtors' Ability to Conduct Good Faith Negotiations*

25. The RSA contains numerous milestones (each, a "Triggering Event") – including those relating to the Debtors' collectively-bargained and retiree obligations – all of which must be satisfied in order to continue pursuing a potential plan.[5] Thus, the mandated timeline for a settlement (or a rejection) may render good faith negotiations impracticable. Among other things:

- the Debtors' deadline to make a proposal to the UMWA expires on August 26, 2015;
- the Debtors also must file a Plan and Disclosure Statement by August 26, 2015;

[5] The Debtors have just one day to respond in the event they are notified of a Triggering Event, and the Debtors and First Lien Creditors have directed that this Court must determine any unresolved disputed Triggering Event within five days, with no flexibility for responses by other parties in interest or the availability or convenience of the Court. *RSA Motion*, at 11; *RSA*, at 13.

● the Debtors' deadline to a make proposal to the USW expires on September 4, 2015;[6]

● by October 21, 2015, the Debtors must either reach settlements with both unions and the Retiree Committee, or file a motion or motions under section 1113 and/or section 1114 with respect to those obligations;

● by October 21, 2015, the Debtors must reach an agreement with the PBGC or move to terminate the Company's excess and supplemental non-qualified pension plans;

● the Bankruptcy Court must enter an order approving the Disclosure Statement by October 28, 2015;

● by November 4, 2015, the Debtors must commence the solicitation on their proposed plan;

● by November 11, 2015, the Bankruptcy Court must commence a hearing on the section 1113/1114 motion(s), if necessary, or approved a settlement with the UMWA and/or the USW and the Retiree Committee; and

● by December 9, 2015, the Court must have granted the relief requested in the section 1113/1114 motion(s), or approved a settlement or settlements with the UMWA and/or the USW and the Retiree Committee.

Motion, at 8-10; *RSA*, at 10-12.[7] In addition, any strike, work slowdown or other concerted labor movement that lasts for more than three days and reduces production by over 100,000 tons, as measured against the Debtors' mining plan is also a Triggering Event. *RSA Motion*, at 10; *RSA*, at 10.

26. Although the timeline for negotiating with the UMWA may not appear truncated at first glance, those negotiations are tucked into a compressed timeline, pursuant to which the Debtors will be simultaneously conducting a plan process, preparing a sale motion, and pursuing negotiations with the UMWA, the USW, the PBGC and the Retiree Committee, and/or relief under sections 1113 and 1114. Thus, the UMWA Funds object to the RSA Motion to the extent

[6] The Debtors' deadlines for commencing the negotiation process with the UMWA and the USW were amended as a result of the adjourned hearing on the RSA Motion.

[7] As discussed below, the RSA Motion also sets forth numerous Support Termination Events, the occurrence of any of which will cause the RSA to immediately terminate. *RSA Motion*, at 11-15; *RSA*, at 13-16.

the Debtors' condensed timeline impairs the ability of the Debtors to meaningfully engage in good faith negotiations with the UMWA.

27. In addition, the Debtors have effectively signed over control of the restructuring process to the certain of the First Lien Creditors (the "Majority Holders"), who must agree in form and substance to any proposed settlement with the UMWA or any proposed Motion to the Bankruptcy Court. *RSA Motion*, at 9; *RSA*, at 11. The virtual veto right also militates against a finding of good faith under Section 1113, as the Debtors are simply a straw man for the First Lien Creditors, who – as evidenced by the Sale Term Sheet (and further discussed below) – have displayed no apparent intention of continuing to contribute to the UMWA Funds, but who will seek to shed the Debtors' pension and retiree benefit obligations.[8] *Sale Term Sheet*, *Exhibit C to RSA*, at 4-6; *Restructuring Term Sheet*, *Exhibit B to RSA*, at 9 (classifying any withdrawal liability claim of the 1974 Pension Plan as a general unsecured claim).

B. *The Sale Process Provides for a Result That Will Be Detrimental to the UMWA Funds*

28. The UMWA Funds also object to the extent the RSA precludes the ability of the Debtors to seek restructuring alternatives. Upon the occurrence of a Triggering Event, the Debtors' restructuring process will automatically convert to a sale process, with no ability to consider other restructuring options. *RSA Motion*, at 8; *RSA*, at 10. Pursuant to the proposed sale process, the First Lien Creditors will act as stalking horse and will seek to purchase the Debtors' assets free and clear of any pension or retiree obligations through a credit bid, leaving no value for other creditors. Thus, the RSA benefits only the First Lien Creditors and is inconsistent with the Debtors' obligation to maximize values for all of its creditors.

[8] The Sale Term Sheet indicates an intention to assume certain tax liabilities of the Debtors. *Sale Term Sheet*, at 4. As noted above, the Coal Act imposes a *mandatory* and *non-negotiable* statutory obligation on current and former signatory coal operators to provide certain retiree health benefits and to pay contributions to the Coal Act Funds. These obligations, which are in the nature of taxes, cannot be modified through section 1114. *See*, *e.g.*, *In re Sunnyside Coal Co.*, 146 F.3d at 1280; *Adventure Res., Inc. v. Holland*, 137 F.3d at 795.

29. In addition, the RSA and related sale terms in the event of a Triggering Event would expressly exclude the Debtors' obligations to the UMWA Funds by providing, among other things, that the following obligations would be excluded (the "Excluded Obligations"):

- any liability or other obligations arising under, related to or with respect to any employee benefit plan, policy, program, agreement or arrangement;
- any liability or other obligations arising under, relating to or with respect to any multi-employer pension plan; or
- any liability under any employment, collective bargaining agreement or arrangement, severance, retention or termination agreement or arrangement with any employee, consultant or contractor (or its representatives) of the Debtors.

Sale Term Sheet, at 5-6, 12.

30. This proposed sale process, to the extent the Debtors seek to sell their assets free and clear of the Excluded Obligations without complying with sections 1113 and 1114 of the Bankruptcy Code, is contrary to law, as the enabling clause of the 2011 NBCWA contains a successorship clause obligating any purchaser of a signatory operator's assets to assume its obligations thereunder. Specifically:

> This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

2011 NBCWA, *Art. 1*, at 1-2.

31. Subsection (f) of section 1113 expressly forbids any construction of the Bankruptcy Code that would be construed to permit a debtor to "unilaterally terminate or alter

any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." *See, e.g., Birmingham Musician's Protective Ass'n, Local 256-733 v. Alabama Symphony Ass'n* (*In re Alabama Symphony Ass'n*), 211 B.R. 65 (N.D. Ala. 1996) (finding that employer's unilateral modification of collective bargaining agreement without prior court relief precluded its ability to seek rejection under section 1113); *see also In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989-90 (2d Cir. 1990) ("The language of [subsection (f)] indicates that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of § 1113 are prohibited."); *In re Continental Airlines*, 125 F.3d 120, 137 (3d Cir. 1997) (noting that "the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113.").

32. At least two circuit courts have held that a debtor may sell the assets of the business unencumbered by a collective bargaining agreement only if that agreement has been rejected pursuant to section 1113. *See, e.g., American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81-82 (3d Cir. 1999); *In re Maxwell Newspapers, Inc.*, 981 F.2d at 89.

33. Similarly, courts examining asset sales have held that a debtor may not sell free and clear of a successorship clause without seeking relief under section 1113. In *In re Stein Henry Co., Inc.*, Bankr. No. 91-15491S, 1992 WL 122902 (Bankr. E.D. Pa. June 1, 1992), for example, the Bankruptcy Court denied confirmation of a plan that sought to reject all executory contracts, including the debtor's collective bargaining arrangements, which contained a

successorship clause. The Bankruptcy Court determined that, absent relief under section 1113, a debtor could not sell its assets through a plan. *See* 1992 WL 122902, *2 ("Rights provided in the agreement as to successor-entities must be pre-served unless there is, unlike here, compliance with the procedures of 11 U.S.C. § 1113."). Similarly, in *In re Agripac, Inc.*, Bankr. Case No. 699-60001-fra11 (Bankr. D. Ore. Apr. 2, 1999), at 13, the Bankruptcy Court determined that an effort to sell free and clear "without compliance with the Collective Bargaining Agreement, amounts to a rejection for purposes § 1113." The Court further noted that "[f]ailure to include in the Sale Agreement a successor clause as required by the CBA is a breach of the Collective Bargaining Agreement which may result in a substantial claim against the estate." *Id.*, at 12. Finally, in *In re Journal Register Co.*, 488 B.R. 835 (Bankr. S.D.N.Y. 2013), the Bankruptcy Court ruled that a debtor's refusal to perform its collective bargaining agreement did not amount to a de facto rejection that satisfied Bankruptcy Code section 1113. *See In re Journal Register Co.*, 488 B.R. at 840 (approving sale notwithstanding failure to comply with section 1113 where collective bargaining agreements expired by their terms, but noting that absent that unique circumstances, "as a general proposition, a sale under Bankruptcy Code § 363 cannot circumvent the condition imposed under a successor clause absent compliance with § 1113.")

34. Accordingly, any effort by the Debtors to sell their assets requires compliance with section 1113 and section 1114 of the Bankruptcy Code, and the UMWA Funds object to any attempt by the Debtors, particularly this early in the cases, to circumvent (or to hardwire in a mandated circumvention of) those requirements.[9]

[9] The UMWA Funds are aware of the holding in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), in which the Fourth Circuit held that debtors could sell their assets free and clear of retiree obligations without first satisfying the requirements of section 1114 of the Bankruptcy Code. The UMWA Funds respectfully submit that, with respect to sales free and clear, *Leckie* is contrary to the holdings of several other courts, wrongfully decided, and, in any event, is not binding on this Court.

C. The Debtors' Use of Cash Collateral Should Not Be Linked to the RSA

35. The UMWA Funds object to the conditioning of the Debtors' continued use of cash collateral on the approval of, and continuing compliance with, the RSA. In addition to the Triggering Events set forth above, the RSA contains a number of onerous "Support Termination Events," the breach of which permits the Majority Holders to immediately terminate the RSA. In turn, the Interim Cash Collateral Order provides that the consensual use of cash collateral terminates upon, among other things, the termination of, or the failure of this Court to approve, the RSA. *Interim Cash Collateral Order*, at ¶ 12(h)(ii), (m). Accordingly, the consensual use of cash collateral terminates with the RSA. The Support Termination Events include, without limitation:

- a breach by the Debtors of any of the undertakings, representations, warranties or covenants set forth in the RSA;
- an exercise by the Debtors of the "fiduciary out" described in the RSA (undermining any suggestion that the Debtors have a meaningful right to exercise their duties for the benefit of all creditors);
- the failure by the Debtors to file a sale motion by September 9, 2015;
- the entry by this Court of a bidding procedures order by September 30, 2015;
- the entry by the Bankruptcy Court by February 3, 2016 of either a confirmation order approving the restructuring contemplated under the RSA, or a sale order providing, among other things, that the successor clause set forth in the NBCWA is not binding on the purchaser (or the Court otherwise grants relief pursuant to section 1113 of the Bankruptcy Code providing for such relief), in either case in form and substance satisfactory to the Majority Holders;

● the substantial consummation of the proposed plan or the consummation of the proposed sale by February 3, 2016;

● the failure of the Debtors to obtain a final cash collateral order (the "Final Cash Collateral Order", within 45 calendar days of the Petition Date, in form and substance satisfactory to the Majority Holders; and

● the failure of the Debtors to obtain enter an order approving the RSA Motion within 60 days after the Petition Date.

RSA Motion at 11-15; *RSA* at 13-17.[10]

36. While the RSA Motion acknowledges that the continued use of cash collateral "lies at the core" of the Debtors' proposed restructuring, *RSA Motion*, at 4, the Debtors' use of cash collateral is entirely dependent upon this Court's approval of the RSA, and the Debtors' compliance with the terms thereof. The immediate termination of use of cash collateral due to the occurrence of a Support Termination Event places too much control in the hands of the Debtors' First Lien Creditors, and prevents the Debtors from even considering any restructuring option other than the process set forth in the RSA. *See, e.g.*, *In re Innkeepers USA Trust*, 442 B.R. 227 (Bankr. S.D.N.Y. 2010) (denying approval of an RSA that, among other things, (i) tied termination of the use of cash collateral to the termination of the RSA and (ii) contained limitations that precluded the ability of the Debtors to employ their "fiduciary out," and holding that the entry into such RSA satisfied neither the heightened scrutiny standard applicable to insiders, nor the less stringent business judgment standard).

[10] The Interim Cash Collateral Order also illustrates the First Lien Creditors' utter control over these cases. Virtually any action by the Debtors thereunder requires the consent of a Steering Committee of First Lien Creditors, whose consent is at their sole discretion, with no reasonableness qualification. Among other things, the Debtors may not make any decision with respect to the assumption of executory contracts and unexpired leases (other than in connection with a sale to a third party), presumably including any collective bargaining arrangement, without first conferring with the Steering Committee. *See, e.g.*, *Interim Cash Collateral Order*, ¶ 11(g).

37. The Debtors have a fiduciary obligation to maximize their estates for the benefit of *all* of their creditors. *See, e.g., id.* at 235. The stringent controls set forth in the RSA and the Interim Cash Collateral Order virtually guarantee that neither the Debtors, nor any creditor constituency other than the First Lien Lenders, will have any meaningful role in these cases. Accordingly, the UMWA Funds object to the extent the RSA mandates restrictions over the use of cash collateral that, absent the intervention of this Court, will permit these cases to be run solely for the benefit of the Debtors' First Lien Creditors.

D. The Restructuring Term Sheet Presumes Treatment of the Claims of the UMWA Funds That Has Not Been Determined in this Circuit

38. While the proposed plan treatment of the Debtors' obligations to the UMWA Funds is a matter for confirmation, the RSA and related Restructuring Term Sheet make unwarranted assumptions, or are at best unclear, as to the treatment of these claims.

39. *Coal Act Liability.* As described above, the statutory claims of the Coal Act Funds are akin to taxes, and, to the extent arising post-petition, are entitled to administrative expense status. *See In re Sunnyside Coal Company*, 146 F.3d at 1280; *Adventure Res. v. Holland*, 137 F.3d at 795; *In re Chateaugay Corp*., 53 F.3d at 498.

40. *1974 Pension Plan Withdrawal Liability Claim.* The Restructuring Term Sheet also presumes that the entirety of any withdrawal liability claim of the 1974 Pension Plan will be treated as a general unsecured claim. *See Restructuring Term Sheet*, at 9. At least some portion of the withdrawal liability claim, however, if not all of it, may be entitled to treatment as an administrative expense claim. The priority treatment of withdrawal liability claims in bankruptcy is not settled, and has not been addressed by the courts of the Northern District of Alabama or the Eleventh Circuit. *See In re Marcal Paper Mills, Inc.*, 650 F.3d 311 (3d Cir.

2011) (holding that the portion of withdrawal liability attributable to the post-petition period was entitled to administrative expense status).

JOINDER AND RESERVATIONS OF RIGHTS

41. The UMWA Funds joins in the objections of the Committee and the UMWA and reserve all rights (i) to raise further and other objections to the RSA Motion prior to or at the hearing, and to amend, supplement or modify this Objection at any time prior to the hearing on the RSA Motion and (ii) to be heard before this Court with respect to the subject matter of this Objection or any other objection raised to the RSA Motion.

WHEREFORE, the UMWA Funds hereby request that this Court (i) deny the RSA Motion, (ii) modify any Final Cash Collateral Order so that such relief is not conditioned upon the continued effectiveness of the RSA; and (iii) grant such other relief as the Court deems appropriate.

Dated: August 26, 2015

Respectfully submitted,

/s/ George N. Davies

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2015, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, which will notify and serve all persons and entities that have formally appeared and requested service in this case. Additionally, I hereby certify that a true and correct copy of the foregoing was served on the Standard Parties via electronic mail as follows:

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