

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

DOMINION RESOURCES BLACK)	
WARRIOR TRUST, by and through its)	
TRUSTEE, SOUTHWEST BANK,)	
)	
Appellant,)	
)	
VS.)	Case No. 15-cv-1531-LSC
)	
WALTER ENERGY, INC., et al. ¹ ,)	
)	
Appellees.)	
)	

**REPLY IN SUPPORT OF AMENDED STEERING COMMITTEE’S NOTICE OF
APPEARANCE AND REQUEST FOR SERVICE OR, IN THE ALTERNATIVE,
MOTION TO INTERVENE IN APPEAL**

The Steering Committee² files this Reply (the “Reply”)³ in support of the *Amended Steering Committee’s Notice of Appearance and Request for Service or, in the Alternative, Motion to Intervene in Appeal* [Dkt. No. 8] (the “Notice and Motion”), and in response to

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), 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 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 Association, as successor trustee and collateral agent to Union Bank, N.A.

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Notice and Motion (as defined below) and the *Steering Committee’s Motion to Intervene* [Adv. Proc. Dkt. No. 25] (the “Adversary Motion to Intervene”), as applicable.



Appellant Dominion Resources Black Warrior Trust's Response to Amended Steering Committee's Notice of Appearance and Request for Service or, in the Alternative, Motion to Intervene in Appeal [Dkt. No. 12] (the "Response"). In support of this Reply, the Steering Committee states as follows:

PRELIMINARY STATEMENT

1. Comprised of holders of over 70% of the Debtors' first lien debt with liens over the Proceeds, the Steering Committee is a clear party-in-interest entitled to appear in all proceedings related to the Proceeds, including this Appeal. In its Response, Dominion ignores the Steering Committee's significant interest in the Proceeds and expects the Steering Committee to rely on the Debtors to protect this interest. Although the Steering Committee and the Debtors share a common interest in this Appeal, intervention by the Steering Committee is necessary so that the first lien creditors' interest will be adequately represented. Unlike the Debtors, who are responsible for the estate and have a fiduciary duty to all creditors, the Steering Committee is focused on the first lien creditors' claims and protecting the liens securing those interests. The Steering Committee therefore cannot sit idly by and expect or hope that the first lien creditors will be represented adequately in this Appeal. These potentially divergent interests justify the Steering Committee's right to intervene in this Appeal.

2. Moreover, Dominion's argument that it will be prejudiced by the Steering Committee's intervention is equally unavailing. The Steering Committee has moved to intervene well within the time set forth in Bankruptcy Rule 8013(g). In addition, the issues raised in this Appeal are the same as those raised and litigated in the Debtors' chapter 11 cases, and Dominion has had ample opportunity to review the Steering Committee's arguments and briefing on these issues. Finally, if anything, the Steering Committee's intervention conserves judicial resources

by having all interested parties present so that this Court may, within one proceeding, fully evaluate the merits of the Appeal.

3. For all of the reasons set forth herein, the Steering Committee should be granted the right to appear and fully participate in this Appeal.

ARGUMENTS AND AUTHORITIES

I. THE STEERING COMMITTEE SATISFIES BANKRUPTCY RULE 8013 REQUIREMENTS FOR INTERVENTION

4. Bankruptcy Rule 8013(g) requires a proposed intervenor to “concisely state the movant’s interest, the grounds for intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participating as an *amicus curiae* would not be adequate.” Fed. R. Bankr. P. 8013(g).

5. As discussed more fully in the Notice and Motion, the Steering Committee satisfies each of the five factors set forth in Bankruptcy Rule 8013(g). *First*, the Steering Committee opposed Dominion’s claim to the Proceeds in both the chapter 11 cases and in the Adversary Proceeding. Notice and Motion ¶¶ 2-6. *Second*, the Steering Committee’s members have an interest in the appeal because they have liens on the Proceeds that will be directly affected by the outcome of the Appeal. *Id.* ¶ 7. *Third*, because the Steering Committee’s interest in this Appeal is distinct from that of the Debtors and Dominion, the Steering Committee cannot be adequately represented by the current parties to the Appeal. *Id.* ¶¶ 8-9. *Fourth*, the Steering Committee’s intervention at this stage is appropriate because the Notice and Motion was timely filed under Bankruptcy Rule 8013(g) and no undue delay or prejudice would result from the Steering Committee’s intervention at this stage of the Appeal. *Id.* ¶ 10; *see also infra* ¶¶ 16-17. *Fifth*, *amicus curiae* participation is insufficient because it does not give the Steering Committee

the right to fully brief and be heard on the issues that arise in the Appeal. Notice and Motion ¶ 11.

6. In its Response, Dominion neglects to address Bankruptcy Rule 8013(g) factors and directs the Court's attention to Rule 24 of the Federal Rules of Civil Procedure without making any showing that the Bankruptcy Rules governing appeal (especially Bankruptcy Rule 8013) or the applicable case law require the Court to apply Federal Rule 24.⁴

7. In light of the fact that the Steering Committee satisfies each of the factors governing intervention under Bankruptcy Rule 8013(g), the Court should grant the Notice and Motion.

II. EVEN IF FEDERAL RULE 24 APPLIES, THE STEERING COMMITTEE SATISFIES THE REQUIREMENTS FOR INTERVENTION OF RIGHT AND PERMISSIVE INTERVENTION

A. The Steering Committee satisfies the elements for intervention of right under both prongs of Federal Rule 24(a).

8. Federal Rule 24(a)(1) (if it were to apply) requires the Court to permit anyone to intervene who "is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). As set forth in the Notice and Motion, *see* Notice and Motion at 2–3, section 1109(b) of the Bankruptcy Code gives the Steering Committee an unconditional right, as a party in interest, to appear and be heard in proceedings related to Dominion's Emergency Motion to Reconsider the Cash Management Order [Bankr. Dkt. No. 239], as well as in the Adversary Proceeding [Adv. Proc. No. 15-102]. 11 U.S.C. § 1109(b); *see also, e.g., Term Loan Holder*

⁴ Dominion asserts that, just as certain courts have applied Federal Rule 24 to intervention in proceedings governed by the Federal Rules of Appellate Procedures, so should this Court apply Federal Rule 24 to this bankruptcy appeal. *See* Response ¶ 5. However, the Bankruptcy Rules governing appeals, including the Committee Notes, do not incorporate or otherwise reference Federal Rule 24. *See* Fed. R. Bankr. P. 8001-8028. Moreover, Dominion cites no binding authority, and research has not revealed any, holding that a district court must apply Federal Rule 24 to a motion to intervene in a bankruptcy appeal. Dominion also failed to cite any case where a district court has applied Federal Rule 24 to such a motion. This Court's discretion is therefore not governed by the standards in Federal Rule 24.

Comm. v. Ozer Grp. L.L.C. (In re Caldor Corp.), 303 F.3d 161, 169 (2d Cir. 2002) (holding that section 1109(b) gives a party in interest the unconditional right to appear and be heard in adversary proceedings); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 (3d Cir. 1994) (holding that section 1109(b) gave party-in-interest creditors' committee the unconditional right to intervene in "non-core, 'related to' proceedings pending in a federal district court"); *see further Official Unsecured Creditors Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 454 (3d Cir. 1982) ("[t]he language of [§ 1109(b)] seems clearly to require that more than mere participation as an amicus be allowed"). This right extends to appeals from orders entered in such proceedings. *Cf. Official Comm. of Unsecured Creditors v. Morgan Stanley & Co., Inc. (In re Sunbeam Corp.)*, 287 B.R. 861, 863 (S.D.N.Y. 2003) (where creditor had "the right to participate in the resolution of issues in the bankruptcy case," it also had the right to "subsequently appeal those issues to the district court"). Thus, if it finds Federal Rule 24 applicable, the Court must permit the Steering Committee to intervene in the Appeal.

9. Federal Rule 24(a)(2) (again, if it were to apply) also requires the Court to permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

10. Dominion does not challenge the Steering Committee's claim of an "interest relating to the property or transaction that is the subject of the action." Nor could it, as the Steering Committee's claim that its members have first-lien interests in the Debtors' cash is amply supported by the First Lien Debt Documents, as well as the Amended Final Cash

Collateral Order [Bankr. Dkt. No. 797] recently entered by the Bankruptcy Court. *See also* Notice and Motion ¶ 7; Adversary Motion to Intervene ¶ 11.

11. Dominion argues only that the Debtors will adequately represent the Steering Committee's interest, implying that disposing of the action without the Steering Committee's presence cannot "impair or impede" the Steering Committee's ability to protect its interest. Response ¶¶ 6-7. Specifically, Dominion asserts that the Steering Committee members' interests in the Proceeds are "derivative" of the Debtors' interest and, therefore, the Steering Committee's interest in the appeal is "identical" to the Debtors' interest and will be adequately represented by the Debtors. *See id.* Dominion's conclusion does not follow from the premise.

12. The Steering Committee comprises holders of the majority of the Debtors' first lien debt that have first priority liens on all of the Debtors' Collateral, which includes the Proceeds. *See* Adversary Motion to Intervene ¶ 11. To the extent that this appeal challenges the first lien creditors' interests in the Proceeds, the Steering Committee cannot rely on the Debtors to advocate for and protect those interests. As set forth above, unlike the Debtors, who are responsible for the estates and have a fiduciary duty to all creditors (and not just the first lien creditors), the Steering Committee is focused on the first lien creditors' claims and protecting the liens securing those interests. For example, courts have found that these potentially divergent interests justify a secured creditor's right to intervene in an adversary proceeding. *See, e.g., Katz v. Steamfitters Local Union 420 Apprenticeship Training Fund (In re David M. Hunt Constr. Co.)*, 3 B.R. 256, 260 (Bankr. E.D. Pa. 1980) (granting the intervention of a secured creditor because the trustee may not represent any particular creditor or group of creditors whose interests are adverse to the interests of the general creditors of the estate); *Partrick v. Macro Indus. Corp. (In re Macro Indus. Corp.)*, 186 B.R. 789, 795 (E.D.N.Y. 1995) (affirming that secured

creditor's "primary interest in its collateral" warrants intervention); *see also Munford, Inc. v. TOC Retail, Inc. (In re Munford, Inc.)*, 115 B.R. 388, 390 (Bankr. N.D. Ga. 1990) (granting creditors' committee's intervention and holding that the "duality of [a debtor's] interests [as representative of secured and unsecured creditors] presents a real conflict which justifies intervention pursuant to Rule 24(a)(2)"). The reasoning in these cases is equally applicable in this Appeal. Because this Appeal affects the first lien creditors' interest in the Collateral, which includes the Proceeds, and the Debtors do not solely represent the interests of the first lien creditors, the Steering Committee has the right to intervene and ensure that those interests are adequately represented in this Appeal.

13. Accordingly, since the Steering Committee also satisfies the requirements for intervention of right under Federal Rule 24(a)(2), the Court must grant the Notice and Motion.

B. The Steering Committee satisfies the elements for permissive intervention under Federal Rule 24(b).

14. Under Federal Rule 24(b), the court may permit anyone to intervene who files a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

15. Dominion does not dispute, nor could it, that the Steering Committee "has a . . . defense that shares with the main action a common question of law or fact." *See also* Adversary Motion to Intervene ¶ 17. Dominion also does not dispute that the Notice and Motion, filed 20 days after the appeal was docketed, was timely. *See* Fed. R. Bankr. P. 8013(g) ("The motion [to intervene] . . . must be filed within 30 days after the appeal is docketed.").

16. Instead, Dominion focuses on Federal Rule 24(b)(3) (requiring courts to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties'

rights”), asserting that intervention “would be duplicative, prejudicial to Dominion, and a waste of judicial resources...” Response ¶ 8.

17. The assertion that the Steering Committee’s timely intervention would be prejudicial to Dominion at this early stage of the Appeal is unpersuasive. The issues in the Appeal were previously litigated in the chapter 11 cases. Almost two months ago, on August 17, 2015, the Steering Committee filed its substantive brief articulating its positions on these issues. *See* Steering Committee’s Objection to the Trust’s Verified Application for Temporary Restraining Order [Adv. Proc. Dkt. No. 27]. As Dominion acknowledges, those positions were argued at the August 18, 2015 hearing. Response ¶ 10. Thus, by now Dominion has had more than sufficient time to digest, and prepare any response it might have, to the Debtors’ and Steering Committee’s arguments raised in the chapter 11 cases and the Adversary Proceeding. Moreover, given that the Appeal is in its earliest stages and there has been no substantive briefing or oral argument yet, there is no prejudice to any party from the Steering Committee’s intervention.

18. Dominion also does not explain how judicial resources would be wasted by the Steering Committee’s intervention. Indeed, the Steering Committee’s intervention is more likely to conserve judicial resources, by putting all interested parties and issues before the Court in a single proceeding. Finally, for its argument that the Steering Committee’s participation would be duplicative, Dominion can point only to a joinder, and three pages of the Steering Committee’s substantive brief in the Adversary Proceeding (out of a total of 28), that purportedly duplicate the Debtors’ briefing. Response ¶ 7 n.10. The Court should reject these specious arguments, find that the Steering Committee meets the elements for permissive intervention, and grant the Notice and Motion.

CONCLUSION

For the foregoing reasons, the Steering Committee respectfully requests that the Court grant the Notice and Motion and enter an order, substantially in the form of the proposed order attached to the Notice and Motion as Exhibit A, and grant such other relief as is just, proper and equitable.

Dated: October 8, 2015

Respectfully submitted,

/s/ Michael Leo Hall

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document by Notice of Electronic Filing, or, if the party served does not participate in Notice of Electronic Filing, by U.S. First Class Mail or email on this 8th day of October, 2015:

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