

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

In re:	)	
	)	Chapter 11
	)	
WALTER ENERGY, INC. <sup>1</sup>	)	Case No. 15-02741 (TOM11)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	

**EMERGENCY MOTION FOR A STAY PENDING APPEAL**

1. Pursuant to Bankruptcy Rule 8007(a), the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America 1992 Benefit Plan (together, the “Coal Act Funds”), by and through their attorneys, respectfully request a stay pending appeal of this Court’s February 8, 2016 order approving, *inter alia* the sale of certain of the Debtors’ assets (referred to by the Debtors and in this motion as the “Non-Core Assets”) free and clear of claims, liens, and encumbrances, pursuant to a proposed asset purchase agreement for those non-core assets (the “Non-Core APA”). Doc. No. 1863 (the “Non-Core Order”). On February 9, 2016, pursuant to 8 U.S.C. § 158 and Federal Rules of Bankruptcy Procedure 8002 and 8003, the Coal Act Funds filed a Notice of Appeal of the Non-Core Order with the Clerk of this Court. Doc. No. 1876.

<sup>1</sup> 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.



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## **PRELIMINARY STATEMENT**

2. This Court is familiar with the Coal Act Funds' jurisdictional and legal objections to the Court's orders extinguishing, via Section 363(f) of the Bankruptcy Code, any obligation of a purchaser of the Debtors' assets to pay future Coal Act tax assessments. As with the first Sale Order, this Court has waived the automatic 14-day stay of the Non-Core Order. The sale of the Non-Core Assets is scheduled to close as early as tomorrow (February 10, 2016), and this Court's order approving the sale was entered yesterday (February 8, 2016).

3. There is no urgency to the Debtors' intended sale of the Non-Core Assets. The would-be purchaser of the Non-Core Assets has not conditioned the sale on being free from Coal Act obligations; as the purchaser's negotiator admitted, Coal Act obligations were not specifically discussed in negotiations over the Non-Core Assets.

4. The Coal Act Funds' appeal raises serious questions of subject-matter jurisdiction and statutory interpretation that are *still unresolved* in this Circuit.

## **BACKGROUND**

5. The Debtors' core assets are slated to be transferred to Coal Acquisition LLC, an entity formed and owned by the Debtors' First-Lien Creditors. By order dated January 8, 2016, this Court authorized that transfer free and clear of, *inter alia*, any Coal Act taxes that might be assessed against Coal Acquisition LLC in the future. Doc. No. 1584 (the "Sale Order"). The Coal Act Funds appealed the Sale Order, and are briefing the merits on an expedited basis before the United States District Court for the Northern District of Alabama (Case No. 2:16-cv-00064) (Proctor, J.). The Coal Act Funds will soon move the Eleventh Circuit for a stay of the Sale Order pending appeal.

6. The Non-Core Assets are not part of the transaction with Coal Acquisition LLC. The Debtors have not even held an auction for the Non-Core Assets, even though they claimed they would. An auction was scheduled for January 14, 2016. Doc. No. 1469. But the Debtors repeatedly pushed off that date (*see* Doc. Nos. 1621, 1660, 1693, and 1729) to, most recently, a date “TBD” (Doc. No. 1729).

7. Without an auction, the Debtors found a purchaser, and they noticed the Non-Core APA on February 1, 2016. Doc. No. 1793. The Debtors asserted in that filing that they, and their advisors, determined that the purchaser they identified submitted the highest and otherwise best bid for the Non-Core Assets. *Id.*

8. In the Non-Core APA, the Debtors included a term that the purchaser of the Non-Core Assets “shall not be deemed to . . . be the successor” to the Debtors “under the Coal Act.” Non-Core APA § 8.8. Some of the Non-Core Assets belong to Taft Coal Sales & Associates, Inc. (“Taft”). Combined Fund taxes (one of the two types of taxes assessed under the Coal Act) are presently assessed against Taft for one beneficiary. *See* Ex. A (“Stover Decl.”) ¶ 8.<sup>2</sup> Ten other Debtors are related persons and thus are jointly and severally liable for these Combined Fund tax assessments. *Id.* ¶ 9 & n.2; *see* 26 U.S.C. § 9701(c). None of the Debtors are assessed 1992 Plan taxes (the other type of Coal Act tax), but they likely will be when they terminate their individual employer plan, which currently provides healthcare benefits to 572 retired miners. Ex. A ¶ 9. Assuming, as is likely, that those retirees become eligible for the 1992 Plan, the Debtors, related persons, and/or successors-in-interest may be assessed 1992 Plan taxes. *See* 26 U.S.C. §§ 9701(c)(4), 9711(g)(1), 9712(d)(3).

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<sup>2</sup> Exhibits cited in this Motion are the exhibits to the Declaration of George N. Davies, filed herewith.

9. On February 3, 2016, the Coal Act Funds objected to the sale and to lifting the automatic 14-day stay. Doc. No. 1821. This Court held a hearing on the proposed sale of the Non-Core Assets on February 4, 2016. At the hearing, Charles Ebetino of ERP Compliant Fuels—one of the purchaser’s representatives—testified that he could not recall Coal Act obligations coming up during negotiations with the Debtors. *See* Ex. B (Feb. 4, 2016 Hr’g Tr.) at 72:9–73:11.

10. Still the Debtors proposed and this Court entered an order approving the sale and specifically extinguishing now any obligation the purchaser might have to pay Coal Act taxes in the future. Doc. No. 1863 ¶¶ Q, U, 6, 16. The Court also waived the otherwise automatic 14-day stay. *Id.* ¶ 39. The Non-Core Order was entered on February 8, 2016, and the sale is scheduled to close as early as February 10, 2016.

11. The Coal Act Funds require a stay of the Non-Core Order pending appeal to avoid the risk that their appeal may be rendered statutorily or equitably moot.

### **ARGUMENT**

12. Stays pending appeal are a vital “means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.” *Nken v. Holder*, 556 U.S. 418, 427 (2009). A court may grant a stay pending appeal when an appellant has a likelihood of success on appeal, when the balance of harms weighs in favor of a stay (irreparable harm to movant in the absence of a stay, balanced against any harm to its opponent were a stay granted), and when a stay will serve the public interest. *See id.* at 434. All of these factors favor a stay of the Non-Core Order pending appeal for the same reasons that they favored a stay of the Sale Order. *See* Doc. No. 1619; *see also* Case No. 2:16-cv-00064-RDP, Doc. No. 14. The Coal Act Funds’ incorporate those arguments in full here and summarize them below.

13. **The Coal Act Funds Are Sufficiently Likely to Succeed On Appeal.** Both this Court and the District Court denied the Coal Act Funds’ request to stay the first Sale Order. Those results, however, do not foreclose a stay. Indeed, before and after the Supreme Court’s ruling in *Nken*, courts have recognized that a likelihood of *prevailing*, while sufficient, is not necessary. Which is to say, the “likelihood of success” moniker is a misnomer. *See, e.g., In re Revel AC, Inc.*, 802 F.3d 558, 568–69 (3d Cir. 2015) (“[T]he likelihood of winning on appeal need not be more likely than not.”). In fact, “the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981);<sup>3</sup> *accord Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (noting that the “reasonable probability,” “fair prospect,” “substantial case on the merits,” and “serious legal questions” formulations “are largely interchangeable”).

14. The Non-Core Order raises the same jurisdictional and legal questions as the Sale Order concerning the interplay between the Coal Act, the Anti-Injunction Act, and the Bankruptcy Code. As it did in the Sale Order, this Court in the Non-Core Order forever barred assessment of Coal Act taxes against the purchaser of the Non-Core Assets. That was reversible error for several reasons.

15. *First*, this Court exceeded its jurisdiction. Coal Act “premiums” are a type of federal tax within the meaning of the Anti-Injunction Act, 26 U.S.C. § 7421(a). *See In re Sunnyside Coal Co.*, 146 F.3d 1273, 1280 (10th Cir. 1998) (reference to “any tax” in 11 U.S.C. § 503(b)(1)(B) includes Coal Act premiums); *Adventure Res. Inc. v. Holland*, 137 F.3d 786, 793–94 (4th Cir. 1998) (same); *In re Chateaugay Corp.*, 53 F.3d 478, 498 (2d Cir. 1995) (same);

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<sup>3</sup> Fifth Circuit decisions issued prior to October 1, 1981 are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

*Pittston Co. v. United States*, 199 F.3d 694, 701–02 (4th Cir. 1999) (waiver of sovereign immunity for suits seeking refunds of “any internal revenue tax” under 28 U.S.C. § 1346(a)(1) waived sovereign immunity in suit for refund of Coal Act premiums); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137 (4th Cir. 1996) (contractual promise to indemnify for “any taxes” included promise to indemnify for Coal Act premiums); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 695 (3d Cir. 1996) (Coal Act premiums are not a taking of property but are “a tax to continue a benefits program”). The Anti-Injunction Act strips this Court (and every other court) of subject-matter jurisdiction to “restrain[] the assessment or collection of *any tax* shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a). That is what this Court did in the Non-Core Order, thereby exceeding its jurisdiction.

16. Notably, in the appeal of the first Sale Order, the Debtors have retreated from the jurisdictional arguments they presented to this Court in opposing the Coal Act Funds’ objection to the first Sale Order and their motion to stay that Sale Order. Now, the Debtors contend that the only reason the Anti-Injunction Act does not preclude the Sale Order is that the Supreme Court’s decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), changed the meaning of the Anti-Injunction Act. *NFIB* did not transform the Anti-Injunction Act into a jurisdictional bar that applies only to taxes labeled “tax”; the Court held that Congress’s intent—not labels—controls whether an exaction is a “tax” for purposes of the Anti-Injunction Act. *NFIB*, 132 S. Ct. at 2581–84. Unlike the word “penalty” used in the statute at issue in *NFIB*, the Coal Act’s “premiums,” 26 U.S.C. §§ 9704, 9712, are revenue-generating exactions to fund government-sponsored endeavors. See AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1430 (3d ed. 1992). That is the sort of “tax” Congress referred to in the Anti-Injunction Act. See *NFIB*, 132

S. Ct. 2851. Moreover, even Coal Act “penalties” are taxes under the Internal Revenue Code (including the Anti-Injunction Act). 26 U.S.C. § 9707(f). Coal Act “premiums” therefore are taxes subject to the Anti-Injunction Act.

17. *Second*, no authority in this Circuit permits Section 363(f) of the Bankruptcy Code to be used to extinguish future Coal Act tax assessments. The operative term in Section 363(f)—“interest in such property”—is undefined in the Bankruptcy Code, and the Eleventh Circuit has not authoritatively construed the term. Textually, “interest in ... property” refers to property interests—that is, *in rem* interests. 11 U.S.C. § 363(f). Some courts have construed the term to include *in personam* interests that can be satisfied at the time of sale. This Court took an even broader view, which cannot be reconciled with the plain language of Section 363(f).

18. *Finally*, any construction of Section 363(f) that allows premature interference with Coal Act tax assessments violates the Coal Act itself. *See* 26 U.S.C. § 9722 (providing that Coal Act liability applies whenever “a principal purpose of any transaction is to evade or avoid liability” for Coal Act taxes). It also undermines the statute’s purpose—saving retired coal miners’ benefits from creative deal-making. *See E. Enters. v. Apfel*, 524 U.S. 498, 511 (1998); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1276 (11th Cir. 2007).

19. The Coal Act Funds’ primary arguments on appeal are important questions of first impression in this Circuit, and are sufficiently likely to succeed that a stay pending appeal is warranted. *See Nken*, 556 U.S. at 434 (noting that the merits factor, along with the irreparable injury factor, is the “most critical”).

20. **The Balance Of Harms Favors A Stay.** Section 363(m) of the Bankruptcy Code often moots appeals of Section 363 sale orders. *See* 11 U.S.C. § 363(m). A stay is necessary to guard against the threat that Section 363(m) will moot the Coal Act Funds’ appeal of the Non-

Core Order. There is no way the Coal Act Funds can be heard on appeal between today and tomorrow (the earliest the day on which the sale might close). That threat of mootness and the financial risk to the Coal Act Funds if their appeal is mooted are both significant and irreparable. In contrast, the Non-Core Assets do not represent a significant part of the Debtors' estate. They are just what was left over after the Debtors and their first-lien creditors negotiated the stalking-horse agreement for substantially all of the Debtors' assets. The Debtors have offered no reason that they need to close this minor, tangential sale immediately.

21. The provisions of the Non-Core Order concerning the purchaser's potential obligations to pay future Coal Act assessments are not material provisions. The purchaser of the Non-Core Assets did not even ask for such relief. On the contrary, as the purchaser's negotiator conceded at the February 4, 2016 hearing, Coal Act obligations were not even discussed in negotiations over the Non-Core APA. This sale, then, will go through whether or not the Court's free-and-clear order is upheld or reversed.

22. **A Stay Will Serve The Public Interest.** The public has a strong interest in ensuring that the Coal Act Funds are well-financed and able to provide for the healthcare needs of retired coal miners and their dependents. *Cf. Marshall v. Super. Sand & Gravel, Inc.*, 492 F. Supp. 1195, 1199 (W.D. Mich. 1980) (granting injunctive relief in light of Congress's "indisputable ... concern over the health and welfare of miners"). Indeed, every dollar of Coal Act taxes not paid by the entities Congress singled out in the Coal Act—coal companies, related persons, and successors—becomes the burden of the U.S. Treasury, which may be called upon to contribute millions of dollars each year to cover Coal Act taxpayers' failures. 30 U.S.C. § 1232(h), (i)(3)(A); 26 U.S.C. § 9712(d).



23. **No Bond Should Be Required.** This Court should grant a stay and exercise its discretion to do so without requiring a bond. *See* Fed. R. Bankr. P. 8007(c). There is no concrete injury the Debtors will suffer if the sale of the Non-Core Assets is delayed pending appeal. As the Debtors’ advisor testified, the purchaser has not conditioned the sale on being free from Coal Act obligations—the issue did not even come up. Moreover, if the identified purchaser walks away from the deal there is no reason to think that the Debtors could not find another purchaser for their minor assets. Indeed, the Debtors have not even held an auction for their assets—they were able to find a purchaser without doing so.

24. A bond is particularly inappropriate given the important interests of the Coal Act Funds and the miners who look to them for benefits. Courts often waive bond requirements because of the “special nature of suits to enforce important federal rights or ‘public interests,’ arising ‘out of comprehensive federal health and welfare statutes.’” *E.g., Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991) (citation omitted). This Court should follow that lead and “consider the impact that a bond requirement would have on enforcement of such a right, in order to prevent undue restriction of it.” *Id.* Here, the Coal Act Funds seek to protect their rights to tax assessments. The Funds have limited resources. If saddled with a bond requirement, the Funds may be unable to appeal; because they are the only parties that enforce the Coal Act, such a result would leave no one to champion an important federal statute and the public interests it represents.

### **CONCLUSION**

For the foregoing reasons, the Court should stay the Non-Core Sale Order pending resolution of the Coal Act Funds’ appeal and should not require the Coal Act Funds to post a bond.

Respectfully submitted,

Dated: February 9, 2016

/s/ George N. Davies

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### **CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2016, 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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/s/ George N. Davies  
George N. Davies

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

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

**DECLARATION OF GEORGE N. DAVIES IN SUPPORT OF  
EMERGENCY MOTION FOR A STAY PENDING APPEAL**

I, George N. Davies, an attorney duly admitted to practice law before the courts of the State of Alabama and the United States Bankruptcy Court for the Northern District of Alabama, and not a party to the above-captioned action, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury as follows:

1. I am a partner of the law firm Quinn, Connor, Weaver, Davies & Rouco LLP, counsel to the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America 1992 Benefit Plan (together, the “**Coal Act Funds**”), parties-in-interest and creditors in the above-captioned matter.

2. I submit this declaration in support of the Coal Act Funds’ *Emergency Motion for Stay Pending Appeal*.

3. The following is based on my own personal knowledge and, where appropriate, a review of the relevant case files. The facts set forth herein are true and correct to the best of my knowledge and belief.

4. Attached hereto as **Exhibit A** is a true and correct copy of the *Declaration of Dale Stover in Support of the Objection of the United Mine Workers of America 1974 Pension*

*Plan and Trust, the United Mine Workers of America 1993 Benefit Plan, the United Mine Workers of America 2012 Retiree Bonus Account Plan, the United Mine Workers of America Cash Deferred Savings Plan of 1988, the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America 1992 Benefit Plan to (1) the Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c), and 1114(g) for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief (the "Stover Declaration"), which was filed on December 9, 2015 (Dkt. No. 1198-1). The Stover Declaration was accepted as part of the record of the January 6, 2016 sale hearing in these chapter 11 cases.*

5. Attached hereto as **Exhibit B** is a true and correct copy of the transcript of the sale hearing held on February 4, 2016 in these Chapter 11 cases.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 9, 2016

/s/ George N. Davies  
George N. Davies

# EXHIBIT A



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

In re:	)	
	)	
	)	Chapter 11
WALTER ENERGY, INC. <sup>1</sup>	)	
	)	Case No. 15-02741 (TOM11)
Debtors.	)	
	)	(Jointly Administered)
	)	

**DECLARATION OF DALE STOVER IN SUPPORT OF THE OBJECTION OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST, THE UNITED MINE WORKERS OF AMERICA 1993 BENEFIT PLAN, THE UNITED MINE WORKERS OF AMERICA 2012 RETIREE BONUS ACCOUNT PLAN, THE UNITED MINE WORKERS OF AMERICA CASH DEFERRED SAVINGS PLAN OF 1988, THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN AND THE UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN TO (I) THE DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 1113(c), AND 1114(g) FOR AN ORDER (I) AUTHORIZING THE DEBTORS TO (A) REJECT COLLECTIVE BARGAINING AGREEMENTS, (B) IMPLEMENT FINAL LABOR PROPOSALS, AND (C) TERMINATE RETIREE BENEFITS; AND (II) GRANTING RELATED RELIEF**

I, Dale Stover, hereby declare:

1. I am over eighteen years of age. I have been employed since January 2, 1980 by the United Mine Workers of America Health & Retirement Funds (the "UMWA Funds").

2. I submit this declaration in support of the Objection of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan"), the United Mine Workers of

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<sup>1</sup> 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.

America 1993 Benefit Plan (the “1993 Plan”), the United Mine Workers of America 2012 Retiree Bonus Account Plan (the “Account Plan”), the United Mine Workers of America Cash Deferred Savings Plan of 1988 (the “CDSP”), 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, the 1993 Plan, the Account Plan, and the CDSP, “UMWA Funds”) to the Debtors’ Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(f) for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief (“1113/1114 Motion”).

3. Since November 3, 2003, I have held the position of Director of Finance and General Services (previously Comptroller) of the UMWA Funds. As Director of Finance and General Services, and formerly as Comptroller, my responsibilities include monitoring the payments made by the contributing employers to the UMWA Funds – including the Plans – and taking steps to ensure contributing employers’ compliance with their contractual and statutory contribution obligations.

4. Except as otherwise indicated herein, all facts set forth in this declaration are based upon my personal knowledge, my review of relevant documents, my opinion based upon experience, knowledge and information concerning the Plans, and information provided to me by employees working under my supervision. If called upon to do so, I would testify competently to the facts set forth in this declaration.

## **A. The UMWA Funds**

5. The UMWA Funds is a group of seven multiemployer employee benefit plans and trusts that provide health insurance and retirement income benefits to retired coal miners and their families. The UMWA Funds are jointly administered by a single staff under administrative services agreements with the 1974 Pension Plan, which serves as the master administrative entity. Each plan was established separately and has its own board of trustees, eligibility requirements, and plan of benefits.

6. Two of the seven UMWA Funds, the United Mine Workers of America 1992 Benefit Plan and the United Mine Workers of America Combined Benefit Fund, were established under the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701 et seq. (the “Coal Act”).

7. The other five UMWA Funds were established pursuant to a collectively bargained agreement between the UMWA and Bituminous Coal Operators’ Association, Inc. (“BCOA”), entitled the National Bituminous Coal Wage Agreement (“NBCWA”) of 2011. The 1974 Pension Plan, the United Mine Workers of America Retiree Bonus Account Trust, and the United Mine Workers of America Cash Deferred Savings Plan of 1988 each provide certain benefit payments to eligible retired coal miners and other beneficiaries. The 1993 Plan and the United Mine Workers of America Prefunded Benefit Plan provide health benefits to certain retired mine workers and their eligible family members.

## **B. The Combined Benefit Fund**

8. Certain Debtors are obligated to the Combined Fund with respect to approximately 32 eligible beneficiaries, with an annual premium of approximately \$147,000. Thirty-one of these beneficiaries are assigned to Jim Walter Resources, Inc. (“Jim Walter”), and

one is assigned to Taft Coal Sales & Associates, Inc. (“Taft”).<sup>2</sup> These premium obligations to the Combined Fund accrue in October of each year and are payable on a monthly basis.

### **C. The 1992 Plan**

9. Currently, no beneficiaries of the 1992 Plan are attributable to the Debtors. I understand that the Debtors provide retiree health benefits to approximately 572 retired coal miners and their dependents through an individual employer plan (“IEP”), which the Debtors are required to provide pursuant to Section 9711 of the Coal Act. Of these beneficiaries, 542 are attributable to Jim Walter, and 30 are attributable to Taft. If the Debtors and their related persons cease providing the statutorily-mandated benefits through an IEP, those Coal Act-eligible miners and their dependents would become eligible to receive benefits from the 1992 Plan.

10. Benefits under the 1992 Plan are paid in part by monthly per beneficiary premiums from each operator to whom beneficiaries enrolled in the Plan are attributed. Because most beneficiaries are attributed to operators that are no longer in business, however, the cost of most benefits under the 1992 Plan are funded by transfers from the federal government under the Surface Mining Control and Reclamation Act, as amended by the Tax Relief and Health Care Act of 2006. If the Debtors are permitted to cease providing the benefits required by Section 9711 of the Coal Act, and if they are permitted to avoid payment of per beneficiary premiums, the cost of providing these benefits would be shifted to the federal government.

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<sup>2</sup> The following Debtors are “related persons” for purposes of the Coal Act: J. W. Walter, Inc., Jefferson Warrior Railroad Company, Inc., Jim Walter Homes, LLC, Jim Walter Resources, Inc., SP Machine, Inc., V Manufacturing Company, Walter Coke, Inc., Walter Energy, Inc., Walter Home Improvement, Inc., Walter Land Company, Walter Minerals, Inc.

11. Certain signatory operators must also provide security 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. This security may take the form of a bond, a letter of credit, or another form. With respect to the 572 beneficiaries described above, Jim Walter is providing security for 542 in the amount of \$4,312,152, and Taft is providing security for the remaining 30 in the amount of \$238,680, each of which is estimated to cover the health benefits of the applicable beneficiaries for approximately one year.

**D. The 1974 Pension Plan**

12. The 1974 Pension Plan is a multiemployer pension plan that was established by the NBCWA of 1974. Jim Walter is a signatory to the most recent NBCWA, the 2011 NBCWA, which continues in effect until December 31, 2016 and sets forth the contribution obligations of contributing employers to the 1974 Pension Plan, benefit levels owed to the 1974 Pension Plan's beneficiaries and participants, and eligibility requirements, among other substantive terms.

13. The 1974 Pension Plan provides pension benefits to approximately 89,000 eligible participants and beneficiaries who are retired or disabled former hourly coal production employees and their eligible surviving spouses. It is a successor to the UMWA Welfare and Retirement Fund of 1950, which grew out of the 1946 Krug-Lewis Agreement between the government of the United States and the UMWA that first established the bituminous coal industry's health and retirement system. This population of participants and beneficiaries includes individuals eligible under the 1974 Pension Plan and the UMWA 1950 Pension Plan, which merged to create the 1974 Pension Plan effective June 30, 2007.

14. Jim Walter is a "participating employer" in the 1974 Pension Plan, and is 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. Jim Walter, together with any other commonly-owned entities (including its co-Debtors), are jointly and severally liable for the withdrawal liability described below.

15. Jim Walter 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, Jim Walter’s contributions represented approximately 18% of the total contributions received by the 1974 Pension Plan from all contributing employers. Jim Walter’s projected contributions to the 1974 Pension Plan from now through December 2016 total \$17.5 million. Jim Walter is the second largest contributor to the 1974 Pension Plan.

16. Although the 1974 Pension Plan’s aggregate benefit payments are large, the individual pensions are quite modest, with majority of beneficiaries receiving less than \$500 per month and almost 80% receiving a monthly pension of less than \$800 a month. More specifically, of the approximately 89,000 beneficiaries:

- approximately 21,000 receive a monthly pension of less than \$200 per month;
- approximately 33,000 receive a monthly pension of between \$200 and \$500 per month;
- and
- approximately 17,000 receive a monthly pension of between \$500 and \$800 per month.

Only about 3% of the 1974 Fund’s beneficiaries receive a monthly check greater than \$2,000. The average monthly pension for a regular retiree is \$680; the average monthly pension for a disabled retiree is \$568; and the average monthly pension for a surviving spouse is \$343.

17. Pursuant to section 305(b)(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), the 1974 Pension Plan’s enrolled actuary certified the 1974

Pension Plan to be in Seriously Endangered Status for the plan years beginning July 1, 2011 through July 1, 2013 and Critical Status for plan year beginning July 1, 2014. On September 28, 2015, the 1974 Pension Plan was certified as being in Critical and Declining Status for the plan year beginning July 1, 2015. *See* 2015 Actuarial Certification, a copy of which is attached as Exhibit 1A. This certification shows that as of July 1, 2015, the 1974 Pension Plan had an estimated funded percentage of 68.5%, and an expected accumulated funding deficiency by June 30, 2019. *Id.* The 1974 Pension Plan's investments are well diversified, but the sharp market declines during 2008-09 caused a precipitous drop in the 1974 Pension Plan's assets at precisely the same time as the demographics of its beneficiary population required the 1974 Pension Plan to pay out benefits at approximately \$650 million per year, near its projected peak rate of payments.

18. Given the 1974 Pension Plan's immediate need for cash to pay benefits, it is unlikely to have sufficient time to recoup its losses from the financial crisis through prudent investment. Moreover, the 1974 Pension Plan cannot recover its funding status through increased contributions, because the number of retirees receiving benefits is approximately 10-12 times the number of active employees whose hours worked in the industry are the basis for employer contributions to the 1974 Pension Plan.

19. Under Section 4201 of ERISA, upon their withdrawal from a multiemployer pension plan, previously contributing employers are immediately liable for their proportionate share of the 1974 Pension Plan's unfunded vested pension liabilities. If Jim Walter were to cease all covered operations or otherwise permanently terminate its obligation to contribute to the 1974 Pension Plan, the Debtors would be jointly and severally liable for approximately \$936 million in withdrawal liability. If the Debtors are unable to satisfy this withdrawal liability obligation, a

significant loss of funding will result, which will exacerbate the 1974 Pension Plan's Critical and Declining Status. This, in turn, will affect the benefit levels of future retirees, and, if the loss of funding causes the 1974 Pension Plan to become insolvent, would reduce (or render the 1974 Pension Plan unable to pay) the pension benefits provided to approximately 89,000 eligible beneficiaries. Although the Pension Benefit Guaranty Corporation ("PBGC") guarantees payment of a portion of the 1974 Pension Plan's benefits (at a reduced level), the PBGC's multiemployer insurance program currently is facing a deficit of over \$52 billion and is projected to be insolvent in the next ten years. *See, e.g., News Update: PBGC Paid Nearly \$6 Billion in Pension Benefits to Retirees in FY 2015* (Nov. 17, 2015), *available at* <http://content.govdelivery.com/accounts/USPBGC/bulletins/1258748>, a copy of which is attached as Exhibit 1B. Even if the PBGC were able to provide financial assistance to the 1974 Pension Plan, the vast majority of beneficiaries would have their already modest pensions reduced even further.

20. In addition, as a result of the loss of funding caused by Jim Walter's withdrawal, and assuming the Debtors' withdrawal liability is not paid in full, the share of the 1974 Pension Plan's unfunded liabilities attributable to each of the remaining employers that contribute to the 1974 Pension Plan would be proportionally increased.

21. I have calculated the Debtors' approximately \$936 million withdrawal liability, assuming Jim Walter were to withdraw from participation in the 1974 Pension Plan in the plan year ending June 30, 2016, based on the withdrawal liability provisions of Article XIV of the 1974 Pension Plan Document (the "1974 Plan Document"), a copy of which is attached hereto as Exhibit 2. The Debtors' withdrawal liability is their share of the 1974 Pension Plan's unfunded vested benefits ("UVBs") that are allocable to Jim Walter. To determine the amount of



withdrawal liability allocable to a withdrawing employer, the 1974 Pension Plan uses a modified version of the “rolling-five” method of allocation. This method was specifically approved for use by the 1974 Pension Plan by the PBGC on June 20, 2003.

22. To calculate liability for a withdrawal in the plan year ending June 30, 2016, the 1974 Pension Plan’s unfunded vested benefits as of June 30, 2015 are multiplied by a fraction, as follows:

a) The numerator of the fraction is the total number of hours worked by the employer’s employees in classified work under the collective bargaining agreement, which form the contribution base units of the employer’s required contributions to the 1974 Pension Plan, for the five years ended June 30, 2015. The total of Jim Walter’s contribution base units for the five year period is 17,108,867 hours.

b) The denominator of the fraction is the total number of hours worked by employees of all employers participating in the 1974 Pension Plan for the same period. This denominator is 104,186,000 hours. This denominator has been adjusted by subtracting the number of any contribution base units of employers which withdrew from the 1974 Pension Plan during that five year period. See Ex. 2 at art. XIV § C.

23. The 1974 Pension Plan’s actuary has preliminarily determined that, as of June 30, 2015, the 1974 Pension Plan’s unfunded vested benefits are \$5,769,684,300. The unfunded vested benefits have been further adjusted by the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing on or before June 30, 2015, resulting in adjusted unfunded vested benefits of \$5,701,092,000. The 1974 Pension Plan’s unfunded vested benefits are calculated using the PBGC’s valuation

assumptions for multiemployer plans terminating as of the first day of the plan year following the valuation date and the Plan's market value of assets.<sup>3</sup>

24. The Debtors' allocable share of the adjusted unfunded vested benefits is calculated by multiplying the 1974 Pension Plan's adjusted unfunded vested benefits times the fraction set forth above representing Jim Walter's share of contribution base units for the five year period. Assuming a complete withdrawal prior to June 30, 2016, the Debtors' total withdrawal liability would be \$936,202,824.00. A copy of Debtors' withdrawal liability calculation worksheet is attached as Exhibit 3.

#### **E. The 1993 Plan**

25. Pursuant to the 2011 NBCWA, and each predecessor NBCWA since 1978, signatory employers agreed to directly provide health benefits, through individual employer plans, for their active employees, as well as lifetime benefits for eligible retirees for which such employer is the last signatory operator, at an agreed level of benefits provided in the NBCWA. *See 2011 NBCWA* at art. XX §§ (c)(3)(i) & (h), relevant portions of which are attached hereto as Exhibit 4.

26. Jim Walter, the same debtor-in-possession entity obligated to contribute to the 1974 Pension Plan, is currently operating and obligated to contribute to the 1993 Plan. Jim Walter also provides health benefits to 1,429 non-Coal Act retirees (and approximately 2,629 individuals, including retirees and dependents).

27. The 1993 Plan is a multi-employer welfare benefit plan that provides health care coverage to a limited group of retirees and their eligible dependents. This group of retirees' last

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<sup>3</sup> These withdrawal liability figures have been updated since the filing of the 1974 Pension Plan's proofs of claim, based on the most recent actuarial valuations provided to the Plan.

signatory employers are no longer in business and they are not otherwise covered and receiving benefits under the Coal Act. Pursuant to the 2011 NBCWA, and each predecessor NBCWA since 1993, signatory operators agreed to contribute to the 1993 Plan for the purpose of providing health care benefits to “orphan” retirees who meet the Plan’s eligibility requirements. *See* Article IX(2) of the UMWA 1993 Benefit Plan Agreement and Declaration of Trust, amended and restated as of July 1, 2011 (the “1993 Trust Document”), a copy of which is attached hereto as Exhibit 5. Jim Walter agreed to contribute to the 1993 Plan at the rate of \$1.10 per hour worked by its active employees. Ex. 4 at art. XX § (d).

28. The Trustees of the 1993 Plan make eligibility decisions for the 1993 Plan. The eligibility rules for the 1993 Benefit Plan are set out in Article IX(2) of the 1993 Trust Document, *see* Ex. 5 at 7-9, and the applicable NBCWA. Retirees who apply to receive their health benefits from the 1993 Plan are determined to be eligible if, in addition to individually meeting criteria relating to age and retirement date, work history and pension eligibility, their last employer signatory to the Wage Agreement, among other things, satisfies the following eligibility requirements:

- the employer must have been obligated to contribute to the 1993 Plan and must have actually contributed to the 1993 Benefit Plan at the standard rate;
- the employer must be obligated to contribute at the standard rate on the date when the employer is first considered to be “no longer in business”;
- the employer must have ceased all mining operations and ceased employing individuals under the applicable NBCWA, with no reasonable expectation that such operations will start up again; and
- the employer and any of its successors and assigns and any related division, subsidiary or parent corporation (regardless of whether they have signed a wage agreement) must meet the test for being “financially unable to provide the health and other non-pension benefits.” *See* Ex. 5 at 8.

29. To determine if the foregoing test is met, the UMWA Funds’ staff and the Trustees consider all of the relevant facts and circumstances, including whether the employer has

ceased all business activity and is financially unable to provide the benefits to its eligible retirees. The initial report regarding eligibility is contained in a Business Status Investigation conducted by the Funds' field auditors.

30. Under Article IX(1) of the 1993 Plan's Trust Document, the level of benefits to be received by eligible retired miners and their families from the 1993 Plan is determined by the Trustees "based on what it is estimated the [1993 Plan] can provide without undue depletion or excessive accumulation," and "shall be only such benefits as can be provided by the assets of the Trust." *Id.* at 6-7.

31. Thus, the 1993 Plan only provides benefits that can be supported by its assets and income. The health benefits as currently provided from the 1993 Plan are significantly below the level of benefits mandated by the Coal Act. For example, the Coal Act Plans require co-pays of \$5 for physician visits, have no deductible, and an annual out of pocket maximum of \$100 per family, while the 1993 Benefit Plan requires a co-pay of \$20 for physician visits and an annual out of pocket maximum of \$400 per family for physician office visits and an annual out of pocket maximum of \$1,600 per family for hospitalizations. For drug benefits, the Coal Act plans require a \$5 co-pay for a 30-day supply at a participating area pharmacy, with an annual out-of-pocket maximum of \$50 per family, whereas the 1993 Benefit Plan requires a \$15 co-pay, with an annual out-of-pocket maximum of \$600 per family.

32. The 1993 Benefit Plan relies on two main sources of funding. The benefits provided to beneficiaries enrolled in the 1993 Plan as of December 31, 2006 are funded by annual federal transfers mandated by statute in the Surface Mining Act, as amended in 2006. 30 U.S.C. § 1232. Benefits for the remaining beneficiaries, enrolled after December 31, 2006, are paid for by the collectively bargained contributions from signatory employers.

33. To the extent that sufficient employer contribution funding is not available to the 1993 Benefit Plan to provide the collectively-bargained level of benefits, the Trustees are required to reduce or eliminate these benefits.

34. At present, there are approximately 11,000 beneficiaries receiving health benefits from the 1993 Plan, which includes retired miners and their family members. Approximately 3,500 beneficiaries were enrolled on or after January 1, 2007. For these 3,500 beneficiaries, the 1993 Benefit Plan depends solely on contributing employers such as Jim Walter.

35. Jim Walter represents one of the largest employers contributing to the 1993 Plan. In 2014, Jim Walter contributed approximately \$3.6 million to the 1993 Benefit Plan, out of total contributions that year of \$16.1 million. Through the remaining term of the 2011 NBCWA, Jim Walter would be expected to contribute an estimated \$3.2 million to the 1993 Plan, at the rate of \$1.10 per hour worked.

36. If Jim Walter were to cease contributing to the 1993 Plan, this would mean a loss of approximately 22% of the 1993 Plan's contribution revenue, which is the only means of funding the benefits for approximately 3,500 beneficiaries currently receiving health benefits from the 1993 Plan. If these contributions cease, current projections show that the 1993 Plan will not have sufficient assets to provide benefits to these orphan beneficiaries through December 31, 2016. This loss of contribution income would require the Trustees of the 1993 Plan to significantly reduce or entirely eliminate benefits for these retirees and their families.

37. If Jim Walter not only ceases contributions to the 1993 Plan, but also ceases to provide health benefits to its retired employees and their families (approximately 2,629 individuals) those retirees and their families will lose their company-provided health care and be facing substantial harm. If such individuals apply for health benefits from the 1993 Benefit Plan,

their eligibility will be determined by the Trustees of the 1993 Plan based on the Plan's eligibility requirements. If the applicants are found not to be eligible for coverage by the 1993 Benefit Plan, they will be without a substantial medical benefit. If they are found to be eligible for benefits from the 1993 Benefit Plan, it will cause the post-2006 population of the 1993 Plan to nearly double, and will require a substantial reduction in benefits, or their elimination entirely.

38. The Funds' staff has estimated the effect upon the health care benefits of the 1993 Plan beneficiaries enrolled after December 31, 2006 if Jim Walter were to cease making contributions and if the eligible beneficiaries covered by the Debtors' individual employer health care plan were enrolled in the 1993 Plan. These estimates are based upon the per-beneficiary expense levels derived from the report of the Funds' health care actuaries as of August 2015, and the assumptions for contribution and population levels were drawn from an optimistic scenario provided by the actuaries at that time. The estimates are therefore conservative. If approximately 2,629 beneficiaries from the Debtors' plans were enrolled in the 1993 Plan, the Funds estimate that this would force a reduction in benefits from present levels of at least 43% in order to prevent a complete termination of benefits during the term of the 2011 NBCWA (to the extent such benefits are not eliminated entirely).

#### **F. The Account Plan**

39. The Account Plan is a benefit plan established by the NBCWA of 2011. The Account Plan was established to fund single sum payments in 2014, 2015, and 2016 to eligible beneficiaries of the 1974 Pension Plan who are pensioners, disabled pensioners, widows, and surviving spouses who satisfy the Account Plan's eligibility criteria.

40. The Account Plan is funded by employers who are signatory to the 2011 NBCWA or any other collective bargaining agreement entered into between the UMWA and an industry

employer that provides for the required contributions to and benefits from the Account Plan. The Account Plan is funded solely by twenty (20) contributing employers.

41. Prior to the 2011 NBCWA, certain annual one-time single sum payments were made from the 1974 Pension Plan to eligible beneficiaries. See 2007 NBCWA at art. XX §§ (1)(a)-(c) (“Pensions for Miners Retired Under the 1950 Pension Plan”); (2)(c)-(d) (“Pensions For Miners Who Retired Under The 1974 Pension Plan Prior To The Effective Date”); & (3) (“Pensions for Miners Who Retire On Or After The Effective Date”), relevant portions of which are attached hereto as Exhibit 6. These payments were in addition to the pension benefits that 1974 Pension Plan beneficiaries received on a monthly basis. Under the 2007 NBCWA, the annual one-time single sum payments from the 1974 Pension Plan ranged from \$455 to \$580 in 2010 and 2011. *Id.* at art. XX §§ (1) (a)-(b); (2)(c)-(d); (3). In 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. In the 2011 NBCWA negotiations, the UMWA and BCOA agreed to create a new plan, the Account Plan, which signatory employers would fund separately. *See* Ex. 4, 2011 NBCWA at art. XX § (c)(4). To assist in funding the Account Plan, no single sum payments were made to beneficiaries in 2012 or 2013. *Id.*

42. Approximately sixty percent (60%) of current 1974 Pension Plan beneficiaries receive monthly pension benefits of \$500 or less. 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.

43. 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. On or about November 1, 2015, the Account Plan made payments ranging from \$392 to \$500.

44. Signatory employers currently are required to contribute \$1.56 per hour to the Account Plan for each hour worked by their active employees and \$.30 per ton of bituminous coal procured or acquired by the employer after January 1, 2012. *Id.* at art. XX §§ (d)(1)(iii)-(iv)(c).

45. Jim Walter 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, Jim Walter paid \$147,416 in differential payments to its eligible beneficiaries in 2014 and \$164,121 in differential payments in 2015. Jim Walter is projected to contribute an estimated \$4.4 million for the calendar year 2015, and \$3.9 million for calendar year 2016. This projection is based upon an assumption that hours worked by industry employers will decline at the rate of 3% per year over the course of the 2011 NBCWA.

46. As noted above, the single sum annual payments from the Account Plan are projected to be in the amount of \$455 or \$580 for each eligible 1974 Pension Plan beneficiary,



with the variance depending on the circumstances of the applicable beneficiary's retirement. If the assets of the Account Plan are insufficient to make the projected payments, all of the beneficiaries of the Account Plan whose last signatory employer is no longer operating ("orphans") will receive reduced payments. There are approximately 51,000 Account Plan eligible 1974 Pension Plan beneficiaries whose last signatory employer is no longer operating. In addition, if the assets of the Account Plan are insufficient to make the projected payments, contributing employers, including Jim Walter, will have an obligation to make up the difference by making individual employer differential payments to their own eligible beneficiaries whose last signatory classified employment was with the employer or related entities in the same controlled group of companies that includes the employer.

47. During the first two years of the NBCWA, Jim Walter contributed approximately 22% of all of the contributions received by the Account Plan from all employers. Only one controlled group of employer companies contributed more than Jim Walter contributed.

48. If Jim Walter terminates all contributions to the Account Plan, a significant loss of funding will result, which will increase the likelihood that approximately 51,000 eligible "orphan" beneficiaries of the Account Plan will not receive the full amount of their projected payments. Because the base amount of the single-sum payment will be lower, the remaining contributing employers (other than Jim Walter) will have to make greater differential payments than otherwise would be required. In addition, if Jim Walter terminates its contributions to the Account Plan, it has not been resolved by the settlors of the Account Plan whether Jim Walter's beneficiaries will be eligible to receive benefits from the Account Plan. There is no alternate source of funding for these payments.

## **G. The CDSP**

49. The CDSP is a defined contribution (individual account) 401(k) plan qualified under Section 401(a) of the Internal Revenue Code. It was established through collective bargaining between UMWA and the BCOA.

50. Pursuant to the terms of the 2011 NBCWA and to that certain rate letter, dated November 30, 2015, from the BCOA to the Trustees of the CDSP, a copy of which is attached as Exhibit 7, Jim Walter is obligated to contribute \$0.055 per employee for each hour worked from November 1 until December 31, 2015, and \$0.0322 per hour for January through December 31, 2016 to cover the administrative expenses of the Plan. *See* Ex. 4, 2011 NBCWA at art. XXB § e; Ex. 7. In calendar year 2014, Jim Walter contributed \$93,430 to the CDSP for these administrative costs. Jim Walter is projected to contribute an estimated \$83,900 for the calendar year 2015, and \$79,500 for calendar year 2016. In addition, Jim Walter is obligated to contribute to the CDSP \$1.50 per hour worked by each new inexperienced miner hired by Jim Walter on or after January 1, 2007; \$1.50 per hour worked by each new inexperienced miner hired by Jim Walter on or after January 1, 2012; \$1.50 per hour for each miner employed by Jim Walter who has 20 or more years of credited service; and \$1.50 per hour for each miner of Jim Walter who opts out of the 1974 Pension Plan on or after January 1, 2012. *See* Ex. 4, 2011 NBCWA at art. XXB § d. If Jim Walter terminates all contributions to the CDSP, these miners will not receive these payments to their accounts.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: December 9, 2015

/s/ Dale Stover

Dale Stover

# EXHIBIT B

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ALABAMA

IN RE: . Case No. 15-02741-TOM  
WALTER ENERGY, INC., .  
et al., . Robert S. Vance Federal Building  
1800 Fifth Avenue North  
Birmingham, AL 35203  
Debtors. . February 4, 2016  
1:30 p.m.

TRANSCRIPT OF MOTION HEARING

BEFORE HONORABLE TAMARA O. MITCHELL  
UNITED STATES BANKRUPTCY COURT JUDGE

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# I N D E X

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1 THE COURT: The folks in the courtroom first, please.

2 MR. BENDER: Yes, good afternoon. Jay Bender for the  
3 debtors. Along with me I've got John Watson, Cathy Moore and  
4 James Bailey from my firm. We have Diane Meyers from Paul  
5 Weiss as well. I also would like to introduce a few other  
6 folks. We've got Bill Harvey from the debtors. We have Adam  
7 Schlesinger with PJT Partners. And then finally Chuck Ebetino  
8 who is a representative of the buyers.

9 THE COURT: Chuck?

10 MR. BENDER: Ebetino, E-b-e-t --

11 THE COURT: E-b?

12 MR. BENDER: E-b, as in boy, e-t-i-n-o.

13 THE COURT: Okay.

14 MR. BENDER: Thank you.

15 THE COURT: Thank you.

16 MR. CARSON: Good afternoon, Your Honor. Chris  
17 Carson and Mike Hall from Burr Forman, Lisa Beckerman from Akin  
18 Gump on behalf of the Steering Committee and Coal Acquisition.

19 THE COURT: Thank you.

20 MR. BRAZEAL: Good afternoon, Your Honor. Ellis  
21 Brazeal as local counsel for the two sureties, Aspen and  
22 American. I'm sorry, Arch, Your Honor. Scott Zuber's on the  
23 telephone with Aspen and Mike Collins of the Manier Herod (sic)  
24 firm is in court today on behalf of Arch.

25 THE COURT: Okay. Thank you.

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1 MR. SPARKS: Morning, Judge. Dan Sparks, Bill  
2 Bensinger of Christian & Small here for the Official Committee  
3 of Unsecured Creditors, and I believe you have phone  
4 participants of the Morrison Foerster firm.

5 THE COURT: Thank you.

6 MR. SPARKS: Thank you.

7 MR. DAVIES: Good afternoon, Your Honor. George  
8 Davies for the UMWA Combined Benefit Fund and the UMWA 1992  
9 Benefit Plan, and I believe we have some of my colleagues from  
10 Morgan Lewis on the phone as well.

11 THE COURT: All right. Thank you.

12 MR. CIANTRA: Good afternoon, Your Honor. I'm Tom  
13 Ciantra with the law firm Cohen, Weiss and Simon, LLP. We're  
14 counsel to the United Steelworkers and on the phone is David  
15 Jury who is Associate General Counsel of the Steelworkers  
16 from --

17 THE COURT: Hang on, let me find you all. Page -- I  
18 know they're on here.

19 MR. CIANTRA: I don't believe that our objection is  
20 noted on the calendar.

21 THE COURT: I've seen the objection though, but I'm  
22 looking on the appearance list.

23 Okay. Tell me again who's here with you for the  
24 Steelworkers?

25 MR. CIANTRA: Myself, Thomas Ciantra, C-i-a-n-t-r-a,

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1 and the firm is called Cohen, Weiss and Simon, and on the phone  
2 is David Jury, as in jury trial.

3 THE COURT: Okay. Thank you.

4 MR. CIANTRA: Thank you.

5 MR. HAHN: Patton Hahn and Matt Cahill from Baker  
6 Donelson for Pardee Minerals and with us today is Jeff Allen,  
7 Senior Vice President of Pardee Minerals.

8 THE COURT: Thank you.

9 MR. McARDLE: Walter McArdle for Marco and Fred  
10 Garfield for Marco International, LLC and Everett Cook.

11 THE COURT: Okay.

12 MR. McCARTHY: Good afternoon, Your Honor. Milton  
13 McCarthy for the Alabama Surface Mining Commission.

14 THE COURT: Thank you, Mr. McCarthy.

15 MR. CORBETT: Judge, Tom Corbett, Bankruptcy  
16 Administrator.

17 THE COURT: Thank you.

18 MR. FINGERHOOD: Good afternoon, Your Honor. Karl  
19 Fingerhood, U.S. Department of Justice on behalf of the  
20 Environmental Protection Agency. On the phone is my co-counsel  
21 Alan Tenenbaum.

22 THE COURT: Thank you.

23 MR. FINGERHOOD: Thank you.

24 MR. BARRETT: Afternoon, Your Honor. Kevin Barrett,  
25 law firm of Bailey & Glasser, Special Assistant Attorney

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1 General for the State of West Virginia.

2 THE COURT: Thank you.

3 Any other counsel present in the courtroom that  
4 wishes to make an appearance?

5 For those on the phone we will use the CourtCall list  
6 as the appearances.

7 All right, Mr. Bender, what do you want to take up  
8 first?

9 MR. BENDER: I think we'd like to take up the item  
10 number 2, the motion nunc pro tunc to approve the Coke supply  
11 agreement.

12 THE COURT: Okay.

13 MR. BENDER: The counsel for the counterpart to that  
14 contract is on the phone and his time is limited, and we had no  
15 objections to that motion. It seeks approval of a new Coke  
16 supply agreement by Walter Coke and that was a core feature of  
17 the marketing of Walter Coke and I think it's a significant  
18 factor in the sale offer that the Court will be considering  
19 today to purchase Walter Coke and the other assets.

20 I'm pleased I can reveal the identity of the  
21 counterparty which is Arcelor Mittal Indiana Harbor, LLC, and  
22 again there are no objections to this motion. Court approval  
23 of the agreement is required as condition to it. And I'm  
24 please to say too that Arcelor informed us this morning that  
25 they consent to the assignment of this agreement to the buyer

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1 as part of the sale.

2 THE COURT: Okay.

3 MR. BENDER: So that was requirement under their  
4 agreement and -- so I believe that Elliot Smith for Arcelor is  
5 on the phone and don't know if he has anything to say.

6 THE COURT: Mr. Smith, anything to add?

7 MR. SMITH: Thank you, Your Honor. Thank you for  
8 allowing me to appear telephonically. I don't have anything to  
9 add other than to voice my support for what counsel just said.  
10 We consent to the assignment.

11 THE COURT: Thank you.

12 Any counsel present in the courtroom having any  
13 objection to the motion to approve the supply agreement?

14 Any counsel on the phone?

15 Then that motion is granted.

16 And Mr. Bender, somebody will need to send the  
17 proposed order to the E-order box.

18 If you have not seen that proposed order and you wish  
19 to see it before it's submitted to the E-order box, let either  
20 Mr. Bender or Ms. Moore or Mr. Bailey know before you leave the  
21 courtroom today.

22 MR. BENDER: Thank you.

23 THE COURT: Thank you.

24 MR. BENDER: Next up we'd like to move to the sale  
25 motion and as a preliminary matter I'd just like to thank the

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1 Court and probably especially the court staff for your  
2 indulgences over the past few weeks as we worked to get here  
3 today. And we feel like the wait was well worth it. We're  
4 very pleased about the deal that we've gotten from the Court  
5 and are happy to present it. We think it's -- you know, we --  
6 a real home run when it comes to the deal, the best deal that  
7 we could get, as it includes all four of the non-core assets,  
8 you know, the non- -- the four lots of non-core assets,  
9 includes the assumption of material liabilities and really all  
10 I've heard is the best prospect for continued employment for  
11 hundreds of employees associated with those lots.

12           The lots as the Court knows, we've got lot 3 which is  
13 the West Virginia assets, lot 4 is Taft, lot 8 is a select  
14 group of JWR assets and then finally, lot 9, the Walter Coke  
15 operations here in Birmingham.

16           The buyer is Seminole Coal Resources and two of its  
17 affiliates. We introduced Mr. Ebetino a little bit earlier and  
18 he will tell the Court more about the buyers in a few minutes  
19 when he takes the stand.

20           We do ask the Court to take the entire record of the  
21 case into consideration. The Court has heard lengthy testimony  
22 about the sales of coal acquisition and about the marketing  
23 process employed by PJT leading up to the coal acquisition deal  
24 and that's the same -- that testimony applies equally to the  
25 non-core assets. To supplement that record, we introduced with

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1 -- filed with the Court yesterday a declaration from Mr.  
2 Schlesinger with PJT --

3 THE COURT: As opposed to Mr. Schlisner (phonetic)  
4 who is somebody local that your firm --

5 MR. BENDER: That was a long time ago.

6 THE COURT: That was a long time ago, Mr. Bender, but  
7 I have not --

8 MR. BENDER: We were all a lot younger back then.

9 THE COURT: I know but I have -- before the time of  
10 many of you at your firm but I remember Mr. Schlisner as well  
11 as now I'm introduced to Mr. Schlesinger.

12 MR. BENDER: I think I probably pronounced both names  
13 about the same so -- but Mr. Schlesinger is a colleague of Mr.  
14 Zohan (phonetic) at PJT Partners and -- and again, he is here.  
15 We will rely upon his declaration, but he's available if  
16 anybody has questions for him.

17 I think a testament to the quality of the offer and  
18 that we have in front of the Court, the quality of the deal is  
19 reflected by the situation with the objections. In reviewing  
20 the objections, we've concluded really most -- think really all  
21 the material objections have been resolved. There were a lot  
22 of objections filed back in December, a lot of pro se  
23 objections. I think most of those pertain to the coal  
24 acquisition deal and have been dealt with, and so I don't think  
25 we don't intend to address those. We'll just address those

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1 that we think are germane to this situation.

2 With respect to the United Steelworkers, they filed  
3 an objection back in December and we were pleased to report  
4 that -- you know, it's my understand that the buyer earlier  
5 this week reached an agreement with the USW about a new CBA.  
6 And so we've worked with the USW, we've incorporated language  
7 into the order and we believe that that objection is resolved.  
8 So we're --

9 THE COURT: Mr. Ciantra, you agree?

10 MR. CIANTRA: Yes, Your Honor. Our objection has  
11 been resolved. In fact we are supportive of the transaction.  
12 It was a -- two agreements that were reached with --

13 THE COURT: The folks on the phone can't hear too  
14 well if you're not at the podium. I -- the proposed -- the new  
15 redline version of the proposed order does indicate that there  
16 was a CBA agreement on February the 2nd, so I'm assuming you  
17 had seen and consented to some changes in that order.

18 MR. CIANTRA: Yes, Your Honor, we saw the changes  
19 that are at paragraph 23 that referenced the agreements that  
20 were reached earlier this week between the local negotiating  
21 committee and the purchaser. One of those agreements -- under  
22 one of those agreements the purchaser has committed to hire the  
23 existing workforce so over a hundred employees will continue to  
24 work at Walter Coke and they also reached a tentative  
25 collective bargaining agreement that would govern the

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1 operations once the -- the transaction closes. That agreement  
2 is subject to membership ratification. There's going to be a  
3 meeting of the membership here in Birmingham on Friday to  
4 consider that agreement.

5 THE COURT: As in tomorrow?

6 MR. CIANTRA: As in tomorrow, ma'am. Yes, ma'am. So  
7 at this point, our objection's been met --

8 THE COURT: But the agreement will be recommended by  
9 the representatives?

10 MR. CIANTRA: That is my understanding --

11 THE COURT: Okay.

12 MR. CIANTRA: -- Your Honor. Yes. The local  
13 negotiating committee reached the agreement with the purchaser  
14 subject to membership ratification the -- the transition  
15 agreement under which employees are to be hired is not subject  
16 to membership ratification but the terms of the agreement going  
17 forward are. That will be presented to the membership on --  
18 tomorrow on Friday and with that our objection has been  
19 resolved and we're supportive of the transaction.

20 THE COURT: Thank you, Mr. Ciantra.

21 MR. CIANTRA: You're welcome.

22 THE COURT: All right. Mr. Bender?

23 MR. BENDER: The second objection that we're pleased  
24 to report that we've resolved is the objection filed by the  
25 Department of Justice on behalf of the Environmental Protection

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1 Agency. They filed an objection earlier this week seeking  
2 confirmation I think primarily that the purchaser of Walter  
3 Coke's assets would also be the same entity that assumed the  
4 liabilities of Walter Coke, including the liabilities with  
5 respect to the RCRA order that is in the record.

6 We have confirmed or Mr. Ebetino has confirmed and  
7 discussed with the DOJ's attorney present that the -- it will  
8 be one in the same entity, that that entity will be ARP  
9 compliant Coke LLC, and so it will be the same entity that  
10 acquires the assets and assumes the liabilities.

11 So that is something where again I think Mr. Ebetino  
12 will confirm that in his testimony and we'll be pleased again  
13 to resolve that objection.

14 THE COURT: And Mr. Fingerhood, to you agree that  
15 that information resolves your limited objection?

16 MR. FINGERHOOD: Yes, Your Honor, I think we will  
17 await the testimony, but assuming it --

18 THE COURT: Assuming the testimony is consistent with  
19 what's --

20 MR. FINGERHOOD: Consistent with --

21 THE COURT: -- been represented to you, you're good?

22 MR. FINGERHOOD: Right. That's right, Your Honor.

23 THE COURT: Thank you, Mr. Fingerhood.

24 MR. FINGERHOOD: Thank you.

25 THE COURT: Appreciate it.

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1 Mr. Bender?

2 MR. BENDER: Next, the two sureties for the Walter  
3 companies, Arch and Aspen, they both filed objections -- I  
4 believe limited objections back in December to the motion.  
5 We've been working with them on the terms of sale order and  
6 also the terms of what is referenced as the surety collateral  
7 agreement and the asset purchase agreement which sets forth  
8 terms under which we've agreed to address their objections and  
9 also to facilitate the sale. We believe that we've agreed on  
10 the language, language in the order that's acceptable to the  
11 sureties and to the buyer and to the debtors and the other  
12 parties as well as agreed to the terms of a surety collateral  
13 agreement.

14 We filed the draft surety collateral agreement  
15 earlier today. I don't know if the Court has had a chance to  
16 review that yet. We do have one change we vetted with material  
17 parties impacted by that agreement and we believe that we've  
18 got that agreement finalized. We are working on finalizing  
19 some schedules to that agreement, but that the -- the support  
20 of the sureties to this transaction's important and again we're  
21 pleased that we can report that we've resolved those  
22 objections --

23 THE COURT: And that will be primarily Mr. Brazeal's  
24 client?

25 MR. BENDER: Mr. Brazeal is local counsel for both

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1 Aspen and Arch.

2 THE COURT: And you all agree with --

3 MR. BRAZEAL: I'll let Mr. Collins speak, Your Honor,  
4 on behalf of --

5 THE COURT: Okay.

6 MR. BRAZEAL: -- Arch and then Mr. Zuber's on the  
7 phone.

8 THE COURT: Thank you.

9 MR. COLLINS: Thank you, Your Honor. Michael Collins  
10 for Arch Insurance. This has been -- the sureties play a  
11 pivotal role in this agreement and part of the reason is  
12 because the sureties aren't obligated to --

13 THE COURT: Been there done that, Mr. Collins, okay,  
14 so kind of move --

15 MR. COLLINS: Well the issue is --

16 THE COURT: We've been through all that already.

17 MR. COLLINS: -- in order for us to do that, we have  
18 to get essentially consents from party that's not really a  
19 party to this proceeding; that is the LC issuers. And so  
20 what's in this agreement, just to make it clear on the record,  
21 that we're willing to go down this road, draw collateral and  
22 give the collateral to somebody else other than the debtor but  
23 only if we have some -- a confirmation from the LC issuers that  
24 we can do a partial draw on the letter of credit without  
25 prejudicing our rights to make further draws on the letter of

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1 credit, item one. And that our delivery of this collateral to  
2 a non-debtor in the absence of a claim is without recourse to  
3 us by any party.

4           So we deliver this collateral to the buyer, Seminole,  
5 and the -- in this language -- in the order is language that  
6 says it's without recourse by any party to us. Now maybe  
7 recourse to the debtor, maybe recourse to somebody else, but in  
8 order for us to be able to do this, we need to be sure that  
9 we're not doing something that then we may get sued for down  
10 the road.

11           So that's in the order, very important to us, but I  
12 want to make it clear on the record. But otherwise we're fully  
13 in agreement --

14           THE COURT: Thank you very much, Mr. Collins.

15           MR. COLLINS: -- with the proposal. Thank you.

16           THE COURT: Mr. Bender?

17           MR. BENDER: I don't know if Mr. Zuber who represents  
18 Aspen --

19           THE COURT: Mr. Zuber, anything to add?

20           MR. ZUBER: No, Your Honor. We agree with everything  
21 Mr. Collins said and we're in agreement with the form of order  
22 as well as the collateral agreement. Thank you.

23           THE COURT: Thank you, Mr. Zuber.

24           MR. BENDER: Your Honor, that leaves a few remaining  
25 objections. One is the West Virginia Department of

1 Environmental Protection and they're here today and they can  
2 kind of address their position probably better than I. I think  
3 it may be --

4 THE COURT: And I'm assuming we'll do that after the  
5 testimony in case you have any questions of the witness --

6 UNIDENTIFIED SPEAKER: Yes, Your Honor --

7 THE COURT: -- or witnesses? Thank you.

8 MR. BENDER: That leaves three where I think -- three  
9 objections which are active. The first one has to do with the  
10 Coal Ac funds and I think the issues that they've raised  
11 they've raised before in connection with the Coal Acquisition  
12 transaction and other matters. For -- you know, we stand by  
13 the record on those issues and ask the Court to overrule that  
14 objection. I'm assuming the Court does not need argument --

15 THE COURT: I'll allow Mr. Davies to make any initial  
16 or renew -- or he can just renew his objections when we get to  
17 the end.

18 MR. DAVIES: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Davies.

20 MR. BENDER: That leaves the two objections that were  
21 filed by Pardee and Marco Resources. I guess there is a third  
22 that was just filed a few minutes before we walked over here by  
23 I believe Everett Cook, a principal of Marco.

24 With Pardee they objected -- that they filed an  
25 objection I believe back in December about a cure dispute and I

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1 think they are looking to move forward with that today. We  
2 don't -- we're not ready to move forward today, nor is the  
3 buyer who just signed an asset purchase agreement four days ago  
4 will be the one who pays that cure amount is that entity ready  
5 to move forward today.

6           The bid procedures anticipate exactly this situation  
7 and said that there was a mechanism for resolving cure disputes  
8 post closing and that that involved putting money up and  
9 putting it into reserve to cover the cure amount and then to  
10 litigate the issue later, so with that we would ask the Court  
11 to refer to the bidding procedures and to follow those and, you  
12 know, later in the hearing we can agree on a time to come back  
13 and to have a hearing on the cure dispute if the parties cannot  
14 resolve that.

15           Earlier this week they filed a supplemental  
16 objection, another objection, objecting to -- really to the  
17 adequate assurance of future performance by the buyer with  
18 respect to the -- I believe they are the Maple leases that are  
19 to be assumed by the buyer under the agreement and that are the  
20 subject of the cure dispute. Mr. Ebetino will testify here in  
21 a few minutes and we will satisfy our burden on the -- on  
22 adequate assurance.

23           With respect, I believe that they're objection also  
24 states that they're uncertain about what other contracts or  
25 what other leases to which they might be a party may or may not

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1 be assumed and we have made it be known that the Maple leases  
2 are to be assumed, the other ones the buyer is reviewing and  
3 will make a determination about those and so that that issue  
4 really is not ripe for the Court at this point.

5 So again, these are the party objections with respect  
6 to the cure dispute that should be deferred until a later date  
7 in accordance with the bid procedures --

8 THE COURT: Okay, I think that one that has to do  
9 with the Maple folks is the Pardee objection.

10 MR. BENDER: Correct.

11 THE COURT: All right, but as I read the Marco  
12 objection which has now been joined in by Mr. Kerr (phonetic),  
13 they are complaining about --

14 MR. BENDER: That's correct.

15 THE COURT: -- an opportunity to bid yackety yackety.

16 MR. BENDER: I'm sorry if I --

17 THE COURT: Okay.

18 MR. BENDER: -- conflated, but --

19 THE COURT: Okay.

20 MR. BENDER: -- I didn't mean to, I was just  
21 addressing party --

22 THE COURT: So with respect to both, at the end or  
23 conclusion of whatever evidence or testimony you want to put  
24 on, I'll hear from whoever -- Mr. Cahill and/or Mr. McArdle  
25 when we get to that point. So those are the two that -- or at

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1 least out there, although I understand the debtor disputes  
2 whether at least one or both of those have any real validity.

3 MR. BENDER: That's right --

4 THE COURT: Okay.

5 MR. BENDER: -- and with Marco we'll just -- Marco --  
6 the debtor objects to their standing, questions their standing  
7 to object to sale. They're nothing more than a disgruntled  
8 bidder that has no pecuniary interest in this case and the case  
9 law I think is strong on this point and clear on this point  
10 that a disgruntled bidder without a pecuniary interest does not  
11 have standing to object to a sale. And in this district I  
12 would refer to the Gulf States Steel case, 285 B.R. 739, that  
13 supports that and it cites ample authority, case law from other  
14 jurisdictions as well as hornbook law on that point. So we do  
15 object to Marco to -- we'd move to strike their objection on  
16 the grounds that they do not have standing.

17 THE COURT: In the joinder filed by Mr. Cook, I don't  
18 know if it's accurate or not, but the very first line reads:  
19 Comes now Everett Cook, comma, creditor in the above styled  
20 bankruptcy case, comma, yackety yackety. Is Mr. Cook in fact a  
21 creditor to your knowledge?

22 MR. BENDER: We've not had a chance go back and  
23 confirm whether --

24 THE COURT: Okay. So you don't know?

25 MR. BENDER: I -- we are familiar with Mr. Cook. I

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1 will not raise question about whether he asserts a claim  
2 against the debtor. I believe he asserts a claim against the  
3 debtors.

4 THE COURT: Okay. I'll address that to Mr. McArdle  
5 later.

6 MR. BENDER: Okay. And again I -- the -- I know the  
7 Court has read Mr. Schlesinger's declaration and I won't  
8 regurgitate or I won't belabor it, but again, there's ample  
9 authority for this deal to be approved. As the declaration  
10 sets forth, there are hundreds of jobs that could be saved,  
11 there's over -- I believe over 40 million or around 38 million  
12 of liabilities are due to be assumed and add to that the  
13 assumption of the RCRA order obligations with the EPA.

14 It's really a remarkable deal to have one buyer, one  
15 qualified buyer who is going to come in and acquire all the --  
16 substantially all of the remaining assets and do so in a very  
17 short period of time. We're excited about that, especially  
18 when we think about the alternative, and the Court has heard  
19 ample testimony about the alternatives to finding a buyer for  
20 the core assets and the reasoning here the same result really  
21 would ensue if there's not a buy -- a deal to be had.

22 For these entities there would be a wind down and how  
23 that would go, we would do our best to wind it down in the most  
24 prudent manner possible, but, you know, in the context of  
25 Walter Coke and Taft and the West Virginia assets, we much,

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1 much prefer to find a deal where they can continue as going  
2 concerns rather than to pursue a wind down and are happy to  
3 present a deal that affords that with one buyer who wants to  
4 close quickly and has the ability to do so.

5 THE COURT: All right, Mr. Bender, I have the  
6 declaration that's been filed. Are you planning to call Mr.  
7 Schlesinger as a witness or only have him available in the  
8 event of anyone having any cross-examination?

9 MR. WATSON: Cross-examination.

10 MR. BENDER: Cross-examination.

11 THE COURT: So we have a declaration of Mr.  
12 Schlesinger that was filed yesterday. It is fairly short and  
13 sweet and to the point. Does any counsel present in the  
14 courtroom wish to have Mr. Schlesinger sworn in so they have an  
15 opportunity to cross-examine him?

16 MR. GARFIELD: Yes.

17 THE COURT: Mr. Garfield?

18 MR. GARFIELD: Yes.

19 THE COURT: Okay, anybody else?

20 UNIDENTIFIED SPEAKER: Mr. Hahn does too.

21 THE COURT: Okay.

22 Mr. Schlesinger, come on up and join us.

23 So you all have no direct examination him at this  
24 point?

25 MR. BENDER: We do not, Your Honor.

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1 UNIDENTIFIED SPEAKER: Not of him.

2 THE COURT: Okay.

3 COURTROOM DEPUTY: Raise your right hand, please.

4 ADAM SCHLESINGER, DEBTOR'S WITNESS, SWORN

5 COURTROOM DEPUTY: Please state your name and address  
6 for the record. There's the microphone.

7 THE WITNESS: I'm having so much fun watching Jay  
8 struggle with it. My name is Adam Schlesinger and I live at  
9 535 Dean Street, Apartment 314 in Brooklyn, New York.

10 THE COURT: All right, Mr. Garfield.

11 MR. GARFIELD: Judge, unless it makes any particular  
12 difference, I'll go ahead and get started.

13 CROSS-EXAMINATION

14 BY MR. GARFIELD:

15 Q Mr. Schlesinger, I'm Fred Garfield. I'm a local counsel  
16 for Marco Resources, LLC and Mr. Everett Cook, along with my  
17 partner Walter McArdle --

18 THE COURT: Mr. Garfield, if I could interrupt you  
19 briefly and direct to you the question that I raised earlier,  
20 and on what basis does Mr. Cook allege that he is a creditor of  
21 one or more of these debtor entities?

22 MR. GARFIELD: Judge, I -- I'll let Walter address  
23 that, Your Honor.

24 THE COURT: Mr. McArdle?

25 MR. McARDLE: Judge --

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1 THE COURT: If you'll come to the podium if you don't  
2 mind, the folks on the phone don't hear as well as you're at  
3 the podium.

4 MR. McARDLE: Yes, Your Honor. Mr. Cook had a  
5 royalty interest in Maple, the Maple mine. He received a  
6 bankruptcy notice. He has filed a claim for -- let me see,  
7 twenty-eight six fifty-five fifty and --

8 (Counsel confer)

9 MR. McARDLE: We have a copy of the claim trying to  
10 make sure that was filed. We just got involved 48 hours ago,  
11 Judge, but it's dated --

12 THE COURT: But that's the basis for the allegation  
13 that he's a creditor is that he assets that he has a royalty  
14 interest?

15 MR. McARDLE: Yes, and he did receive a notice of the  
16 bankruptcy individually.

17 THE COURT: And that would be in the West Virginia  
18 property?

19 MR. McARDLE: The Maple coal mine.

20 THE COURT: Okay. Thank you.

21 MR. McARDLE: Right. Thank you, Judge.

22 THE COURT: All right, Mr. Garfield.

23 BY MR. GARFIELD:

24 Q Mr. Schlesinger, if you would -- I've read the declaration  
25 as have our clients, but if you would just re-describe as

1 succinctly as you could what your engagement was and particular  
2 with respect to the invitation to interested bidders and what  
3 the vetting process consisted of.

4 A Sure. We were hired as the investment banker to the  
5 debtors to assist them in as -- as investment banker in both  
6 the context of their restructuring as well as any M&A efforts.

7 Q Okay. And then -- and so -- well continue on if you  
8 would. In terms of the solicitation of offers for bulk assets  
9 to include lots and non-core assets and particularly --

10 THE COURT: Mr. Garfield, with all due respect --

11 MR. GARFIELD: And --

12 THE COURT: -- I'm going to give you a little bit of  
13 leeway, but to be honest with you, the other dozens of us in  
14 this courtroom and dozens of us on the phone have heard all of  
15 this testimony --

16 MR. GARFIELD: Yes, ma'am.

17 THE COURT: -- ad nauseam.

18 MR. GARFIELD: Yes, ma'am.

19 THE COURT: So I don't plan, to the tune of 60 or 70  
20 lawyers involved in this case, to let this go on so --

21 MR. GARFIELD: I understand.

22 THE COURT: -- Mr. Schlesinger, if you would give him  
23 a brief overview -- other than that, everything was available  
24 in this record and you all could have found it.

25 MR. GARFIELD: Yes, ma'am.

1 THE COURT: So --

2 MR. GARFIELD: Thank you.

3 BY MR. GARFIELD:

4 Q Go ahead if you would just what was the bid process to be?

5 THE COURT: In three minutes or --

6 THE WITNESS: Sure.

7 THE COURT: -- less, Mr. Schlesinger.

8 MR. GARFIELD: Three minutes or less. Thank you,

9 Mr. --

10 THE WITNESS: I will do my best to be --

11 MR. GARFIELD: Thank you, Judge.

12 THE WITNESS: -- brief, Your Honor. Around the  
13 middle of August we began reaching out to potential bidders  
14 knowing that at the time the RSA we had in place with the  
15 Steering Committee had certain contingencies in which we'd be  
16 pursuing an M&A process and we wanted to be prepared for that.

17 In line with that, we started reaching out to  
18 potentially interested parties and distributing teasers that  
19 had information on Walter Energy and its case that was already  
20 released to the public to see if -- to see if there was an  
21 interest in further continuing in diligence efforts.

22 At some point in the middle of October we went back  
23 out to bidders, asked them to give us what we called a  
24 confirmation of interest and identify whether or not they had  
25 the financial backing to engage in a transaction and what

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1 individual lots within the bidding process they'd be interested  
2 in looking at. Once we received those confirmations from  
3 bidders, that's when they received access to a data room.

4           After that on November 10th we had asked bidders to  
5 give an indicative proposal with a view of what level of  
6 valuation they'd be looking at. And following that we had  
7 initially a bid -- a final bid deadline on the non-core assets  
8 of January 5th, which was subsequently extended to January  
9 12th.

10 BY MR. GARFIELD:

11 Q     Marco Resources, LLC was identified as a possible  
12 candidate, correct?

13 A     Marco Resources reached out to PJT. I believe it was  
14 December 2nd.

15 Q     Okay. And on that basis you disseminated materials to  
16 Marco Resources?

17 A     We -- we negotiated an NDA with Marco Resources. I think  
18 several days later they received a confidential information  
19 memorandum.

20 Q     All right. And they expressed only an interest in the --  
21 in lot 3; is that correct?

22 A     About a week after getting the confidential information  
23 memorandum, they just stated they posited to us that they were  
24 interested in lot 3.

25 Q     All right. But it was always contemplated that at least

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1 from a solicitation standpoint there may be partial proposals,  
2 partial interest as opposed to a bulk sale or bulk purchase  
3 proposal of all of the assets; am I right?

4 A Do you mean did we contemplate the possibility that the  
5 highest and best bid would be for different individual lots?

6 Q Yes.

7 A Yes, and --

8 Q Okay.

9 A -- we ultimately did sell the assets in multiple sales.  
10 One is the Coal Acquisition sale --

11 Q All right.

12 A -- and then the Seminole/ERP agreement.

13 Q All right. What about with respect to lot 3? Was it  
14 within the realm of possibility as it was disclosed and  
15 disseminated for interest creating purposes that lot 3 was an  
16 asset that would be sold standing alone?

17 A The possibility that lot 3 --

18 Q Okay.

19 A -- would be sold standalone --

20 Q Okay.

21 A -- was something that was contemplated.

22 Q Okay. Who did you communicate with at Marco Resources; do  
23 you recall?

24 A I'm sure I don't recall every single person at Marco  
25 Resources who was --

1 Q Okay.

2 A -- involved. I do recall Jamie Ferguson being involved.

3 Q Right. Okay. So Mr. Ferguson --

4 A And I believe John Wooten (phonetic).

5 Q All right. Mr. Wooten is counsel for Marco; is that  
6 right?

7 A That's my understanding.

8 Q Okay. All right. How did Mr. Ferguson, who's present in  
9 the courtroom today, express interest in lot 3?

10 A I received an email from Mr. Ferguson.

11 Q All right.

12 A He had said that he was interested in evaluating assets of  
13 Walter Energy. He did not tell me at that time he was  
14 interested in lot 3. I believe that happened -- I want to say  
15 a week and a half later.

16 Q And how did that occur?

17 A How did he tell us he was interested in lot 3?

18 Q Yeah, and -- right, at what point did he disclose lot 3 as  
19 an asset that Marco would be interested in --

20 A I believe it was over email --

21 Q -- doing due diligence?

22 A -- to one of my colleagues.

23 Q Okay. And they requested a due diligence -- they  
24 requested paperwork, did they not, and/or a protocol as to how  
25 to generate or indicate interest, formal interest?

1 A At that point I believe their request was to schedule a  
2 site tour and to have access to the data room. As part of our  
3 procedures, they had given a confirmation of interest in what  
4 assets they were interested in diligencing. We also required a  
5 statement or some evidence of the financial capability to  
6 pursue a transaction. I believe following that December 11th  
7 email the engagement back and forth with Marco was around  
8 getting us comfortable that they had the financial wherewithal  
9 and the financial backing to engage in a transaction. I should  
10 say in the immediate aftermath of that. I believe we did  
11 eventually open up the data room to them once -- once we had  
12 those assurances.

13 Q Well I'm going to assume from that answer that they  
14 provided the requisite assurances?

15 A On December 30th.

16 Q Okay. All right. And so they were invited for -- they  
17 were invited onto the lot, is that right, for inspection  
18 purposes?

19 A That's right. I believe they did a site tour on January  
20 5th.

21 Q Okay, what -- were you present for site tour?

22 A I was not.

23 Q Okay.

24 A Other colleagues at PJT were but I was not.

25 Q Okay. And what was a site tour to consist of? What -- as

1 you understood it, what would occur on a site tour?

2 A An inspection of the facilities to the extent safe and  
3 allowable.

4 Q Okay. Do you have any understanding of what the site tour  
5 experienced and/or offered to Marco Industries was? Let me  
6 rephrase that. Are you familiar with the phrase windshield  
7 inspection?

8 A I became familiar with it upon reading the objection of  
9 Marco Resources.

10 Q Okay. All right. Are you aware that Marco Resources and  
11 its representatives weren't allow out of their truck to conduct  
12 diligence and an inspection to include the data room?

13 A Like I said, I wasn't there personally, but I do know that  
14 Marco Resources received the same site tour as the other  
15 bidders who gave conforming bids for lot 3.

16 Q Well if we had representatives of Marco here and we do and  
17 they were to offer to the Court under oath that in fact they  
18 were prevented from conducting their diligence in accordance  
19 with whatever normal diligence inspection would be, would you  
20 have any reason to refute that or take issue with that?

21 A Well I'm not sure what you're implying a normal diligence  
22 session would be. I'm --

23 Q In the context of --

24 A Maybe if you rephrase the question.

25 Q Right. In the context of how lot 3 and the non-core

1 assets were offered up for inspection, was it contemplated by  
2 Walter and/or whoever was attending to these inspections that  
3 only windshield tours would be allowed and that interested  
4 representative individuals would not be allowed out of  
5 vehicles?

6 A Yes, I believe at the time that that site tour and other  
7 site tours were conducted, the underground mines and many of  
8 the facilities were in idle mode and inspecting those  
9 facilities given the limited number of employees on site would  
10 not have been safe or advisable.

11 Q So what you are saying then, if I can infer, is that only  
12 windshield tours were extended to all of the interested  
13 prospective bidders in regard to lot 3?

14 A For all prospective bidders who toured the lot around that  
15 time frame when the operations were idle, yes, Marco Resources  
16 received the same site tour that other bidders did.

17 Q So there would have been no difference between the site  
18 tour that Marco and its representatives would have been  
19 extended upon showing up at lot 3 and any other of the six or  
20 seven interested and/or prospective purchasers. There would  
21 have been no difference in how Marco's interest was  
22 accommodated?

23 A Having not been at the site tour on that day, it's hard  
24 for me to say that there was no difference. I don't know if  
25 other people visited the tour at a time -- visited the mine at

1 a time when it was operating or if other people had requested  
2 other meetings with personnel at the mine that would have made  
3 some slight differences, but I do know that Marco was offered  
4 every safe opportunity to tour the mine as much as they wanted  
5 to and it was consistent with how other people viewed the mine  
6 at that time.

7 Q But Marco Resources was not offered and/or allowed access  
8 to the data room, correct?

9 A No, Marco Resources received access to the data room.

10 Q They were not then extended an opportunity to do a -- what  
11 would be considered in the industry to be a reasonable  
12 inspection of the data room and whatever its importance and  
13 contents were and systems were?

14 A No, I believe they had every opportunity to pursue a  
15 reasonable amount of diligence, as did others who made  
16 conforming bids in accordance with the bid deadline.

17 Q Mr. Schlesinger, Marco made a formal offer for lot 3,  
18 correct?

19 A It's unclear whether or not I would describe their offer  
20 as formal.

21 Q Okay.

22 A They made what we have been describing as a non-conforming  
23 bid. It consist of a letter with a purchase price but did not  
24 include any sort of a markup of an asset purchase agreement.  
25 From other bidders who we considered a conforming bid for

1 lot 3 --

2 Q Right.

3 A -- they provided markups of asset purchase agreements.

4 (Counsel confer)

5 MR. GARFIELD: Judge, I've got two sheets of paper I  
6 need the witness to look at. Would you care to glance at them?

7 THE COURT: Mr. Watson, do you have any objection?

8 MR. WATSON: Your Honor, no question that they're  
9 authentic, I guess. We're not -- object on authenticity.

10 THE COURT: You do object?

11 MR. WATSON: Do not.

12 THE COURT: Do not.

13 MR. WATSON: I'm sorry.

14 THE COURT: Thank you.

15 MR. WATSON: I'm sorry.

16 MR. GARFIELD: And he may have no knowledge of what  
17 I'm about to --

18 THE COURT: Okay.

19 MR. GARFIELD: -- present to him so we'll find out.

20 BY MR. GARFIELD:

21 Q Mr. Schlesinger --

22 A Yes.

23 Q -- let me hand you what I'll call Marco 1 and 2 --

24 A Thank you.

25 Q -- consisting of a letter from Jamie Schlesinger and

1 check, and I'll let you glance --

2 A Just to clarify, the letter is from Jamie Ferguson.

3 Q Jamie Ferguson I mean. I'm sorry, you're --

4 A Although he gets Schlesinger right, so --

5 Q -- you're Mr. Schlesinger.

6 A Correct.

7 Q Have you seen that letter before?

8 A Yes, I have.

9 Q Okay. And in your quick review, would that letter be a  
10 proposal to Walter and/or the financial consults --

11 A This letter is what I --

12 Q -- for the purchase of --

13 A -- refer to as a non-conforming bid.

14 Q Okay. And behind the letter that I've just handed you is  
15 an image of a check payment drawn on a Marco Resources account,  
16 correct?

17 A I cannot verify the account, although it certainly appears  
18 to be. It says Marco Resources on it --

19 Q Have you seen that before? Have you --

20 A Yes.

21 Q You've seen --

22 A I've seen the image of the check as well.

23 Q Okay. Where is that payment?

24 A Excuse me?

25 Q Where is the payment? Where is the check right now? Has



1 it been negotiated?

2 A The physical check I do not know.

3 Q Okay. Has the check been negotiated?

4 A Could you --

5 Q Has it been deposited?

6 A I do not know.

7 Q Okay. Who received that check for your client and/or its  
8 professional consultants?

9 A I do not know. I've seen the image of it. I do not know  
10 who received the physical check.

11 Q Okay. All right. Well, what did the bid protocol call  
12 for, if anything, upon -- in regard to a tender of a payment  
13 and receipt of a payment? What then was to have occurred, as  
14 you understand the bid procedures, in terms of receiving their  
15 interest backed up by a financial demonstration of interest in  
16 moving forward on vetting the Marco proposal?

17 A Sure, I believe the bid procedures called for a full  
18 markup of an asset purchase agreement alongside a good faith  
19 deposit of 10 percent of the proposed purchase price, as well  
20 as financial assurances that the proposed buyer could  
21 eventually complete the acquisition and close, including things  
22 such as for example, but not limited to, transferring permits  
23 and receiving replacement surety bonding.

24 Q May I get those --

25 A Sure.

1 Q Thank you.

2 A You're welcome.

3 Q What other -- I'm referring to your declaration, Mr.  
4 Schlesinger, wherein in paragraph 22 you state that there were  
5 only six parties -- formal bid submissions for the purchase of  
6 some or all of the non-core assets. Did that include -- did  
7 that statement include Marco's?

8 A Yes, it did.

9 Q It did. And then you go on to say two of the six bids  
10 were non-conforming under the bidding procedures. Who were  
11 those -- who were the makers of those two bids, those so-called  
12 non-conforming bid?

13 MR. WATSON: Your Honor, I object. I think the  
14 identities of the other bidders is confidential.

15 BY MR. GARFIELD:

16 Q Was Marco one of those two bids?

17 A Yes.

18 Q Then you go on to state that of the three other conforming  
19 bids -- I'm reading from paragraph 22, page 8 of your  
20 stipulation. Two sought to purchase lot 3, parenthetically  
21 West Virginia assets, one of whom was Marco; is that right?

22 A I'm sorry, could you repeat the question?

23 Q Of -- you state of the three other conforming bids,  
24 conforming parenthetically set off -- or excuse me, in  
25 quotation marks, two sought to purchase lot 3, the West

1 Virginia assets. One of those was Marco I believe you just  
2 testified to; is that right?

3 A Yes, of the three with bids to purchase solely lot 3, one  
4 of them was Marco Resources.

5 Q All right.

6 THE COURT: Wait a minute now I'm confused. That  
7 paragraph says two of the six bids were non-conforming.

8 THE WITNESS: Yes.

9 THE COURT: Then it goes to say of the three other  
10 conforming bids. So if two of the conforming bids were to  
11 purchase lot 3, is Marco included in there or is Marco included  
12 of one of the two that were non-conforming? You want to see  
13 your declaration?

14 THE WITNESS: I'm sorry, if possible. I think I'm  
15 getting --

16 THE COURT: Here.

17 THE WITNESS: -- a little mixed up in the --

18 THE COURT: Okay.

19 THE WITNESS: -- in the wording here. Thank you.

20 MR. GARFIELD: Good question, Your Honor.

21 (Counsel confer)

22 THE WITNESS: Oh, sorry, yes, I can clarify this.

23 THE COURT: Hang on one second, Mr. Schlesinger,  
24 they're having a conversation.

25 (Counsel confer)

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1 THE COURT: All right, Mr. Garfield, he's prepared to  
2 answer now.

3 MR. GARFIELD: Okay.

4 THE WITNESS: Yeah, sorry, so of the six total bids,  
5 two were non-conforming and four were conforming. Of the six  
6 total bids, three of them, including Marco Resources, were to  
7 purchase solely lot 3. What I say here of the three other  
8 conforming bids, those are the six bids less the two non-  
9 conforming bids also excluding the Seminole/ERP bid.

10 MR. GARFIELD: Okay. All right.

11 THE WITNESS: The Seminole/ERP bid was the fourth  
12 conforming bid.

13 BY MR. GARFIELD:

14 Q Mr. Schlesinger, do you know if there was anything in the  
15 data room when Marco was allowed access to the data room?

16 A Yes, there were many items in the data room.

17 Q What were they?

18 A I don't think I could recite a list of what was in the  
19 data room.

20 Q But there were contents and/or systems and/or stuff in the  
21 data room; is that right?

22 A There were hundreds if not thousands of documents in the  
23 data room.

24 Q All right. Was any bidder allowed into the mines itself?

25 A I do not recall whether or not there were any bidders

1 throughout the entire process that did a tour of the West  
2 Virginia mines while they were still operating, and therefore  
3 there would have been safety employees on site that would have  
4 permitted a tour of the underground mine. I do not recall if  
5 that was the case. I do know for a fact that of all the  
6 bidders who toured the mine in the December/January time frame,  
7 none were allowed into the mine itself.

8 Q And Marco was not allowed into the mine?

9 A As I -- as I mentioned, Marco first reached out to us on  
10 December 2nd.

11 Q All right. How was Marco's expressed interest and  
12 proposal ultimately dealt with by Walter? Did you respond, did  
13 you engage?

14 A Could you perhaps be a little more specific when you say  
15 -- when you say their ultimate proposal, do you mean the letter  
16 you put in front of me?

17 Q What was the conclusion of Walter as to the offer for lot  
18 3 by Marco Resources?

19 A The conclusion was that that offer, like other offers, was  
20 not the highest and best bid.

21 Q And how as that communicated? That was a rejection then,  
22 right? How was that rejection communicated to Mr. Ferguson or  
23 Mr. Cook or anybody within Marco?

24 A I don't recall exactly how that was communicated.

25 Q Okay.

1 (Counsel confer)

2 MR. GARFIELD: Judge, I think we only have a couple  
3 more questions. May -- would the Court entertain Mr. McArdle  
4 asking just a couple questions? And then I think we're --

5 THE COURT: It's really not my preference, Mr.  
6 Garfield. I don't like tag teams. You took this witness. I  
7 think you have to --

8 MR. GARFIELD: All right.

9 THE COURT: Mr. Watson?

10 MR. WATSON: We object to tag teaming, Your Honor.

11 THE COURT: I don't -- I'm not sure that's a legal  
12 term, but that's not new here, Mr. Garfield. That can't be new  
13 to you. I mean I never kind of -- I never allow tag teams.

14 MR. WATSON: I don't know why they're laughing.

15 MR. GARFIELD: Judge, I think I'm done --

16 THE COURT: Okay.

17 MR. GARFIELD: -- with Mr. Schlesinger.

18 THE COURT: Thank you, Mr. Garfield.

19 MR. GARFIELD: Thank you, Mr. Schlesinger.

20 THE COURT: Mr. Hahn?

21 MR. HAHN: Thank you, Your Honor. And I'll try to be  
22 very brief.

23 BY MR. HAHN:

24 Q Mr. Schlesinger, my name is Patton Hahn. I represent  
25 Pardee Minerals. You understand that they're the lessor of the

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1 leasehold interests that were in lot 3, correct?

2 A It is my understanding -- I don't recall if they were the  
3 only lessor for leasehold interest in lot 3, but I know that  
4 they do -- are lessor within assets of lot 3.

5 Q To be specific, the lessor on the Maple Coal lease and the  
6 Atlantic Leaseco leases, correct?

7 A I believe that's correct.

8 Q Okay. You reviewed the bid submissions or the bid  
9 qualification submissions of the purchaser under the current  
10 Atlanta APA which is -- I call them the VCLF entities, correct?

11 A Yes. I'm sorry, actually could you be a little more --  
12 could you repeat the question?

13 Q Well you reviewed and helped qualify the bidders in this  
14 process, correct?

15 A Yes, I was part of the team that did that.

16 Q And you reviewed their bid -- their submissions to be a  
17 qualified bidder, correct?

18 A Yes.

19 THE COURT: Who is theirs?

20 MR. HAHN: Correct, Your Honor.

21 BY MR. HAHN:

22 Q All of the bidders.

23 A Yes.

24 Q Including the two purchaser entities that we're here  
25 today, Seminole and E -- what is it, ERP?

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1 THE COURT: I think there are actually three  
2 entities --

3 MR. HAHN: Three.

4 THE COURT: -- referred to I think collectively by  
5 the debtor as purchaser --

6 MR. HAHN: Okay.

7 THE COURT: -- singular.

8 BY MR. HAHN:

9 Q Three -- all of those entities are affiliates or  
10 subsidiaries of VCLF; is that correct?

11 THE COURT: Who who? V?

12 MR. HAHN: VCLF.

13 THE COURT: Okay.

14 BY MR. HAHN:

15 Q Do you know what VCLF is?

16 THE COURT: I think that's in there somewhere.

17 A I do. I understand what you mean. I -- my understanding  
18 is they're subsidiaries, although I haven't reviewed their  
19 legal structure to really know for sure. But that is my  
20 understanding. And I should qualify that statement and say  
21 that either myself or members of my team have reviewed all of  
22 the submissions and they were all communicated --

23 Q okay.

24 A -- to me.

25 Q Your declaration identifies VCLF as Virginia Conservation



1 Legacy Fund, correct?

2 A Yes.

3 Q And if I say VCLF, that is who I'm referring to?

4 A Understood.

5 Q And you understand that Seminole Coal Resources, ERP  
6 Compliant Coke, LLC and ERP Environmental Fund, Inc., according  
7 to your declaration are direct or indirect subsidiaries of  
8 VCLF?

9 A That is my understanding.

10 Q But you don't know the legal relationship between those  
11 entities?

12 A I have not reviewed a legal org chart of the -- of VCLF  
13 and they're associated entities.

14 Q Were these bidders required to submit a legal org chart as  
15 part of their bid?

16 A No.

17 Q Are they required to identify who owns them?

18 A Yes. When you say are they required to identify who owns  
19 them, is there something specific you're -- some sort of  
20 specific type of -- I should say what they were required to do  
21 was provide assurance to the debtors, in whatever manner that  
22 they were able to do that, that they had the financial  
23 wherewithal to consummate the transaction.

24 Q Okay.

25 THE COURT: If I could refer you all to page 21 of

1 the original motion, it -- at paragraph 9, it says what the  
2 bid must disclose as to the identity of a bidder.

3 MR. HAHN: Okay.

4 THE COURT: You have that in front of you, Mr. Hahn?  
5 If not, you can borrow my copy.

6 UNIDENTIFIED SPEAKER: Here you go, Patton. Patton.  
7 Bottom right.

8 MR. HAHN: Okay.

9 BY MR. HAHN:

10 Q What assurance did this bidder provide that it will be  
11 able to execute this transaction?

12 A So the VCLF for the Seminole/ERP bid is for a fairly  
13 nominal cash purchase price which we felt comfortable they'd be  
14 able to put up --

15 Q One dollar.

16 A Yes. In terms of their ability to consummate the  
17 transaction, they have had and we have confirmed and in some  
18 cases we, PJT, have been a part of discussions amongst the VCLF  
19 professionals and surety bond providers and the LC providers  
20 that in combination with their track record of being able to  
21 consummate transactions such as this -- I'll refer you to their  
22 acquisition of certain assets of Patriot Coal out of  
23 bankruptcy, as well as their recent acquisition of other Cliffs  
24 assets within Alabama. In combination with that track record  
25 and the conversations that we know that they've had with

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1 providers of surety bonding, we thought comfortable that they  
2 would be able to consummate and ultimately close the  
3 transaction.

4 Q Okay. On their -- you -- I think you said their  
5 conversations with surety bonding companies convinced you  
6 they'd be able to obtain the replacement surety bonds; is that  
7 correct?

8 A Yes.

9 Q You or your company has not actually spoken with the  
10 surety bond companies?

11 A We have had conversations with certain surety bond  
12 providers.

13 Q Okay.

14 A I do not know for sure exactly what bonding companies --  
15 I do not recall what bonding companies exactly VCLF would tend  
16 to use to consummate the transaction, but through our  
17 conversations with them and other providers of surety bonds, we  
18 have -- we and the debtors have gotten comfort that they can  
19 ultimately consummate the transaction.

20 Q When you said your -- and you just said your conversations  
21 with them. Are you referring to the VCLF employees or agents?

22 A Conversations with VCLF employees and agents as well as  
23 surety bond providers.

24 Q Okay. Do you have any written documentation from surety  
25 bond providers that they will be able to -- that they will

1 issue to VCLF or the three purchaser entities --

2 A I do not recall if we got written confirmation from surety  
3 bond providers regarding eventual bonding for VCLF.

4 Q Okay. Because I don't remember in your declaration that  
5 communications with surety bond providers is described as part  
6 of the reason you believe they will have adequate -- they'll be  
7 able to perform.

8 A I believe I gave several reasons why we felt they were --

9 Q Okay.

10 A -- the highest and best offer. That was not necessarily  
11 exhaustive of the benefits of their bid, but I felt those were  
12 the main reasons.

13 Q Back to what you said about the track record of their  
14 performance. VCLF was only formed in 2014, correct?

15 A I don't know when exactly they were formed as an entity.

16 Q Okay. Before 2014, do you know of any acquisitions or  
17 transactions they engaged in that you believe is evidence of  
18 their track record?

19 A The first significant that they've made that I'm aware of  
20 was the Patriot Coal acquisition.

21 Q Okay. And how long have they actually been operating  
22 Patriot Coal?

23 A I don't recall when that transaction closed.

24 Q Isn't it true that that was in October of 2015?

25 A I don't recall.

1 Q Okay. What assurance do you have or can you -- have you  
2 been given that they can perform under their leases with my  
3 client, Pardee Minerals?

4 A I have not had any conversations with representatives of  
5 VCLF specifically regarding the Pardee Minerals lease.

6 Q Okay. Thank you.

7 THE COURT: Any other witnesses have any cross- --  
8 I'm sorry, any other counsel have any cross-examination of this  
9 witness?

10 Any direct as a result of the cross-examination, Mr.  
11 Watson?

12 MR. WATSON: Just a couple, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. WATSON:

15 Q Is the data room a physical room?

16 A No, it's an electronic data room.

17 Q And access to the electronic data room is provided by  
18 giving a password; is that correct?

19 A Essentially.

20 Q Okay. And when you got satisfied I believe you said on  
21 December 30th, 2015 about Marco Resources' financial ability,  
22 isn't it true that you gave them passwords to the data room on  
23 December 31st?

24 A I believe we gave them passwords on the 30th. However we  
25 had heard from Mr. Ferguson that he was having an issue with

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1 his invite. We re-issued him an invite on the 31st, which is  
2 my understanding worked and he was able to get access at that  
3 time.

4 Q Once you have access -- a password and access to the  
5 electronic data room, isn't it true that you've got access to  
6 everything in there? In the electronic data room that's set up  
7 for the bidders?

8 A Yes, well for Mr. Ferguson who and for Marco Resources who  
9 had indicated interest in lot 3, once they had access to the  
10 lot 3 data room, they received access to everything related to  
11 lot 3.

12 Q Again that's the same access that anybody else who  
13 expressed sufficient satisfactory interest in lot 3 had?

14 A That's right.

15 Q Okay.

16 MR. WATSON: That's all, Your Honor.

17 THE COURT: Thank you.

18 Mr. Garfield?

19 MR. GARFIELD: Yes.

20 THE COURT: Anything else?

21 MR. GARFIELD: Yeah, just a couple things.

22 RECROSS EXAMINATION

23 BY MR. GARFIELD:

24 Q Mr. Schlesinger, so the key, the whatever the unlocking  
25 code was, was provided to Mr. Ferguson, correct?

1 A Yes, it's --

2 Q All right.

3 A -- it's a password and --

4 Q All right.

5 A -- a user name that is communicated to you over email from  
6 the data room provider.

7 Q Are you aware that one of his requests was for maps?

8 A I have since become aware that that --

9 Q All right.

10 A -- was a request of his, yes.

11 Q And are you aware that whoever was on site to answer  
12 questions and perhaps provide some guidance on the day that my  
13 representatives showed and/or through further discussion that  
14 the location of maps could not be provided?

15 A I was not there that day.

16 Q All right. Well were you aware of that, that they were  
17 denied the ability to review maps?

18 A I have not heard from anyone that they were denied the  
19 ability to review anything.

20 Q Okay. All right.

21 (Counsel confer)

22 BY MR. GARFIELD:

23 Q Mr. Schlesinger, I may have asked this before, but I'm not  
24 certain that I understood the answer or that I got an answer.  
25 What is in the electronic data room? Are there OSHA reports,

1 are there mining reports, what is the contents of the  
2 electronic data room?

3 A The data room has literally hundreds of documents  
4 concerning a multitude of different items concerning -- with --  
5 you know, with diligence around the West Virginia properties.  
6 It is the full set of diligence that was required -- that was  
7 reviewed by all of the other bidders.

8 Q Except Marco?

9 A No, Marco also had access to the data room and as far as I  
10 know, they certainly had the opportunity to review every item  
11 in the data room --

12 Q Okay.

13 A -- just as the other bidders did. They had the exact same  
14 access.

15 Q All right, thank you.

16 MR. GARFIELD: Judge, unless there's an objection,  
17 I'm going to go ahead -- since I referred to exhibits, I was  
18 going to go ahead and offer those.

19 THE COURT: Any objection to his offering of this  
20 exhibit?

21 MR. HAHN: No objection, Your Honor.

22 THE COURT: All right, we'll -- anybody else have an  
23 objection? We'll mark it in then as Marco Exhibit 1.

24 MR. GARFIELD: One and 2 -- well, yeah, 1  
25 collectively or 1 and 2.



1 THE COURT: You want -- how you want it, 1 and 1 --

2 MR. GARFIELD: Let's go 1, yeah, yeah, because --

3 THE COURT: Okay.

4 MR. GARFIELD: -- the check image is an attachment to  
5 the letter.

6 THE COURT: Okay.

7 MR. GARFIELD: Thank you, Judge. That's all I have.

8 THE COURT: Mr. Hahn, anything else?

9 MR. HAHN: Nothing further, Your Honor.

10 THE COURT: Thank you.

11 MR. WATSON: Your Honor, I'm not sure it's required,  
12 but we would offer Mr. Schlesinger's declaration into evidence.

13 THE COURT: It will be noted as part of the record  
14 and marked into evidence as part of the ECF system. Thank you,  
15 Mr. Watson.

16 MR. WATSON: Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Schlesinger.

18 THE WITNESS: Thank you.

19 THE COURT: You may step down.

20 All right. Mr. Bender, does the debtor have any  
21 additional testimony that it wishes to offer or witnesses it  
22 wants to call in support of the sale?

23 MR. BENDER: Your Honor, we would like to call Chuck  
24 Ebetino.

25 THE COURT: Okay.

1 COURTROOM CLERK: Raise your right hand, please.

2 CHARLES EBETINO, DEBTOR'S WITNESS, SWORN

3 COURTROOM CLERK: Please state your name and address  
4 for the record.

5 THE WITNESS: My name is Charles A. Ebetino, Jr. I  
6 live at 3694 Seaford Drive, Columbus, Ohio.

7 THE COURT: And if you would spell your name one more  
8 time for the record please, sir.

9 THE WITNESS: E-b, as in boy, e-t, as in Tom, i-n, as  
10 in Nancy, o.

11 THE COURT: Thank you.

12 DIRECT EXAMINATION

13 BY MR. WATSON:

14 Q Mr. Ebetino, where are you employed?

15 A I'm employed by ERP Compliance (sic) Fuels.

16 Q And what is your position at ERP Compliant Fuels?

17 A Senior Vice President of Business Development.

18 Q And what do you do there?

19 A Basically am in charge of merger and acquisition  
20 opportunities and everything else that gets assigned associated  
21 with those projects.

22 Q Okay. And briefly what is your background in the coal  
23 industry?

24 A Okay, I'm a civil engineer and I worked 28 years for  
25 American Electric Power, about 14 years of it in the -- in

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1 their fuel group ending up as Senior Vice President of coal  
2 mining operations and President of all their coal mining  
3 subsidiaries.

4 Q How long have you been in the coal industry generally?

5 A About 38 years.

6 Q Okay. ERP Compliant Fuels, LLC, what is its relationship  
7 to the purchaser, the three entities we've defined as purchaser  
8 with respect to this transaction?

9 A ERP Compliance Fuels is like the service company for a set  
10 of special purpose entities that are under common ownership and  
11 control and management by ERP Compliance Fuels.

12 Q And does ERP Compliant Fuels contemplate having the  
13 management responsibility with respect to the three entities  
14 that are the purchaser her?

15 A Yes, that's correct. The officers of those three entities  
16 are officers of ERP Compliance Fuels.

17 Q Can you tell me what other entities are under -- that ERP  
18 Compliant Fuels has management responsibility for that are  
19 under common ownership or control with the three entities that  
20 are purchasers here?

21 A ERP Compliant Fuels, as was mentioned, there was a Patriot  
22 Coal Corporation purchase acquisition made on October 22nd and  
23 there were several subsidiaries, direct subsidiaries of ERP  
24 Compliant Fuels set up to take ownership of those assets and  
25 those consist of one -- one of which is ERP Federal Mining

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1 Company and that company employs about 400 UMWA employees and  
2 mining in about 350,000 tons a month of steam coal in northern  
3 West Virginia.

4 In addition to that, there was a sister company --  
5 well, let me say first that ERP Compliance Fuels is partially  
6 owned by Virginia -- VCLF as it was talked about before and  
7 also owned by a management team of the Kevin or Ken McCoy  
8 family called IRON Properties and those two entities, Tom  
9 Clarke being the principal in Virginia Conservation Legacy  
10 Fund, basically own all of the sister companies.

11 Q And that includes the three entities -- let me back up.  
12 That includes two of the three entities that are purchasers  
13 here; is that correct?

14 A Yeah --

15 Q Common ownership --

16 A Right.

17 Q -- same ownership.

18 A At the same time ERP Compliance Fuels was set up a  
19 nonprofit company called ERP Environmental Fund, Incorporated  
20 was also established, its purpose solely for the reclamation of  
21 properties that was -- were being acquired that would only  
22 require reclamation, and the purchaser includes that company as  
23 well here to -- that will take on the reclamation obligations  
24 of the properties that are not going to be mined.

25 Q Okay, and ERP Environmental Fund, Inc. is owned by VCLF;

1 is that correct?

2 A Yes, it's a -- actually a direct subsidiary of VCLF Land  
3 Trust which is a direct subsidiary of VCLF parent.

4 Q And these entities that acquired the assets of Patriot,  
5 they were set up late last year, is that correct, for that  
6 purpose?

7 A Right, October 27th.

8 Q All right. And since then have similar entities been set  
9 up to own and manage the assets formerly belong to Cliffs  
10 Resources?

11 A That's correct. A company called Seneca Coal Resources  
12 was established through the Cliffs acquisition which includes  
13 Pinnacle underground met coal mine in West Virginia and the Oak  
14 Grove medical -- metallurgical coal mine here in -- just  
15 outside of Birmingham.

16 Q Are those mines that those entities have acquired, are  
17 they operating?

18 A Yes, they are.

19 Q Are they employing people getting coal out of the ground  
20 now?

21 A Yes. We have approximately little over 900 employees  
22 working at those mines right now. They are not at full  
23 capacity and ultimately that will employ about 1,500 employees.

24 Q Okay. Has ERP Compliant Funds (sic) and its affiliated  
25 companies -- think you've already answered this -- had

1 experience purchasing coal assets out of bankruptcy before?

2 A Yes, sir.

3 Q And that was the Patriot acquisitions, right?

4 A That's correct.

5 Q That was not all of Patriot mines, that was very similar  
6 to what we have here where some buyers were getting some of the  
7 assets and the ERP Compliant Fuels affiliated companies were  
8 getting other of the assets?

9 A That's correct. The VCLF/ERP companies basically acquired  
10 the non-core assets of Patriot Coal Corporation similar to  
11 their acquiring the non-coal -- non-core assets here in the  
12 Walters bankruptcy.

13 Q The VLC (sic), Virginia Conservation Legacy Fund, what is  
14 its stated goals?

15 A The -- I was not involved in it at the original  
16 establishment of that entity, but basically its stated goals  
17 are to acquire properties and conserve -- you know, basically  
18 keep them preserved for among other things there's a Natural  
19 Bridge project in I guess central -- northern central Virginia  
20 which is right where their headquarters main office is.

21 Q It's a nonprofit conservation group; is it not?

22 A Yes.

23 Q And part of the concept for the acquisition of these coal  
24 assets is to combine operation of the coal assets in an  
25 environmentally friendly way with reclamation that plants trees

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1 to replace the carbon that's -- the carbon dioxide that's been  
2 caused by the burning of the coal; is that correct?

3 A Yes, one of the objectives of ERP Compliance Fuels, LLC  
4 and -- besides the word compliance is that it intends from its  
5 coal mining operations to market compliant fuel and compliant  
6 fuel is a combination of coal with bundled with CO2 credits.  
7 And that's a market that is not established, but, you know, we  
8 hope to get established in the eastern part of the United  
9 States, states of Virginia, West Virginia and et cetera so that  
10 basically it can take advantage of reclaimed property and tree  
11 reforestation in order to offset carbon emissions.

12 Q Burning of coal puts carbon into the atmosphere. Planting  
13 of trees takes it back out. Is that the idea?

14 A That's correct.

15 Q Okay. Is that something that is anticipated the assets  
16 that are being acquired by the purchaser here today in this  
17 transaction?

18 A There will be opportunities to do that with the assets  
19 we're acquiring from Walters.

20 Q Has -- have the purchasers -- let me back up. Have those  
21 -- I'm going to call them those affiliated entities that ERP  
22 Compliant Fuels help managing. Do they have any debt?

23 A The ERP companies have absolutely no debt. We do have a  
24 funding letter of commitment for this transaction that will be  
25 issued at the time of closing in the amount -- in an amount

1 ranging from 10 to \$15 million.

2 Q And that is for working capital?

3 A And that's basically to bridge working capital needs of  
4 the initial startup of the companies.

5 Q All those affiliated companies that are under management  
6 by ERP Compliant, how -- what are their anticipated revenues?  
7 Not counting the acquired assets here.

8 A We -- revenues would be anticipated in about the \$1  
9 billion range.

10 Q Okay. You understand that the purchaser here is assuming  
11 various leases as a result of the transaction?

12 A Yes.

13 Q Have you had a chance to look at the Pardee lease for  
14 example?

15 A Yes, the main Pardee lease, the Maple lease was a  
16 requirement to be assumed in the acquisition and comes with a  
17 couple of active mines on that property. And that of course is  
18 designated as a -- an assumed contract right from the get-go.  
19 There are other we're doing final diligence on the rest of the  
20 real property to determine which of those leases we are going  
21 to assume.

22 Q Okay. Are you satisfied that the purchaser is financially  
23 able to satisfy the obligations under that lease?

24 A Absolutely.

25 Q You understand that certain permits and bonding



1 requirements are also assumed under the asset purchase  
2 agreement, don't you?

3 A Yes. That was a very key element of the negotiations and  
4 the -- what was referenced earlier in court, the surety bond  
5 collateral agreement was a very essential ingredient in which  
6 case the purchaser will receive an amount equal to the penal  
7 sum of the bonds for reclamation.

8 Q Okay. Do the affiliated companies that ERP Compliant  
9 Fuels helps manage, do they have experience with assumption and  
10 acquiring of permits and bonding obligations?

11 A Yes, sir.

12 Q Tell me about that.

13 A In the Patriot transaction --

14 MR. McARDLE: Objection. Seems to me that's a  
15 question that -- I mean, the questions should be narrowed to  
16 who he works, his position and not the companies in general.

17 MR. WATSON: Your Honor, all due respect, he said  
18 that the ERP Compliant Fuels manages these other companies and  
19 they're going to manage the companies that are acquiring these  
20 assets and the question's been raised as to their competency  
21 and ability to do that and I was trying to show that they have  
22 experience in doing that.

23 THE COURT: I don't think I understand the objection,  
24 Mr. McArdle.

25 MR. McARDLE: I think it's basically hearsay. He's

1 saying what he's been told or heard from somebody else about  
2 what other companies can do and comply with this -- these  
3 particular agreements.

4 THE COURT: I'm going to overrule the objection and  
5 allow the witness to testify as to what he's -- knows from his  
6 own personal knowledge and then Mr. McArdle can cross-examine  
7 him with respect to that if he chooses.

8 THE WITNESS: Okay, from my --  
9 BY MR. WATSON:

10 Q From -- let me see if I can -- just so clarify, from your  
11 own personal knowledge of the companies that ERP Compliant  
12 Fuels is managing as they would manage the companies acquiring  
13 these assets, have -- do you -- do they have experience with  
14 permitting and bonding in managing those companies?

15 MR. McARDLE: Same objection, Your Honor.

16 THE COURT: Overruled.

17 THE WITNESS: Having been involved in Patriot Coal  
18 Corporation prior to the closing with VCLF, there were  
19 approximately a hundred -- I'm very familiar with the permits  
20 in that situation and what's going on with those and a hundred  
21 and fifty-one permits just smackler (phonetic) permits also and  
22 PDS permits along with it were to be transferred from Patriot  
23 to the VCLF companies and a hundred and thirty-one of those are  
24 in the state of West Virginia, several in Ohio, Pennsylvania,  
25 Kentucky and Illinois, and all hundred and thirty-one for

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1 example in West Virginia, the applications for transfers are in  
2 and about 50 of them are in the advertising stage right now.

3 BY MR. WATSON:

4 Q Have you done any preliminary work toward permits and  
5 bonding for the acquired -- companies to be acquired in this  
6 asset purchase agreement?

7 A (No audible response.)

8 Q Have you done any preliminary work towards the permitting  
9 and bonding required for the companies that are being acquired  
10 in this asset purchase agreement?

11 A We have very specifically reviewed all the permits,  
12 estimated all the environmental obligations related to those  
13 permits and we have had preliminary discussions with sureties,  
14 both the existing ones and the -- and new ones, such that we do  
15 not think we'll have any problems in replacing the bonds,  
16 especially given the fact that the cash collateral is going to  
17 backstop those bonds.

18 Q You understand that as part of the asset purchase  
19 agreement the purchaser will be acquiring some reclamation  
20 liabilities?

21 A Yes, sir.

22 Q Do -- are you satisfied that the purchaser companies will  
23 be able to satisfy those reclamation liabilities?

24 A Yes, sir.

25 Q Is that something that you have experience with from these

1 other affiliated companies that are under common management and  
2 ownership?

3 A The -- currently the VCLF related entities manage  
4 something close to about 500 permits and they are successfully  
5 managing them, staying in compliance with all the obligations  
6 related thereto.

7 Q Okay. Let me switch gears a little bit and talk about the  
8 bidding process. Did you take part in the bidding process for  
9 these assets?

10 A Yes, sir. I was directly responsible for the negotiations  
11 of agreements and participating in the process.

12 Q Were you the prime negotiator after -- for the bids and  
13 for the -- reaching the asset purchase agreement?

14 A Yes, sir.

15 Q Were those negotiations arm's length negotiations?

16 A Yes, sir.

17 Q There were not any common owners, officers or directors  
18 between the purchasers and the buyers?

19 A That's --

20 Q I mean the sellers, were there?

21 A That's correct.

22 Q Was there any interference that you're aware of with any  
23 other bidders in that process?

24 A We had no contact with any other bidders.

25 Q So there was no collusion with any other bidders?

1 A No, sir.

2 Q Okay. Let me switch again to -- and ask you about ERP  
3 Compliant Coke. What is that entity formed to do?

4 A That, again, special purpose entity, its sole assets and  
5 assumption of liabilities and employment of people operating  
6 the plant, everything will be self-contained in the ERP  
7 Compliance (sic) Coke that now consists of the operations and  
8 business of Walter Coke.

9 Q Okay, and ERP Compliance Coke will acquire the assets and  
10 the liabilities of what -- or the assets that now are --  
11 constitute Walter Coke; is that correct?

12 A That's correct, and it will hold the air permit and other  
13 licenses and -- needed to operate the plant.

14 Q And as the Court hear earlier, ERP Compliant Coke has a  
15 tentative agreement with United Steelworkers which is set to be  
16 voted on by the members of the USW tomorrow; is that correct?

17 A Yes, sir.

18 Q Does ERP Compliant Coke intend to operate the Walter Coke  
19 assets?

20 A Yes, sir.

21 Q Does ERP Compliant Coke intend to meet the environmental  
22 obligations that Walter Coke has?

23 A Absolutely.

24 Q Does that include the RCRA order with respect to Walter  
25 Coke that's currently in place?

1 A Yes, it does. And we are --

2 Q Do you have any question in your mind that ERP Compliant  
3 Coke has the ability to do that?

4 A No, sir.

5 MR. WATSON: Your Honor, that's all I have.

6 THE COURT: Thank you.

7 MR. WATSON: Thank you.

8 THE COURT: Anybody have any cross-examination of  
9 this witness?

10 MR. HAHN: I will, Your Honor.

11 (Counsel confer)

12 THE COURT: Mr. Hahn, you going to go first?

13 MR. HAHN: I will, Your Honor.

14 THE COURT: For Pardee.

15 MR. HAHN: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. HAHN:

18 Q Mr. Ebetino, we met earlier. I represent Pardee Minerals.  
19 What assurance can you give my client that your companies will  
20 be able to perform under the lease?

21 A Well we have the financial resources, the operating  
22 capability to do so.

23 Q What financial resources do you have?

24 A We currently have about \$19 million in cash, one example.  
25 We are going to have a funding commitment exercised at the date

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1 of closing that's going to give us an additional 10 to \$15  
2 million that will basically bridge the closing and provide for  
3 the net working capital and prior to the ability to liquidate  
4 and monetize the net working capital we're getting in the  
5 transaction which is about 42 -- \$43.8 million. And we also  
6 ultimately will have access to \$30 million of cash collateral  
7 to do the reclamation that would be required under the leases  
8 and the permits associated with your client's property.

9 Q When you say we, who are you referring to?

10 A The purchasers.

11 Q The three purchaser entities?

12 A Yes.

13 Q Let me talk to you about -- a little bit about the -- what  
14 types of -- what is the number or amount of liabilities that  
15 were assumed as part of the -- by the purchasers as part of the  
16 Patriot Coal transaction?

17 A In terms of --

18 Q Reclamation liabilities.

19 A -- reclamation liabilities?

20 Q Yes.

21 A Approximately -- obviously they can be valued a number of  
22 different ways. The way we looked at them, the reclamation  
23 liabilities in West Virginia would total approximately \$30  
24 million.

25 Q So between the two transactions, am I right that the

1 companies would have about \$60 million in reclamation  
2 liabilities, is that right, between the Patriot transaction and  
3 this -- and these two transactions?

4 A I think there were considerably more liabilities in the  
5 Patriot transaction.

6 Q Okay. The -- I think you mentioned the Natural Bridge.  
7 Is that a mine?

8 A Natural Bridge -- no, no, it's --

9 Q What is that --

10 A Natural Bridge is actually a city or town in --

11 Q But what's that relation --

12 A -- in Virginia called Natural Bridge, Virginia.

13 Q Right, and what -- that was part of the Patriot  
14 transaction or there's a --

15 A No.

16 Q -- facility there?

17 A No. No, has nothing to do with it. The origination of  
18 VCLF, one of their essential initial projects was to purchase  
19 and acquire properties associated with a geological formation  
20 in Virginia called Natural Bridge which is a -- sort of that  
21 natural rock arch --

22 Q Okay.

23 A -- and they were acquiring properties and, you know,  
24 associated with perhaps establishing a state park --

25 Q Okay.



1 A -- and state preservation area.

2 Q And did VCLF or its subsidiary in that transaction get a  
3 loan from the State of -- Commonwealth of Virginia?

4 A Again it predates me. I don't have direct knowledge of  
5 that.

6 Q Do you know whether the Commonwealth of Virginia's  
7 foreclosed on that property?

8 A I do not.

9 Q The 10 to 15 million in addition funding, the commitment  
10 you mentioned, who or what is that coming from?

11 A It's coming from a company called Bay Point Capital  
12 Partners, LP. They provided the -- a \$5 million bridge loan  
13 facility for the acquisition of Cliffs which has been totally  
14 repaid. Acquisition took place on December 22nd, had the same  
15 functionality which was basically to bridge time between  
16 working capital monetization that could take place and that has  
17 all happened.

18 Q Okay. Thank you.

19 THE COURT: Mr. Fingerhood?

20 MR. FINGERHOOD: Thank you, Your Honor. I just have  
21 a few questions.

22 BY MR. FINGERHOOD:

23 Q I just want to clarify, Mr. Ebetino, the Walter Coke  
24 assets as I understand it will stay with the ERP Compliant  
25 Coke --

1 A That's correct.

2 Q -- entity to be used for ongoing operations as well as --

3 A Yes.

4 Q -- compliance with the RCRA order?

5 A That's correct. All the real personal property, the net  
6 working capital, et cetera will all be in ERP Compliance Coke.

7 Q And so it's not going to go to any of the other --

8 A That's correct. --

9 Q -- buyers associated --

10 A It's a standalone entity.

11 Q Okay. Thank you. Going to the RCRA cleanup, do you have  
12 any understanding as far as how much the buyers estimate it  
13 will cost to assume the obligations of complying with the RCRA  
14 order?

15 A I believe there's a range of 35 to \$50 million as -- and I  
16 don't know whether it's all just the RCRA agreement. I think  
17 it's the entire, you know, reclamation environmental obligation  
18 of the properties.

19 Q And do you have any question as far as whether or not the  
20 buyer is able to meet that obligation?

21 A I have no question, no. I think --

22 Q And there's no -- the intent of ERP Compliant Coke is to  
23 operate the Coke facility as ongoing business?

24 A That's correct, sir.

25 Q There have been no discussions about liquidating the

1 company that you're aware of?

2 A No. In fact it's, you know, able to take raw coal product  
3 from our Oak Grove mine.

4 I would also like to point out that the net working  
5 capital associated with the ERP Coke facility is in excess of  
6 \$30 million.

7 Q And that includes the --

8 A Accounts receivables, inventories net of trade payables.

9 MR. FINGERHOOD: I don't have any further questions.  
10 Thank you.

11 THE COURT: Thank you.

12 MR. FINGERHOOD: Thank you, Mr. --

13 (Counsel confer)

14 MR. DAVIES: I just have a few, Your Honor.

15 THE COURT: All right, Mr. Davies.

16 BY MR. DAVIES:

17 Q Good afternoon, Mr. Ebetino. My name is George Davies and  
18 I represent the UMWA Combined Benefit Fund and the UMWA 1992  
19 Benefit Plan. Just have a few questions. You said you were  
20 involved in the negotiation of the APA?

21 A That's correct.

22 Q Okay, and were -- or during those negotiations was there  
23 any discussion or discussions about -- or between the  
24 purchasers and the debtors whether or not an exemption from the  
25 debtors' coal backed obligations was necessary to close this

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1 deal?

2 A I'm not sure I understand the question enough to give you  
3 a good answer --

4 Q Okay, I'll try again. That was a --

5 A Okay.

6 Q -- bad question. You negotiated the APA on behalf of ERP  
7 and -- is that correct?

8 A Yes.

9 Q Okay. And during those negotiations did the issue of the  
10 debtors' or some of the debtors' obligations to the UMWA  
11 Combined Benefit Fund or the UMWA 1992 Benefit Plan come up;  
12 were they discussed?

13 A Obviously we're bidding on lots, 3, 4, 8 and 9 and I'm not  
14 sure whether there were any ever, you know, obligations  
15 associated with those funds. I don't know. I know that our  
16 basis of our bid was to not assume those kinds of legacy  
17 liabilities other than environmental. I think the APA  
18 regarding employees in general was pretty much no commitment in  
19 terms of the obligation to employ, you know, employees at all,  
20 let alone assume past obligations related to them. Obviously  
21 we are assuming -- we're going to hire, you know, many many of  
22 the employees. I won't say all of them but substantially all  
23 the employees involved.

24 Q Right, understood, Mr. Ebetino, but what I was asking is  
25 whether or not you're aware of any discussions between the

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1 purchasers you're -- the group you're representing and the  
2 debtors about whether or not the obligations of some of the  
3 debtors to the UMWA funds, the Coal Ac funds in particular, was  
4 discussed?

5 A Other than the fact that we made it perfectly clear we  
6 weren't assuming those obligations, I -- there were -- I don't  
7 know of any -- I don't remember any discussions.

8 Q You don't recall any specific discussions --

9 A That's correct.

10 Q -- about those specific liabilities?

11 A That's correct.

12 MR. DAVIES: Thank you.

13 BY MR. McARDLE:

14 Q Good afternoon. Could you describe for me please -- I'm  
15 Walter McArdle, counsel for Marco Resources. Could you  
16 describe for me please the access that the purchasers I'm --  
17 and I -- if you don't mind, I'm going to call the group that's  
18 purchasing collectively the purchasers as they're referred to  
19 in the notices and motions. Is that okay with you?

20 A (No audible response.)

21 Q But do you -- what access were the purchasers given as far  
22 as reviewing the physical property on the type the lot 3  
23 properties, the mines and so forth in West Virginia?

24 A We -- our operating side conducted whatever site visits  
25 were done and I did not participate in those so I can't tell

1 you other than I know they visited the property. I don't even  
2 remember exactly when at this point they visited or what they  
3 got a chance to see.

4 Q Did you see any reports that were prepared in regard --

5 A No --

6 Q -- any such visitation?

7 A No formal reports were issued. I think it was largely  
8 looked at from, you know, an environmental obligation  
9 standpoint and then we understand that there was operating  
10 mines on the property and that we -- that our operating people  
11 thought could perhaps be more efficiently run and hope to do  
12 so.

13 Q So the operating people did get to go in and inspect the  
14 mines, the underground mines?

15 A I don't know whether they went underground or not.

16 Q You were involved in the Patriot Coal acquisition. Was  
17 there any underground mines there?

18 A Mostly the -- the federal mine was the only acquisition  
19 made by ERP. It's a long haul underground operation in  
20 Pittsburgh --

21 Q Were you involved in the due diligence steps in that  
22 process?

23 A Well again, I was on the seller side there so -- in  
24 Patriot.

25 Q Was access given in that case to potential purchasers to

1 the coal mine?

2 A I believe the ERP went underground at that coal mine.

3 Q Would you consider that part of the due diligence to be  
4 able to inspect the underground coal mine for safety and other  
5 concerns?

6 A Where it's possible you'd -- we would like to -- we would  
7 -- we -- any purchaser would want to do that if possible.

8 Q What is a fire boss record?

9 A What does a fire boss --

10 Q Record.

11 A -- have to do with --

12 Q Record.

13 A Oh, the records?

14 Q Yes.

15 A Under -- and again, I'm not an underground coal miner but  
16 my understanding of it is that, you know, there -- that once a  
17 shift a fire boss makes the mine checking for issues related to  
18 the safety of the mine and that they keep a record of what they  
19 find.

20 Q And these records are available to be inspected by MHSA  
21 and other companies; is that correct? I mean in other such  
22 governmental --

23 A Again, it's my general understanding of that. I don't  
24 specifically get involved in that for our company.

25 Q What kind of steps do you -- were taken in the -- would

1 you believe would be steps of appropriate due diligence -- well  
2 what did -- what steps for due diligence did the purchasers in  
3 this particular case take?

4 A We had access to the data room, the data rooms for the --  
5 we were interested in all of the properties and I think granted  
6 access to -- or all of the lots and granted access to at least  
7 four separate data rooms. I had access but I had two people  
8 principally do all of the data room diligence for me.

9 Q Well, would you consider access to daily production  
10 reports important?

11 A Of some importance.

12 Q What about any violations of the law, regulatory laws,  
13 safety laws, health laws, that type of thing?

14 A We're required to have that attached to the APA, so we  
15 understood the record at the operation.

16 Q What about the condition of equipment located on the  
17 properties?

18 A It's important.

19 Q And equipment repair and rebuild schedules, would that be  
20 important, too?

21 A Again, depending on you're intent on operating the  
22 properties, it would be, yes.

23 Q What about the availability of replacement parts for the  
24 equipment, that type of thing? Would that be an important  
25 issue?



1 A I think that would be fairly -- would be hard not to  
2 expect that to be available --

3 Q Now --

4 A -- unless you had very equipment at the mine.

5 Q And so you would also agree that being able to actually  
6 physically view the mine would be an important part of the  
7 inspection and due diligence process. Isn't that correct? An  
8 underground mine, that is.

9 A Yeah. I mean, I -- the more information you have about a  
10 property that you intend to purchase, I think the better.

11 Q And that would also include access to the refuse areas  
12 where the ponds and --

13 A Certainly, understanding the --

14 Q -- fines.

15 A -- refuse areas would be important.

16 Q Would load out reports and ratings be important?

17 A Every aspect of the property is important.

18 Q Safety reports, correct?

19 A Right.

20 Q Copies of MHSA and state plans concerning controlled  
21 ventilation, other health concerns, safety concerns, that would  
22 be important, too, correct?

23 A Sure. And I would be surprised if those things were not  
24 in the data room, but again, I did not access it directly.

25 Q You -- so do you know exactly what was in the data room?

1 A No, I didn't access it.

2 Q Do you know how the data room was set up, as far as links  
3 and separate --

4 A Alls I know is that there were four separate data rooms  
5 that we had access to.

6 Q Okay.

7 A And I think --

8 Q But you never --

9 A -- and I think they basically corresponded to the Lot --

10 Q Okay.

11 A -- the Lot Numbers 3, 4, 8 and 9.

12 Q Would projection maps -- would those be important, as far  
13 as --

14 A Yes. Yeah.

15 Q -- reviewing those and due diligence?

16 A Absolutely. You know, I will say that in the data rooms  
17 we established for the Patriot project, maps and those kinds of  
18 records were all in the data room.

19 Q Would that include roof fall maps?

20 A That would not include that level of detail, no. It would  
21 be much more general maps, but anything attached to a permit,  
22 of course, would be in there.

23 Q And would roof fall maps be attached to a permit?

24 A No, not typically.

25 Q Would that be important to the due diligence process?

1 A You know, I mean, those are localized conditions that  
2 would be of some importance, but not necessarily --

3 Q I mean, if the mine's going to cave in, that's kind of  
4 important, isn't it?

5 A Yeah, but a roof fall is where it's already caved in.

6 Q Right. What about belt lines -- conveyer belt lines and  
7 that type of thing? Wouldn't inspecting those be an important  
8 criteria?

9 A Every aspect of an underground mine tour would be  
10 important.

11 Q Including ventilation readings, correct?

12 A If you could do it. If you could do it, it'd be  
13 important.

14 Q Including ventilation readings, correct?

15 A Yes.

16 Q And the efficiency of fans that ventilate, correct?

17 A Yes.

18 Q Now, was --

19 A Those kinds of things, you know, probably, a physical  
20 inspection wouldn't show you how well that fan's working. You  
21 know, reports and, you know, the data would be better, you  
22 know, give you a better indication on that.

23 Q Now, wouldn't you agree that if one of the potential  
24 bidders had problems gaining access to some items in the data  
25 room, that the seller should provide information that are -- is

1 -- information on how to get to the data or hard copies of the  
2 data to the potential bidder? Wouldn't that be a reasonable  
3 request?

4 A Yeah. And I can't speak to the auction process here,  
5 though, other than our participation in it. But yeah, I mean,  
6 as much information as you have, I'll say it again, related to  
7 the assets you're buying, the better off you are.

8 Q And -- but did the purchasers have access to all of this  
9 information?

10 A We had access to everything that was in the data room.

11 Q And including inspecting the refuse areas and the  
12 underground mines and the strip mines.

13 A Again, I didn't go on the site inspections, so I don't  
14 know what they looked at.

15 Q But your understanding is they did not go into the  
16 underground mines?

17 A I said I don't --

18 THE COURT: Mr. McArdle, he's told you twice he was  
19 not on the site visit and he can't tell you what they saw.

20 THE WITNESS: Right.

21 BY MR. MCARDLE:

22 Q Do you know of any acquisitions Marco's made in this area  
23 of coal mining properties?

24 A Other than yesterday mentioning some potential access of  
25 Arch property near -- in the general area, I didn't even know

1 the name Marco before two days ago.

2 Q What kind of financial information did the purchasers  
3 provide to the debtor?

4 A Generally, the same information I provided the Court  
5 today.

6 Q Your verbal testimony?

7 A I think that was what was discussed in -- talked about  
8 with PJT.

9 Q Were any documents provided, financial statements, that  
10 type of thing?

11 A Not that I'm aware of.

12 Q So just based upon your word, that's -- the word of the  
13 purchasers, that's --

14 A I had no direct discussion with PJT on that subject. They  
15 talked with other members of our management team.

16 Q Do you know if a certified mine inspector would be  
17 entitled to access or be allowed to have access to a mine,  
18 whereas some person who was not certified as a mine inspector  
19 may not?

20 A I can't answer that question.

21 Q Now, counsel for the debtor mentioned planting trees and  
22 so forth. Do you remember those questions?

23 A Uh-huh.

24 Q That's basically reclamation, correct? Part of the  
25 reclamation process --

1 A Right.

2 Q -- correct?

3 A Well, you don't necessarily have to plant trees to  
4 complete final reclamation.

5 Q But there is a certain reclamation process that everybody  
6 has to go through, correct?

7 A That's correct.

8 Q Was any financial information provided to Pardee by the  
9 purchasers concerning their ability to perform under the  
10 leases?

11 A It has not been done so yet.

12 Q It doesn't -- does the West Virginia Department -- I think  
13 it's the Department of Environmental Management or -- that and  
14 the Department of Environmental Safety or whatever it is in  
15 West Virginia, did they have concerns about the purchaser's  
16 acquisition and ability to perform their reclamation duties?

17 A I think their attorney is here today to talk --

18 Q Have they voiced any such --

19 A -- talk to that point.

20 Q -- have they voiced any such concerns to you?

21 A We had a discussion about what our plans were yesterday  
22 afternoon with the department.

23 Q And what was the nature of that discussion?

24 A Just explaining what the APA provided for and how we  
25 intended to handle the reclamation under the funding, mainly

1 talking to the cash collateral aspect and the replacement of  
2 the bonds. That's all, you know, in the APA.

3 Q Were they assured by that?

4 A You'll have to ask them.

5 Q So you don't know? They didn't say to you, we're okay, or  
6 anything to that effect?

7 A I got the general impression that they felt comfortable  
8 with what was being provided for, but again, I'll refer to the  
9 -- to their representative here.

10 Q Now, you mentioned there was -- I was trying to do the  
11 math as you went along, but it sounded like you had about --  
12 including the 15 million in new capital, is it about \$70  
13 million in -- 17 -- 70 million, yeah, \$70 million in liquid  
14 assets that would be available --

15 A Between --

16 Q -- at or about the time of the sale?

17 A Yeah. \$30 million of cash collateral, 43.8 million in  
18 networking capital and 15 million in new financing.

19 Q Eighty-eight million, about?

20 A That sounds right.

21 Q Okay. And you said that the reclamation liabilities for  
22 these particular properties that the purchasers are acquiring  
23 are going to be in excess of \$30 million.

24 A West Virginia was 30 million.

25 Q How much in excess of \$30 million? How far in excess of

1 \$30 million do you estimate those reclamation liabilities to  
2 be?

3 A That was the estimate, 30.

4 Q Thirty million?

5 A Yeah.

6 Q But that wasn't the --

7 A I think it was either plus or minus a couple hundred  
8 thousand dollars.

9 Q And Patriot has -- the Patriot acquisition, that's an  
10 addition of 30 million. Is that right?

11 A No, I did not testify to that.

12 Q What will the Patriot --

13 A Patriot is a huge number of more permits and liabilities,  
14 and I think the -- it's been a while since I've seen those  
15 numbers, but it's in excess of \$100 million.

16 Q Now, the \$73 million, is that just earmarked for this  
17 particular purchase?

18 A Yes.

19 Q Okay. So you've got well over \$100 million Patriot, and  
20 you've got approximately --

21 A Well, you've got resources there, as well, so just don't  
22 -- I don't think you can just look at the liability side and  
23 say that's necessarily a problem.

24 Q How much in resources do you have to deal with that --

25 A I think there were something in excess of \$200 million in



1 letters of credit associated with Patriot and for covering  
2 various liabilities, so --

3 MR. McARDLE: That's all I have.

4 THE COURT: Thank you. Any other cross-examination?  
5 Any redirect?

6 MR. WATSON: No, Your Honor.

7 THE COURT: Thank you. You may step down.

8 THE WITNESS: Thank you.

9 THE COURT: Oh, I do have one question. I'm sorry.

10 THE WITNESS: Yes.

11 THE COURT: Did I understand you to say that you did  
12 not access the data room?

13 THE WITNESS: I didn't -- well, I think I got in  
14 there and glanced around, but I had two people --

15 THE COURT: But you had people that did that at your  
16 request.

17 THE WITNESS: Right. And --

18 THE COURT: Was there any information that you asked  
19 for from your people to negotiate this proposed purchase that  
20 you were unable to get from your people?

21 THE WITNESS: I don't believe so. I --

22 THE COURT: Thank you.

23 MR. McARDLE: Can I follow up?

24 THE COURT: Yes, sir.

25 BY MR. McARDLE:

1 Q The information you just --

2 THE COURT: Mr. McArdle, you need to come to the  
3 podium.

4 MR. McARDLE: I'm sorry.

5 THE COURT: I've got dozens of people on the  
6 telephone.

7 MR. McARDLE: Sorry, Your Honor.

8 BY MR. McARDLE:

9 Q The information that the Judge just asked you about, I  
10 wanted to clarify. Was that information also included on the  
11 data room?

12 A Largely, the schedules that were needed for the APA, in  
13 terms of, you know, equipment, leases, contracts, all of that  
14 information that, you know, I needed for the essential  
15 negotiations of the equipment. I believe all of those came  
16 from the data room. I don't believe there was information  
17 missing in the -- from the data room for the purposes I needed  
18 it for.

19 MR. McARDLE: Okay, thank you.

20 THE COURT: Thank you.

21 (Witness excused)

22 THE COURT: Does the debtor have any additional  
23 testimony?

24 MR. WATSON: No, Your Honor. That's all we have.

25 THE COURT: Thank you. Any of the objecting parties

1 or other parties that are represented by counsel have any  
2 witnesses they want to offer?

3 MR. McARDLE: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. McARDLE: We call Everett Cook.

6 EVERETT J. COOK, MARCO RESOURCE'S WITNESS, SWORN

7 THE CLERK: State your name and address for the  
8 record.

9 THE WITNESS: My name is Everett J. Cook. My address  
10 is 144 Beachwood Drive, Beaver, West Virginia 25813.

11 DIRECT EXAMINATION

12 BY MR. McARDLE:

13 Q Excuse me. Mr. Cook, where did you go to school?

14 A I went to school at Marshfork High School.

15 Q You graduated from high school, correct?

16 A Yes.

17 Q And what did you do after that?

18 A I went into the -- I got drafted into the Navy and -- I  
19 went into the Army in 1966. I took the test to go into the  
20 Navy. I passed the test. I went into the Navy for two years,  
21 came out in 1968.

22 Q What did you do after you got out of the Navy?

23 A I went in the coal mines.

24 Q And how old were you when you started in the coal mines?

25 A Roughly, about 20, 20 and a half years old.

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1 Q And what did you do, to begin with?

2 A General labor.

3 Q So you started just being a coal miner?

4 A Yes, sir.

5 Q When did you own your first coal mine?

6 A Own my first coal mine?

7 Q Yes, sir.

8 A 1977.

9 Q And how did -- and you purchased that coal mine. How many  
10 coal mines have you bought -- been involved with the  
11 acquisition or sale of since that time?

12 A In the neighborhood of 20.

13 Q Is there certain information you generally seek to acquire  
14 when you're inspecting these coal mines?

15 A Absolutely.

16 Q Not -- inspecting with the possibility of purchasing them?

17 A Absolutely.

18 Q And have you ever sold any coal mines?

19 A Yes, I have.

20 Q And is the information that you expect to acquire -- to  
21 get when you're trying to purchase a coal mine, is this the  
22 information that people generally speak when they're -- seek  
23 when they're attempting -- when they're interesting (sic) in  
24 purchasing it, too?

25 A Yes.

1 Q And as a seller, you expect them to make such requests,  
2 correct?

3 A Yes.

4 Q Now, you heard me ask questions concerning certain  
5 information that was requested and whether that should be given  
6 to potential purchasers as part of their due diligence. Did  
7 you hear those questions about access to daily reports --

8 A Yes.

9 Q -- and all that other information?

10 A Yes.

11 Q Would you agree that all that information is important?

12 A I did not.

13 Q Huh?

14 A I did not agree with all the information.

15 Q Well, you don't agree that access to daily production  
16 reports and that type of thing --

17 A I -- the maps that we needed to make a decision on were  
18 not in that data room.

19 Q And what about some of the other information that was  
20 listed in the --

21 MR. McARDLE: Judge, may I approach the witness and  
22 maybe save some time and just let him look at the --

23 THE COURT: Mr. Watson?

24 MR. McARDLE: -- list of information he says was not  
25 provided.

1 MR. WATSON: What are you looking at? No objection.

2 THE WITNESS: I want to see. Turn it around.

3 MR. McARDLE: 8 of Document 1833, the objection, and  
4 quickly look at that.

5 MR. SPARKS: Walker, is this your objection? Your  
6 objection?

7 MR. WATSON: My objection. Thank you.

8 BY MR. McARDLE:

9 Q Now, that information was not provided to Marco Resources.  
10 Is that correct?

11 A That's correct.

12 Q Now, in fact, you were forbidden access to the property.  
13 Isn't that correct?

14 A Yes.

15 Q And do you know why?

16 A I do not.

17 Q Was it -- wasn't it because of a dispute or were you told  
18 -- what were you told -- why were you told you were denied it?

19 A Actually, I was not told. My president, which is Jamie  
20 Ferguson, was told.

21 MR. WATSON: Objection, Your Honor. Hearsay.

22 BY MR. McARDLE:

23 Q Did you -- take a look back at that paragraph and the  
24 information that was not provided. Is that -- all that  
25 information important in doing due diligence?

1 A You have to have it.

2 Q Why are the maps so important?

3 A Well, it goes how the mounds developed, and normally you  
4 have some dates on the mine maps of how they're moving, and  
5 normally on my maps, you have the rock falls marked on there so  
6 that we can determine how the top is reacting to mining the  
7 coal.

8 Q Is it important to look at the refuse areas?

9 A Very important because, you know, the refuse is permitted,  
10 and if you don't have enough refuse area to put your spoil in,  
11 then you're in trouble.

12 Q And you've got to make sure that they're safe and  
13 well-kept, correct?

14 A Yes, right.

15 Q In fact, just a few years ago, there was a huge spill in  
16 West Virginia, correct?

17 A Yes.

18 Q The -- what type of -- when you were not able to locate --  
19 did you all go into the data room and try and locate documents?

20 A Yes.

21 Q Did you have problems locating some of the information?

22 A Yes.

23 Q What --

24 THE COURT: Excuse me. You all have an objection,  
25 but I'd like for you to qualify whether or not this witness did

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1 it himself or whether he delegated to someone else because  
2 unless he went to sit down at the computer and negotiated the  
3 mouse and so forth himself, I don't know that he can testify.

4 MR. McARDLE: I understand.

5 BY MR. McARDLE:

6 Q You heard the Judge. Did you actually look at the data  
7 room yourself?

8 A Yes, I did.

9 Q Did you find all the information that you needed in the  
10 data room?

11 A These requesting here is what we did not find.

12 Q Did you request Walter Energy or any of its  
13 representatives how to locate that information in the data  
14 room? Did you, personally?

15 A I did not specifically ask that question.

16 Q Do you know did anybody at Marco ask that question?

17 A I think maybe Jamie Ferguson did.

18 Q Okay. We'll leave that for him. Now, why is it so  
19 important to go into the coal mine and actually inspect the  
20 interior of the underground coal mines?

21 A Well, most big coal buyers that you sell the coal to,  
22 they're going to inspect the coal mine to make sure that the  
23 coal mine will put out the amount of coal that you're  
24 committing to the market. So we go into it if we're purchasing  
25 a coal mine to make sure that mine can produce enough coal to



1 meet the markets that we have. And it's also the conditions of  
2 the mine, the bad top, the water, the -- whatever the  
3 conditions may be so we will know how to deal with it.

4 Q And Marco was not allowed access to the underground coal  
5 mines?

6 A I didn't -- sir, I didn't hear you.

7 Q Marco was not allowed access to the underground coal  
8 mines?

9 A Marco was denied access to the underground mines.

10 Q Do you know when Marco first contacted the debtor to  
11 express interest in purchasing the properties?

12 A Around December the 14th. I'm not sure exactly what date.  
13 It's around December the 14th, in that area.

14 Q And the only property you were interested in purchasing --  
15 only lot you were interested in purchasing was all of the  
16 property in Lot 3, correct?

17 A Yes.

18 Q Do you -- and you contacted -- it's my understanding you  
19 contacted them on December 2nd. Is that correct?

20 A Yes.

21 Q When did you first receive the information that gave you  
22 access to the data room?

23 A I'm not sure what that date was. I can't remember.

24 Q Now, you submitted a bid -- actually did submit a bid in  
25 this case. Is that correct?

1 A Yes.

2 Q And how much was that bid for?

3 A \$10,000.

4 Q And that's reflected in Exhibit --

5 A Yes.

6 Q -- 1 and 2, I think, that Mr. Garfield previously offered  
7 into evidence.

8 A Yes.

9 Q Were you willing to offer more?

10 A Yes.

11 Q How -- based upon what -- were you familiar with these  
12 properties?

13 A Yes.

14 Q How were you familiar with them?

15 A I actually put the Maple Coal and Atlantic Leaseco deal  
16 together when Coal International came in and bought it,  
17 purchased three of them out of bankruptcy and started all these  
18 operations, and we formulated a company called Coal  
19 International and took it -- IPO'd it in the London Stock  
20 Exchange.

21 Q And did those purchasers inspect this property?

22 A Yeah. I was one of those people. I -- yeah.

23 Q And did you request an acquire the information --

24 A Yes.

25 Q -- described in Paragraph 8 here?

1 A Yes.

2 Q And that was given to you at the time?

3 A Yes.

4 Q So based upon what you knew and your familiarity with Lot  
5 3 properties, how much more would you have been willing to --  
6 just based upon your familiarity, how much more would you all  
7 may have been willing to offer, as far as a bid is concerned?

8 MR. WATSON: Your Honor, I object. This is  
9 speculation, and I -- it is also, I think, immaterial. They  
10 made the bid for what it's -- for what they made it for.

11 MR. McARDLE: They made an offer. They were willing  
12 to pay more, a lot more.

13 THE COURT: Well, I'm looking at what you keep  
14 referring to, and I use the term loosely "bid," but I'm looking  
15 at your Exhibit 1, and it makes no reference to that, but I  
16 think the bigger problem, Mr. McArdle, is that it was a  
17 non-conforming bid. So I'm going to sustain his objection  
18 because your exhibit does not say, "I'll pay more," in addition  
19 to the fact that it's a non-conforming bid. So I'm going to  
20 sustain his objection.

21 BY MR. McARDLE:

22 Q That was -- was this your first offer? In other words,  
23 were you willing to make an additional offer?

24 A Yes.

25 MR. WATSON: Sorry, objection, Your Honor.

1 THE COURT: Already asked and answered. I'll  
2 overrule the objection. Nice way to come in the back door,  
3 Mr. McArdle.

4 MR. McARDLE: I'm trying my best, Judge. Sorry.  
5 BY MR. McARDLE:

6 Q Why was -- why did you not mark up and submit an asset  
7 purchase agreement?

8 A I don't know. I actually don't know why they didn't allow  
9 us to look at the property.

10 Q What about the document, the asset purchase agreement?  
11 Did you review that?

12 A Yes.

13 Q Okay. Did you ever mark it up and submit a -- an asset  
14 purchase agreement marked up?

15 A Yes.

16 Q You did actually submit one?

17 A Well, I'm not exactly sure. I think Jamie may have, but  
18 I'm not sure.

19 Q Okay. I'll leave that to him. Is Marco qualified to  
20 obtain bonding for reclamation purposes for these properties?

21 A Marco is already approved by First Surety.

22 Q For these properties?

23 A For these properties.

24 Q Would it -- is -- would Marco be able to obtain the mining  
25 permits for these properties?

1 A Yes.

2 MR. McARDLE: No further questions.

3 THE COURT: Thank you.

4 MR. WATSON: Follow up. Excuse me.

5 THE COURT: Mr. Watson?

6 MR. WATSON: Thank you, Your Honor. Just a couple.

7 CROSS-EXAMINATION

8 BY MR. WATSON:

9 Q Mr. Cook, as you're sitting here today, you don't know  
10 whether there was a asset purchase agreement submitted with  
11 Exhibit 1 or not, do you?

12 A No, there was not.

13 Q Okay.

14 MR. WATSON: That's all I have, Your Honor.

15 THE COURT: Thank you. Anybody else have any  
16 questions of this witness?

17 (No audible response)

18 THE COURT: Thank you, Mr. Cook. You may step down.

19 THE WITNESS: Thank you, Your Honor.

20 (Witness excused)

21 THE COURT: Mr. McArdle.

22 MR. McARDLE: Yes, Your Honor. Jamie Ferguson.

23 THE CLERK: Raise your right hand, please.

24 BENJAMIN JAMES FERGUSON, MARCO RESOURCE'S WITNESS, SWORN

25 THE CLERK: State your name and address for the

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1 record.

2 THE WITNESS: Benjamin James Ferguson, 295 Sturgeon  
3 Branch Road, Dry Creek, West Virginia.

4 DIRECT EXAMINATION

5 BY MR. MCARDLE:

6 Q Did you -- how long have you been in the coal mining  
7 business?

8 A Nineteen years.

9 Q And when did you -- where did you start in the process?

10 A I started in the surveying/engineering department.

11 Q Have you -- you have a degree?

12 A I -- yes, I do. I have a business degree.

13 Q And what's your position with Marco Resources?

14 A President.

15 Q Did you participate in any of the inspections or the due  
16 diligence efforts?

17 A Yes, I did. Yes, in the due diligence, yes, I did.

18 THE COURT: Okay. Mr. Ferguson, I'm going to ask you  
19 if you will, make sure he finishes his question --

20 THE WITNESS: Okay, I'm sorry.

21 THE COURT: -- before you start your answer --

22 THE WITNESS: I'm sorry.

23 THE COURT: -- in case this has to be transcribed.  
24 It's very difficult if you all talk over one another.

25 BY MR. MCARDLE:

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1 Q What we -- you've heard me refer to or you've referred to  
2 your inspection as, I think, a windshield inspection.

3 A Yes, sir.

4 Q What do you mean by that?

5 A The only thing we were allowed to do was drive around the  
6 property. We weren't allowed to examine the prep plant, the  
7 deep mines, the refuse area, the belts on the -- the overland  
8 belts, even.

9 Q And you heard Mr. Cook testify that access was denied or  
10 was not -- information described in Paragraph 8 of that  
11 document I just showed you, the objection, that access was  
12 denied or was not given or the copies of those documents were  
13 not provided to Marco?

14 A Yes, sir.

15 Q And were you involved in trying to acquire that  
16 information?

17 A Yes, sir, I was.

18 Q Was there any particular reason why Everett Cook was not  
19 allowed to inspect the property?

20 MR. WATSON: Objection, Your Honor. Calls for  
21 hearsay.

22 THE COURT: I'm sorry, calls for --

23 MR. WATSON: Calls for hearsay and speculation.

24 MR. McARDLE: I think it's a declaration against  
25 interest, Your Honor.

1 THE COURT: I don't see how that's going to fly,  
2 Mr. McArdle.

3 MR. McARDLE: Well, I mean, basically, the testimony  
4 would be that a person wasn't allowed on it.

5 THE COURT: Did you go with Mr. Cook when he  
6 attempted to make an inspection?

7 THE WITNESS: No, I received a phone call from John  
8 Mattis (phonetic).

9 THE COURT: I think -- I don't think he can testify  
10 about anything about the inspection, Mr. McArdle, if he wasn't  
11 there in person.

12 MR. McARDLE: Mr. Ferguson was present. Weren't you  
13 present?

14 THE COURT: I thought you said you weren't present  
15 when he went and made the site inspection.

16 THE WITNESS: Mr. Cook was not allowed on. He did  
17 not go with us.

18 THE COURT: Were you present?

19 THE WITNESS: On the site inspection?

20 THE COURT: Yes.

21 THE WITNESS: Yes. Okay, I'm sorry. Now, what was  
22 your question?

23 MR. McARDLE: Why was Mr. Cook allowed on the  
24 inspection?

25 MR. WATSON: Your Honor, I think he is going to



1 answer that question with hearsay, so what somebody else told  
2 him.

3 THE COURT: Okay. I'll sustain your objection in  
4 part.

5 MR. McARDLE: It's not truth -- not being offered to  
6 prove the truth of the matter asserted. It's being offered to  
7 establish reasons that are irrelevant and immaterial to the due  
8 diligence process were used to keep Mr. Cook off the property.

9 MR. WATSON: Your Honor, I think that is being  
10 offered to prove the truth of the matter.

11 THE COURT: I mean, that's the whole point of your  
12 objection, really, Mr. McArdle, is you all weren't treated  
13 fairly and you didn't get what you needed.

14 MR. McARDLE: Why they weren't treated fairly is  
15 important, I think, Your Honor. And whether he was told that  
16 he --

17 THE COURT: So you're suggesting there's some  
18 ulterior motive?

19 MR. McARDLE: I'm just suggesting there were personal  
20 motivations that prevented Mr. Cook from being allowed on the  
21 property that had no relevance or material to the bidding  
22 process.

23 THE COURT: What's the harm or prejudice to the  
24 debtor, Mr. Watson?

25 MR. WATSON: Your Honor, in the grand scheme of

1 things, none. We'll recall the objection.

2 THE COURT: I'm going to overrule the objection and  
3 I'm going to allow it in.

4 BY MR. McARDLE:

5 Q What were you told?

6 A I received an email from John Mattis to give him a call,  
7 and when I called him, which he works for the JBP (sic), the  
8 partners --

9 Q Uh-huh.

10 A -- and he asked me --

11 THE COURT: PJT?

12 BY MR. McARDLE:

13 Q The purchasers?

14 A No.

15 Q PJT Partners?

16 A Yes.

17 Q Okay, yeah.

18 A Yes, sir. And he asked me if there was people in our  
19 corporation who had issues with executives at Walter Energy?  
20 And I told him there possibly was one, and without mentioning  
21 his name, John said, is it Everett Cook? And I said, Everett  
22 is our CEO, and he told me point-blank Everett Cook will not be  
23 allowed on the property.

24 Q Did he tell you why?

25 A No.

1 Q Okay. What properties did you ask to see that you weren't  
2 allowed to see?

3 A I asked to see the preparation plants, both preparation  
4 plants at the Gauley Eagle and at the Maple. I asked to go  
5 underground at Maple. I asked to check the fire boss books,  
6 the roof fall maps, the overland belts, and we were allowed --  
7 not allowed access to any of that.

8 Q Now, aren't you a certified mine inspector?

9 A I'm a certified mine foreman in the state of West  
10 Virginia.

11 Q And what does -- does that mean that you have access to  
12 properties where other people may not?

13 A What ends up happening, if the fan's been off, which these  
14 things were running, a certified mine foreman has to go in and  
15 certify that the mine is safe and report any hazards in the  
16 fire boss book before anyone else is allowed to come in behind  
17 him.

18 Q What are the -- what does it mean if the fans are running?

19 A Well, if the fan was off, then nobody's allowed in. Now,  
20 first, we were told that the fans were not running. We  
21 arrived. All the mine sites, the fans were running. The  
22 associate that was with me is also a certified mine foreman,  
23 and he asked Dan Stickel, the president of there, if they were  
24 fire bossing the mines, and Mr. Stickel replied to him, yes,  
25 they were doing 24-hour inspection.

1 Q So were you able to look at the fire boss books to  
2 determine why they were allegedly unsafe?

3 A Not -- we were not allowed to look at any fire boss books.

4 Q Did Mr. Stickel tell you that the mines were unsafe and  
5 that was the reason you couldn't go in?

6 A No.

7 Q Why did he tell you, you couldn't go into the mines?

8 A He did not.

9 Q He wouldn't tell you why?

10 A No.

11 Q Or didn't tell you why?

12 A He did not tell us why.

13 Q Did you ask him?

14 A No.

15 Q What about the refuse areas? Why weren't you allowed --  
16 did you see the refuse areas?

17 A No.

18 Q Were -- did you ask to see the refuse areas?

19 A Yes.

20 Q Why weren't you allowed to see the refuse areas?

21 A We weren't told that either.

22 Q You were just told nothing?

23 A We -- he just would not take us -- he was the one driving  
24 the vehicle and did not take us to that area.

25 Q Now, is it your belief or opinion that the mine fan is on

1 and it's being inspected 24 hours a day, that it's safe enough  
2 for a certified mine foreman to inspect and go down and take a  
3 look at?

4 A Absolutely.

5 MR. McARDLE: No further questions.

6 THE COURT: Mr. Watson?

7 CROSS-EXAMINATION

8 BY MR. WATSON:

9 Q Mr. Ferguson, what date was the inspection that you made  
10 of these mines you're talking about?

11 A January 5th.

12 Q And are you familiar with the fact that Marco Resources  
13 provided some information about their financial ability to  
14 consummate this deal only on December 30th?

15 A Yes, I am.

16 Q So you were allowed at the mine five days later?

17 A Yes.

18 Q Mr. Ferguson, if you were operating a mine, would you let  
19 a third-party mine inspector go in the mine? You wouldn't do  
20 that, would you?

21 A I would do that because I would --

22 Q You'd let a third --

23 A -- I would accompany him.

24 Q So you would have to have somebody else to accompany then  
25 if it were you, wouldn't you?

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1 A If I was me? No, I wouldn't have to have nobody else.

2 Q If it were you and you were operating a mine and somebody  
3 came up and said, "I'm a mine inspector. I want to go down in  
4 that mine, and it's okay for me to do it because I'm a mine  
5 inspector," you're saying you'd let him do that without being  
6 accompanied?

7 A They had people there that could accompany us.

8 Q Okay.

9 A They just now told us that they have mine inspectors.  
10 They were inspecting the mines on a 24-hour basis, so we could  
11 have went with the person that was inspecting that mine on that  
12 24-hour basis.

13 Q You don't have any reason to believe that that mine was  
14 operating, do you? It wasn't producing coal.

15 A It was not producing coal --

16 Q You don't have any i --

17 A -- but the fan was running.

18 Q Excuse me, go ahead.

19 A But the fan was running. It was ventilated.

20 Q So it was ventilated. You don't have any idea how many  
21 people were there or available to do mine tours that day, do  
22 you?

23 A There was approximately four people there, and we didn't  
24 select the date. We could have came at any time, any date, and  
25 we made that clear.

1 Q Are you familiar with the materials that were submitted in  
2 connection with what's been marked as Exhibit 1, which was --  
3 has been referred to as the bid Marco Resources made?

4 A Yes.

5 Q There wasn't an asset purchase agreement submitted, was  
6 there?

7 A No, there was not.

8 Q And Marco Resources did not express any interest in or  
9 attempt to make any offer with respect to the assets being  
10 offered, other than the West Virginia mines, did it?

11 A That's correct.

12 Q That includes no offer to acquire Walter Coke or its  
13 assets and liabilities?

14 A That is correct.

15 Q No offer to acquire the Taft mines and their assets and  
16 liabilities?

17 A That is correct.

18 Q No offer to acquire the various Jim Walter Resources  
19 assets that were offered in this sale?

20 A That is correct. The only property we wanted was Lot 3.

21 Q All right. Thank you.

22 MR. WATSON: That's all I have, Your Honor.

23 THE COURT: Any other questions by any other counsel?

24 (No audible response)

25 THE COURT: Mr. McArdle, I want to ask him a couple

1 of questions, so if you don't mind, let me go first because you  
2 may have follow-ups.

3 Mr. Ferguson, are you familiar with what an asset  
4 purchase agreement is?

5 THE WITNESS: Yes, and the main reason, honestly,  
6 that we filled this out was again with the very limited  
7 information that we were given and I have done 18 other due  
8 diligences, and it's hard to buy something if you can't go look  
9 at what your conditions are --

10 THE COURT: Sir, listen, with all due respect, you  
11 have a very competent counsel who can ask you these questions  
12 and give you an opportunity to answer.

13 THE WITNESS: Sure.

14 THE COURT: I'm not giving you an --

15 THE WITNESS: Yes, ma'am.

16 THE COURT: -- open opportunity to tell me all of  
17 what you want to tell me.

18 THE WITNESS: Yes, ma'am.

19 THE COURT: So you are -- you know what an APA, as we  
20 refer to it, an asset purchase agreement, is?

21 THE WITNESS: Yes, ma'am.

22 THE COURT: And you admit, acknowledge, agree that  
23 this Exhibit 1 that was offered by your counsel is not an asset  
24 purchase agreement?

25 THE WITNESS: Yes, ma'am.



1 THE COURT: Did you understand that bidders were  
2 required to submit an asset purchase agreement?

3 THE WITNESS: Yes, ma'am.

4 THE COURT: So at the time you sent this Exhibit 1  
5 dated January 11th, 2016, and although it doesn't contain your  
6 signature, it has your name at the bottom, you knew that this  
7 was not in compliance with the requirements pursuant to an  
8 order signed by this Court?

9 THE WITNESS: Yes, ma'am.

10 THE COURT: All right, Mr. McArdle. Have at it.

11 REDIRECT EXAMINATION

12 BY MR. McARDLE:

13 Q Now --

14 THE COURT: Come to the podium, if you don't mind,  
15 Mr. McArdle because again there are --

16 MR. McARDLE: I'm bad again, Your Honor.

17 THE COURT: -- quite a number of people on the phone,  
18 and I don't want anybody to miss out.

19 MR. McARDLE: I'm good here. No, this is really my  
20 first time, but --

21 BY MR. McARDLE:

22 Q Now, if you had been told, okay, we can't do mine  
23 inspection now, you have to wait until a certified mining  
24 foreman or inspector is here, could you have gone back?

25 A Yes, sir.

1 Q How far is your office from the Lot 3 properties?

2 A Roughly, 22 miles.

3 Q Now, why didn't you submit a marked up asset purchase  
4 agreement with your offer?

5 A There were several things in there that we couldn't  
6 answer, seeing that we didn't have access to the information we  
7 needed in order to do the correct due diligence.

8 Q Did you feel like the due diligence that you requested was  
9 reasonable and within the parameters of the bidding order?

10 A Absolutely.

11 Q Did you feel like the debtor or the sellers were complying  
12 with the bidding procedures in failing to provide certain  
13 information?

14 A Can you repeat that question?

15 Q Did you feel they were not in compliance with the bidding  
16 order?

17 A Yes.

18 Q Did you think it was fair that you had to comply with the  
19 bidding order when they didn't?

20 A No, I do not.

21 MR. McARDLE: No further questions, Judge.

22 THE COURT: Mr. Watson, anything else?

23 MR. WATSON: One question, Your Honor.

24 RECROSS EXAMINATION

25 BY MR. WATSON:

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1 Q Mr. Ferguson, as you're sitting here, you don't have any  
2 information on which you can testify under oath that any of the  
3 other bidders had any more or different access to the data room  
4 or to the mines than you did, do you?

5 A I do not.

6 Q Thank you.

7 THE COURT: Anything else, Mr. McArdle, of this  
8 witness?

9 MR. McARDLE: No, Judge.

10 THE COURT: Thank you very much, Mr. Ferguson.

11 (Witness excused)

12 THE COURT: Mr. McArdle, do you have any additional  
13 witnesses?

14 MR. McARDLE: No, ma'am.

15 THE COURT: Okay. Any other objecting counsel have  
16 any witnesses?

17 (No audible response)

18 THE COURT: Any rebuttal witnesses by the debtor?

19 MR. WATSON: No, Your Honor.

20 THE COURT: All right, thank you. I'm good to keep  
21 going, but if you all want to take a five-minute break before  
22 you do your closing arguments, I'll let you. Otherwise, I'm  
23 going to just keep going. You all want to break?

24 MR. BENDER: We're good to keep -- we're fine to keep  
25 going.

1 THE COURT: Okay. Then, let's just keep going.  
2 Okay. Mr. Bender, since you would normally get to go first and  
3 last and you've already made a good bit of opening argument,  
4 can I just let you sit down and let --

5 MR. BENDER: That'll be fine, Your Honor.

6 THE COURT: -- you hear what everybody else has to  
7 say and then you come back at the end?

8 MR. BENDER: That's perfectly fine. Thank you.

9 THE COURT: Anything from, Mr. Hahn, your group?

10 MS. BECKERMAN: One minute, Your Honor.

11 THE COURT: Okay.

12 MS. BECKERMAN: Your Honor, Lisa Beckerman from Akin  
13 Gump on behalf of both Coal Acquisition and the Steering  
14 Committee. We obviously support the sale transaction and would  
15 ask the Court to approve it. The only other thing I wanted to  
16 advise Your Honor about that actually doesn't have anything to  
17 do with this sale transaction, but with ours, is that today, we  
18 actually signed an AP -- CBA ourselves with the UMWA, and we  
19 have a ratification vote scheduled for February 16th. Just  
20 wanted to let Your Honor know that.

21 THE COURT: Did you all let Judge Proctor know that?

22 MS. BECKERMAN: We have to put it in our footnote of  
23 our briefs next week, Your Honor, I think, but we will let him  
24 know it.

25 THE COURT: Thank you very much, Ms. Beckerman.

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1           Okay. I think I'm going to go to those of you who I  
2 think your objections perhaps are resolved. So let me start  
3 over here. Mr. Fingerhood, you're on the far right over here.  
4 You have any remaining objections, having elicited the  
5 testimony today?

6           MR. FINGERHOOD: No, Your Honor, based on the  
7 testimony elicited today and --

8           THE COURT: And the proposed changes to the order.

9           MR. FINGERHOOD: And the proposed changes in the  
10 confirmation that the RCRA order will be assumed by ERP Coke,  
11 we feel our concerns and our objection have been addressed.

12          THE COURT: Thank you very much.

13          MR. FINGERHOOD: Thank you.

14          THE COURT: Mr. Ciantra, you're good still?

15          MR. CIANTRA: We're good still, Your Honor. Thank  
16 you.

17          THE COURT: Thank you. And for the State of West  
18 Virginia?

19          MR. BARRETT: Your Honor, just want to make a brief  
20 statement, and I think we're good to get past today, but did  
21 want to point out there are provisions in the asset purchase  
22 agreement with VCLF that require VCLF to obtain governmental  
23 approval of the transfer of the permits. That includes  
24 specifically DEP's approval of the transfer of the West  
25 Virginia permits. The proposed order, as well, specifically

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1 contemplates that the parties will comply with those permit  
2 transfer provisions and West Virginia law. And I just want to  
3 emphasize, Your Honor, that the provisions of West Virginia  
4 law, among other things, authorized DEP to deny transfer of a  
5 permit if it determines that the transferee lacks the ability  
6 to perform reclamation in accordance with the permit or  
7 applicable law or the applicable rules. I think there's an  
8 obvious reason for that, Your Honor. It's a very important  
9 provision of the mining laws.

10 THE COURT: But with all due respect, this is not the  
11 -- this purchaser's first venture into coal mining in West  
12 Virginia, and I don't have any reason to believe any of this is  
13 a surprise to them or they wouldn't have been in the first  
14 place.

15 MR. BARRETT: I'm not quite sure I understand that  
16 last part, but yes, Your Honor, they do know that they have to  
17 comply. We do have a very long history with these people. We  
18 have been involved with Patriot, and I think that is part of  
19 where we are. I just want to make it clear that we are going  
20 to exercise our regulatory authority, as provided under West  
21 Virginia law, and exercise it closely.

22 THE COURT: And this is new or different from what  
23 any of us would expect because --

24 MR. BARRETT: No, Your Honor.

25 THE COURT: Okay.

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1 MR. BARRETT: I just want to make it clear that we  
2 are not -- we have not approved the transfer of the permits.  
3 We have not really even considered the applicants --

4 THE COURT: But you have nothing from which to doubt  
5 that they will comply in all respects, in terms of their other  
6 ventures in West Virginia. These folks, or their related  
7 entities, have complied in the past?

8 MR. BARRETT: Your Honor, we have very significant  
9 concerns that they will be able to satisfy the permit transfer  
10 requirements.

11 THE COURT: So what testimony or evidence do you have  
12 of that today?

13 MR. BARRETT: We are not going -- we are not here  
14 today to contest it.

15 THE COURT: Okay.

16 MR. BARRETT: We are going to exercise that in our  
17 regulatory forum.

18 THE COURT: Okay.

19 MR. BARRETT: And I just want to make that clear.

20 THE COURT: Okay, thank you. Okay. Mr. Collins,  
21 anything to add?

22 MR. COLLINS: Nothing, Your Honor.

23 THE COURT: Thank you. Mr. Zuber, are you still with  
24 us and do you have anything to add?

25 MR. ZUBER: Yes, Your Honor, I do not. Thank you.

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1 THE COURT: All right, thank you. Mr. Sparks,  
2 anything from the committee?

3 MR. SPARKS: No comments from the committee, Your  
4 Honor.

5 THE COURT: Okay. So did I get everybody except  
6 Mr. McArdle and Mr. Davies?

7 (No audible response)

8 THE COURT: All right, Mr. Davies, come on. I  
9 suspect your arguments are some I've heard before.

10 MR. DAVIES: Well, Your Honor, I won't belabor the  
11 point.

12 THE COURT: Thank you very much.

13 MR. DAVIES: You're aware of our arguments in our  
14 previously filed objection to the sale motion regarding Coal  
15 Acquisition, so we'll stand on that objection and the papers  
16 we've previously submitted. And as you know, that ruling is on  
17 appeal across the street, and we don't think at this point any  
18 sale orders should be entered with respect to the Coal Act  
19 obligations and the extinguishment of any future Coal Act  
20 obligations.

21 THE COURT: Thank you, Mr. Davies.

22 MR. DAVIES: Thank you.

23 THE COURT: Mr. McArdle? Did I miss anybody other  
24 than Mr. McArdle? Oh, I'm sorry, Mr. Hahn. Come on up.

25 MR. HAHN: Do you want me?

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1           THE COURT: Yes, sir, you can come on. I think the  
2 debtor's position is that your objection really has to do more  
3 with the cure issue as opposed to the actual sale. Other than  
4 I understand your supplement to indicate you have questions  
5 about whether or not this purchaser has provided sufficient  
6 proof of their ability to provide you assurance of performance  
7 on a go-forward basis.

8           MR. HAHN: Correct, Your Honor. We don't believe  
9 that they've provided or that the debtors have provided  
10 sufficient evidence of their ability to perform under the  
11 lease. The order that they submitted this morning, the  
12 proposed order, says exactly that, that they've submitted --  
13 that the Court is going to find they have sufficient evidence  
14 of their ability to perform.

15           Your Honor, my client, Pardee, has effectively been  
16 asked to take the debtor's word for it, the purchaser's word  
17 for it and Mr. Schlesinger's word for it. We've never seen  
18 evidence of their financial ability to perform or their ability  
19 to obtain the regulatory approvals. We've never seen their bid  
20 documents. We haven't even seen most of the schedules for the  
21 asset purchase agreement. We couldn't -- we spent several  
22 hours this after -- this week trying just to figure out which  
23 of our leases were even being assumed, and Your Honor, today,  
24 for the -- really kind of for the first time that two of them  
25 might be, but might not be.

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1           Your Honor, we've asked some questions. I mean, Mr.  
2 -- the purchaser's representative indicated -- he has said they  
3 have all this financial ability. We don't have any, never been  
4 provided. And, you know, if we were entering a lease with  
5 these -- with this company, we would provide -- we would demand  
6 that. We're simply being asked to take the word of all of  
7 these folks that the tenant we're going to have to live with is  
8 able to perform, and we simply don't think that's evidence of  
9 it.

10           THE COURT: I don't dispute that entirely, Mr. Hahn,  
11 but if you don't have the purchaser, what do you have?

12           MR. HAHN: We've -- the leases are rejected.

13           THE COURT: Which perhaps is what Pardee wants  
14 anyway?

15           MR. HAHN: We would be fine if we had a tenant that  
16 had provided all of the sufficient evidence --

17           THE COURT: Tenant to your liking or of your  
18 choosing, recent choosing.

19           MR. HAHN: Not necessarily of our choosing, but if  
20 the debtors had brought one that was clearly working -- that we  
21 had been provided sufficient evidence of their ability to  
22 perform -- well, obviously, any landlord wants to be able to  
23 choose its tenant. We're in bankruptcy. We might -- we  
24 understand we might not have that option. But at the very  
25 minimum, we think we should be able to evaluate the evidence or

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1 that the Court should evaluate the evidence. That same  
2 evidence that we've not been provided, to my knowledge, has not  
3 been provided to Your Honor. In terms of the information that  
4 allowed them to be a qualified bidder would quickly tell Your  
5 Honor and, candidly, my client, well, they do have the ability  
6 to perform, they don't have a liability situation that casts  
7 doubt on it. All of it -- all of this information that they  
8 claim candidly makes them a good buyer for this whole deal, but  
9 specifically to my client that they can perform under the lease  
10 is behind a wall, and it's a wall that I'm not sure that the  
11 Court has been given access to, much less the tenant -- the  
12 landlord here, who the debtors and the purchasers are saying,  
13 "You've got to live with this, but hey, trust us, we can do  
14 it." That's really all that we've been provided, and I don't  
15 think that's the standard that they're obligated to provide. I  
16 think that falls short of the standard to say that the Court is  
17 going to enter an order saying "I've been provided evidence  
18 that these folks will be able to perform under the lease."

19 All it is is, you know, I'm sure the purchaser's  
20 represented -- who I've never met, haven't had ability to  
21 depose, I didn't even know anything about this deal until  
22 Monday when it was filed, but I'm sure if we had that he would  
23 -- he testified truthfully and he believes he has an the  
24 ability. I just don't have that information. In a transaction  
25 such as this, normally, I wouldn't be asked to simply take

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1 someone's word for it on the types of dollar figures we're  
2 talking about. I would have the ability to vet this person,  
3 and I think that's the ability that the Court should have.

4 THE COURT: Thank you, Mr. Hahn.

5 MR. HAHN: Thank you, Your Honor.

6 THE COURT: Mr. McArdle.

7 MR. McARDLE: Your Honor, our position is that we've  
8 requested certain information for due diligence purposes,  
9 information that you would request if you were inspecting a  
10 vehicle. We wanted to look under the hood. We wanted to look  
11 in the mines and were not given that access. This is something  
12 that any coal miner would want to do.

13 We may not have submitted an asset purchase  
14 agreement, but the debtors did not provide the information.  
15 Fair is fair. They should be required to comply with the  
16 bidding procedures, as well, and we think that they waived, to  
17 a certain extent, their ability to object to our failure to  
18 fully and particularly comply with the bidding procedures in  
19 all respects when, in fact, they haven't complied with the  
20 bidding procedures in all respects by failing to provide all  
21 the information necessary. Not just us, but apparently to the  
22 environmental people of Virginia, to the landlord and that type  
23 of thing.

24 Business judgment, as far as from the debtor's  
25 perspective, should include all potential offers and possible

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1 offers in the future. Sound business judgment should seek to  
2 gain the most vantage and the highest dollar amount for the  
3 asset to be sold. These assets were offered in lots or in  
4 bulk, and we made an offer on one of the particular lots. Now,  
5 that offer was \$10,000, and it would have included the  
6 assumption of all the liabilities related to reclamation, et  
7 cetera. That's \$10,000 more than the offer that was made.  
8 Now, that was a bid, and there was going to be an auction. So  
9 that was an opening bid, and there would have been an  
10 opportunity for my client to make another bid and another bid  
11 maybe, and there was supposed to be an open auction to conduct  
12 that process. So this was an opening bid. And forbidding  
13 bidders from coming into the process just does not, to me, show  
14 sound business judgment.

15           There are environmental concerns here that have been  
16 expressed by the State of West Virginia. Pardee's got  
17 concerns. They've been provided no financial data to support  
18 the debtor's ability to perform, and the debtor's basically  
19 attempting to sell to people who are uninformed, who have not  
20 been provided information. They're trying to sell a pig in a  
21 poke, and that's where we're at here.

22           THE COURT: Thank you, Mr. McArdle. Anybody else  
23 before I go to Mr. Bender?

24                               (No audible response)

25           THE COURT: Mr. Bender, it is my intention to hold

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1 everybody to the order that was entered on the debtor's motion  
2 in the original proceeding 993. And as I referenced earlier in  
3 terms of the disclosure of the identify of the bidder, there's  
4 also, of course, the provision about an executed APA, which I  
5 intend to enforce that, as well. But similarly, at Paragraph  
6 10, which in the original motion is on my Page 22, it talks  
7 about the proof of financial ability to perform. Now, I  
8 understand that that may not be directly what Mr. Hahn --  
9 Mr. Hahn's issue is whether or not there's adequate assurance  
10 of ability to perform pursuant to his lease, but it's the same  
11 principle.

12 MR. BENDER: Uh-huh.

13 THE COURT: Was this information provided to the  
14 debtor by this purchaser?

15 MR. BENDER: Your Honor, the -- what Mr. Schlesinger  
16 testified is that -- I think that the determination with  
17 respect to VCLF and the affiliated buyers really is based in  
18 large part on his track record and stem tradability because --

19 THE COURT: That's my concern, Mr. Bender. Let me  
20 just read, for everybody's benefit, what it say.

21 "A bid must include written evidence that the debtors  
22 may conclude, in consultation with their advisors and  
23 the consultation parties, and demonstrates that the  
24 bidder has the necessarily financial ability to close  
25 the alternate transaction or supplemental transaction

1           as applicable,"  
2 and yackety, yackety, yackety, and it goes on, Subparagraphs  
3 (a) through (e). So my question is was any written evidence  
4 provided with their bid?

5           MR. BENDER: Your Honor, I do not know the answer to  
6 that, but I --

7           THE COURT: Who would know that answer?

8           MR. BENDER: -- I know that we conferred with the  
9 consultation parties about the bids, and it was determined that  
10 this was a qualified bid and it was a bid that we were going to  
11 pursue. And with the bid procedures, I believe that there is a  
12 latitude in there to make, you know, to make decisions that are  
13 in the best interest of the sale process. But going back to  
14 your question about who would know, it would be PJT.

15           THE COURT: Was -- do you all have any written  
16 financial information with respect to this purchaser that can  
17 be provided to Mr. Hahn or his client?

18           MR. BENDER: I could check with PJT.

19           THE COURT: Well, he's talking to Mr. Bailey as we  
20 speak.

21           MR. BENDER: Your Honor, what -- in talking with  
22 Mr. Schlesinger, what we have is communications that we had  
23 with the sureties that the ability of the VCLF entities, the  
24 Seminole parties, to obtain bonding, which is the test that  
25 we've found to be less probative in terms of their financial

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1 ability to perform is their ability to secure bonding. And in  
2 terms of the financial information, that is what we've found to  
3 be the best indicator of their ability.

4 THE COURT: So if I understood correctly at the very  
5 beginning, and perhaps I read it in something else you filed,  
6 as well, with respect to the cure issues that the debtor may or  
7 may not have with Pardee, you expect to deal with that down the  
8 road, perhaps on the 17th, with other cure issues, depending  
9 upon whether or not this purchaser intends to assume some or  
10 all of these contracts?

11 MR. BENDER: Well, there are -- the Maple leases or  
12 contracts have been identified as contracts that will be  
13 assumed.

14 THE COURT: Okay. And --

15 MR. BENDER: Those are the ones that are the subject  
16 to the cure dispute, where they are asserting that they are  
17 owed 800,000 or so in cure. We contend that the amount is  
18 between 250 and 300,000. And so that is a ripe dispute. That  
19 falls within --

20 THE COURT: You say it's 250 --

21 MR. BENDER: I believe that the amount is -- James?  
22 It's around 280, 275. It's in that area.

23 THE COURT: Is that consistent with what Pardee says?

24 MR. HAHN: No, Your Honor. We filed an objection  
25 saying it's around 800,000. We brought evidence today. Since



1 we've analyzed that issue, we think the total debt on that is  
2 around 1.2 million.

3 THE COURT: Okay. Well, here's my point. Even if it  
4 is your number, which is roughly 300,000, at any cure hearing,  
5 what evidence are you going to have to offer that even if it is  
6 300,000, that it's going to get paid?

7 MR. BENDER: What the bid procedures require is at  
8 closing that the amount, the disputed cure amount, be placed  
9 into a reserve account. So that will be funded at closing.

10 THE COURT: Okay. So the -- what you anticipate is  
11 before you close with this purchaser, if I were to grant this  
12 motion, is that we will have to resolve these cure issues  
13 before then so that this purchaser knows exactly how much they  
14 have to just put -- deposit at closing?

15 MR. BENDER: No. What I'm saying is that they -- we  
16 had filed a list of the cure amounts for the 270 number. The  
17 -- Pardee filed a response, I think, back in December saying  
18 that they assert that the cure amount was in the neighborhood  
19 of 800,000. The \$1.2 million figure that was just floated,  
20 that's news. I understood the figure to be 800,000. But --  
21 and so I'll work off the 800,000-odd figure.

22 At the closing, in accordance with the bid procedures  
23 -- and let me refer you to the section there. On Page 17 of  
24 the order, it says any objection -- and this is Paragraph 39:

25 "Any objection solely to the cure amounts may not

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1 prevent or delay the debtor's assumption and  
2 assignment of assumed and assigned contracts or  
3 leases. If a party objects solely to cure amounts,  
4 the debtors may, with the consent of the relevant  
5 successful debtor, hold the claim cure amounts in  
6 reserve pending further order of the Court or mutual  
7 agreement of the parties. So long as the cure  
8 amounts are held in reserve and there are no other  
9 unresolved objections to the assumption and  
10 assignment of the applicable assumed and assigned  
11 contracts or leases, the debtor can, without further  
12 delay, assume and assign such contracts released to  
13 the applicable successful bidder. Under such  
14 circumstances, any objecting non-debtor counterpart's  
15 recourse is limited to the funds in reserve."

16 So the issue for today is not the cure amount.  
17 That'll be resolved at some later date. The amount will be  
18 posted into closing -- the disputed cure amount will be posted  
19 into a reserve at closing, and we will -- we're happy to  
20 provide proof of that to the parties. The issue today is  
21 simply adequate assurance of future performance, and what we've  
22 got is testimony from the buyer of their ability, both  
23 operationally and financially, to perform. We've got an  
24 agreement with the sureties, and we see a way towards closing  
25 that will facilitate that.

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1           We've got parties like Arcelor Mittal who did not  
2 have to consent to this deal with this entity, but have elected  
3 to do so after their own due diligence. There is ample  
4 evidence to show that there is adequate assurance of future  
5 performance. The standard, I think, that Pardee is looking for  
6 is something that goes way beyond adequate. We have proven  
7 that through the testimony of the buyer.

8           THE COURT: I hear you, Mr. Bender, but given -- this  
9 deal is not really about purchase price. It's about assumption  
10 of liability and basically relieving various debtors of future  
11 liability or claims, as well as the other thing that we've all  
12 been interested in these cases from day one, which is the  
13 future employment of a couple hundred people. But it does give  
14 me some concern that all we have with respect to this  
15 purchaser's financial ability is the testimony of the purchaser  
16 that we can do this, we have these assets, we have sureties, we  
17 have deals we're going to make with sureties, sureties have  
18 confirmed that we have deals. You know, some kind of balance  
19 sheet or something in writing would have been nice. If they  
20 really have everything they say they have, how difficult would  
21 it be for them to provide some documentation to that effect?

22           MR. BENDER: What we have done -- again, we are here  
23 a month after the initial bid deadline. We have been working  
24 on an APA with these people for a month to get a deal for all  
25 four lots. We have gone through the process of proving their

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1 ability to perform, and they're ready to perform. I think it's  
2 a mistake to go back a month to focus on language in the bid  
3 procedures that is now being tested or being a litmus test for  
4 satisfying adequate assurance of future performance. The  
5 evidence should be today.

6 THE COURT: But it's not just with respect to  
7 Mr. Hahn and the lease, but it's also with respect to their  
8 ability to perform whatever the total amount was of the assumed  
9 liabilities, 37 -- almost 38 million in assumed liabilities.  
10 They say they can do it. They say they have plenty cash and  
11 commitment.

12 Come on, Mr. Hall. What you got to add?

13 MR. BENDER: Your Honor, if we could have a break.

14 THE COURT: Sure.

15 MR. BENDER: Thank you.

16 THE COURT: We'll come back in about five minutes.

17 (Recess)

18 MR. BENDER: Your Honor --

19 THE COURT: Yes.

20 MR. BENDER: -- if you could give us one more minute,  
21 please.

22 THE COURT: Okay.

23 MR. BENDER: Thank you.

24 (Pause)

25 MR. BENDER: Your Honor --

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1 THE COURT: Yes, sir.

2 MR. BENDER: -- thank you very much. We appreciate  
3 the break. We appreciate the opportunity to meet. We did want  
4 to kind of summarize again Seminole and the assets that it does  
5 have available and will have available post-closing. And this  
6 goes again to Mr. Ebetino's testimony about the various sources  
7 of funding. He referred to the 59 of new funding that he's got  
8 commitments for. We talked about 30 million in cash collateral  
9 that will be available through the closing, and then a net 43.9  
10 million of working capital for a total of 88.9, the 88.9  
11 million that will be available.

12 In terms of the reclamation with respect to the  
13 liabilities, we talked about the 2.2 million of cure costs that  
14 will be funded, and then the reclamation costs. And with  
15 respect to the replacement bonds, we do have a deal in place  
16 that will utilize the existing cash collateral for the bonds in  
17 place that will help facilitate the issuance of the new bonds  
18 and replacement bonds. So that will be made available and be  
19 part of this deal to help fund the transaction and allow the  
20 debtor to perform their obligation -- the buyer performance  
21 obligation.

22 THE COURT: So is the answer to my question, "No, we  
23 don't have anything -- any paper or written document"?

24 MR. BENDER: We do not. We would be happy to submit  
25 a supplemental declaration from the buyer if the Court would

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1 like that supplementing this, and --

2 THE COURT: Would it -- if all it's going to do is  
3 rehash for me what the testimony has already provided, that's  
4 still not what I'm asking. I'm asking whether or not you all  
5 have -- I mean, you know, this is the simplest form, you know,  
6 tax returns, bank statements, balance sheets, anything of that  
7 nature that was provided that shows that these folks really  
8 have the assets they say they have.

9 MR. BENDER: I will ask again and have Adam correct  
10 me if I'm wrong, but we do not have that at this point. The  
11 buyer may be able to provide that.

12 MR. EBETINO: We'll have to provide it.

13 THE COURT: I'm sorry?

14 MR. EBETINO: I said we will have to provide it now,  
15 but it's not been provided today.

16 THE COURT: And is that something that could be  
17 provide on a fairly expedited basis?

18 MR. EBETINO: That's something -- I believe so. They  
19 --

20 MR. SPARKS: Can he come to the podium?

21 THE COURT: I'm sorry, yeah.

22 MR. SPARKS: For benefit of my constituents.

23 MR. EBETINO: Okay.

24 THE COURT: Sure.

25 MR. EBETINO: You know, again, I think you have to

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1 consider that these entities are newly formed. I mean,  
2 Seminole will be newly formed that we -- and we're in the  
3 process of having, after newly forming, in effect, the entities  
4 on October 22nd and the separate -- sorry, October 27th and  
5 December 22nd pursuant to the last two acquisitions. Those end  
6 of the year balance sheets are in the -- are being audited  
7 right now, as we said, and I think we can provide some  
8 preliminary information related to those. But we don't have  
9 what would normally be audited financial statements. Simply --

10 THE COURT: But you have something that you all could  
11 put together that would perhaps be even unaudited?

12 MR. EBETINO: Yes, that's correct.

13 THE COURT: And over -- in what time frame?

14 MR. EBETINO: I think there -- that we've probably  
15 got draft statements already available.

16 THE COURT: So those could be perhaps provided to  
17 Mr. Bender -- I'm assuming this is information that we would  
18 not file into the ECF systems necessarily, but provide to the  
19 parties that are interested in some form or fashion. I mean, I  
20 don't know that you all want to put that out there for the  
21 world to see.

22 MR. BENDER: I think that that would be appropriate  
23 just to share, and I think it's really to share with the -- to  
24 the several objecting parties, really party and --

25 THE COURT: Okay.

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1 MR. BENDER: -- and that's like --

2 THE COURT: So here's what we're going to do.  
3 Twenty-four hours enough time or less?

4 MR. EBETINO: Again, I'm not the CFO of our company,  
5 so --

6 THE COURT: I understand.

7 MR. EBETINO: -- but I would say at a late date, it  
8 would be on -- first thing on Monday, but we will strike to do  
9 it by the end of business tomorrow.

10 THE COURT: Mr. Bender?

11 MR. BENDER: We are looking to the buyer to provide  
12 that information obviously, so we rely --

13 THE COURT: Then if the buyer would provide that  
14 information as soon as possible to Mr. Bender's firm, and then  
15 you all would provide it -- anybody who wants to see this  
16 information, counsel shall let Mr. Bender know today. If you  
17 don't tell him and you don't get on the list, you're not going  
18 to get the information. To the extent the information is  
19 provided to the Court, send it to the e-order box, but not file  
20 into the ECF system. Okay? Thank you, Mr. Ebetino.

21 MR. EBETINO: Thank you.

22 THE COURT: Just a minute, Mr. McArdle.

23 Mr. Bender, anything else?

24 MR. BENDER: Your Honor, I guess with respect to -- I  
25 think that with respect to the party objection, we note the

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1 marching orders with respect to the Marco objection. I think  
2 the testimony shows that we did run a fair, complete auction  
3 process. There is nothing in the record to indicate that Marco  
4 received any different treatment than the other bidders for the  
5 West Virginia assets. To the contrary, the record reflects  
6 that --

7 THE COURT: Mr. McArdle, I'll give you every  
8 opportunity. If you don't mind --

9 MR. McARDLE: I'm sorry, Judge.

10 THE COURT: Thank you.

11 MR. BENDER: To the contrary, the record reflected  
12 that there were three parties that submitted qualifying bids  
13 for West Virginia by the bid deadline, and I'll remind the  
14 Court that that was an extended deadline -- bid deadline that  
15 the debtors extended to facilitate the auction process and that  
16 the original auction deadline was January 4. So because even  
17 with that extended deadline, Marco was not able to provide an  
18 APA, to satisfy the bid procedures that three other parties  
19 were able to do.

20 Again, this is -- and with respect to Mr. Cook's  
21 objection and his joinder really in Marco's objection, we view  
22 them as one and the same. They're just stemming purely from a  
23 disgruntled bidder who does not have a financial interest in  
24 this case. So for that reason, again, we would ask the Court  
25 to overrule those two objections and look to the process where

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1 86 people were contacted. We received qualifying, conforming  
2 bids from four parties, and only one party is a complainant of  
3 the 86 that were contacted.

4           Going back to the bid at hand, it satisfies all the  
5 standards of -- to approve the sale under 363 and the  
6 assignment of the leases and contracts under 365. Again, the  
7 transaction provides for the assumption of material  
8 liabilities. I won't go through those again.  
9 Mr. Schlesinger's declaration lists those out well.

10           It also -- the declaration describes the jobs that  
11 are -- we think may be preserved as part of this comprehensive  
12 bid for all the coal asset -- for all the non-core assets. The  
13 process was a developed process. It involved the consultation  
14 parties, you know, joins the support of really the main  
15 constituencies affected by this, and that would be Coal  
16 Acquisition and the lender group, the USW, the sureties and the  
17 -- obviously, the debtors. The alternatives I've alluded, they  
18 are much the same as if the Coal Acquisition deal were not to  
19 go through. We would have no choice but to wind down these  
20 facilities. We would lose the use of cash collateral, and we  
21 would enter a wind-down phase, which we do not want to pursue.

22           We have no backup bids for Walter Coke. We have no  
23 backup bids for Lot 8. So this is the deal that we have, and  
24 if this deal isn't approved, we are going to be going back to  
25 the plan B for Walter Coke with the funding of a wind-down

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1 rather than continuation of operations. And with Lot 8, we  
2 will be dealing with that, as well, in a much less satisfactory  
3 manner.

4           So I think the record -- again, we look to the record  
5 at this hearing and prior hearings. We ask that the Court take  
6 that into consideration. We think that there's ample reason to  
7 approve the sale globally. We will get the information from  
8 the buyer to supplement the record that will demonstrate their  
9 ability to perform their obligations under the APA and under  
10 the agreements that they are assuming, and we will get that to  
11 the parties as soon as possible to supplement that. We clearly  
12 have confidence in the buyer, and we want the Court, obviously,  
13 to share that confidence.

14           Your Honor, we have asked and we were aiming for a  
15 very swift closing of this transaction. We are aiming for next  
16 week, and we will want, as soon as the order to -- is entered,  
17 to be able to move swiftly to the closing. That's important, I  
18 think, for the businesses and important to our buyer that we  
19 move quickly from the sale hearing to a closing, and there are  
20 meetings -- I think I'm going -- as we are here preparing for  
21 that. And so we are working optimistically in that directly.  
22 And so with respect to the 14-day stay, we will ask the Court  
23 to waive that stay to allow for a swift closing, and that's  
24 consistent with the sale motion.

25           Your Honor, beyond that, again, we feel that the

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1 record supports the sale, and we would ask the Court to approve  
2 it.

3 THE COURT: Thank you, Mr. Bender.

4 Mr. Ebetino, also, if you all have something that you  
5 can share that is the commitment for the bridge loan or the  
6 bridge funding or whatever you call it, the 15 -- \$10 to \$15  
7 million. If you have something in writing -- you already have  
8 that?

9 MR. EBETINO: We brought that document.

10 MR. BENDER: We do -- I think --

11 MR. EBETINO: And it is a condition --

12 THE COURT: Is this something that can be shared or  
13 not shared?

14 MR. BENDER: I think it's fine to share it.

15 MR. EBETINO: Fine to share it. It is a conditional  
16 commitment. Obviously, we've got definitive documents to  
17 finish.

18 MR. BENDER: If I may, Your Honor.

19 THE COURT: Thank you. Anybody have any questions of  
20 Mr. Ebetino with respect to this exhibit? Otherwise, I'm going  
21 to mark this as Debtor's Exhibit 1.

22 MR. HAHN: No objection from Pardee, Your Honor.

23 THE COURT: Mr. McArdle?

24 MR. McARDLE: No objection, Your Honor.

25 THE COURT: All right. So here's back Marco 1, and

1 here's Debtor's Exhibit 1. Is that your only copy or you have  
2 all the copies?

3 MR. Ebetino: We've got other copies.

4 THE COURT: Okay. We're going to keep that one.

5 MR. BENDER: Copy signed?

6 THE COURT: So then, all we need from them is  
7 something else.

8 MR. BENDER: Okay.

9 MR. SPARKS: Your Honor, just for the record, could  
10 you briefly identify the documents.

11 THE COURT: I'm sorry. It is a --

12 MR. SPARKS: Yeah.

13 THE COURT: -- one-page, two-paragraph document from  
14 Bay Point that basically confirms exactly what Mr. Ebetino  
15 testified, that they are making a commitment to provide \$10 to  
16 \$15 million in financing. So I have to say the fact that that  
17 document is almost verbatim what Mr. Ebetino testified to is  
18 confidence building that the rest of the information that he  
19 will provide will also be substantially the same, if not  
20 identical, to his testimony because this is almost identical to  
21 what he said, so -- thank you, Mr. Sparks.

22 MR. BENDER: It is.

23 THE COURT: Thank you, Mr. Bender.

24 MR. BENDER: All right.

25 THE COURT: Mr. McArdle, what else you got?

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1 MR. McARDLE: Judge, you know, we just --

2 THE COURT: Again, Mr. McArdle -- sorry.

3 MR. McARDLE: My bad. Sorry, Your Honor. Judge, I  
4 mean, a lot of the testimony was to the effect that the  
5 reputation of this company was part of the basis for agreeing  
6 to sell the assets to them, and yet we've learned they're newly  
7 formed. It's my understanding they're only about five months  
8 old. Everybody has to provide financial information and  
9 financial data, yet before the contract was even entered into,  
10 the debtor didn't receive any. I don't know how anyone can use  
11 business judgment to judge an offer based upon what is hearsay,  
12 and we object to basically the hearsay testimony of counsel to  
13 that effect. And we don't think sound business judgment could  
14 have been exercised in this situation, and we would request 24  
15 hours to submit a marked-up asset purchase agreement and a new  
16 offer.

17 THE COURT: Thank you, Mr. McArdle.

18 MR. McARDLE: Thank you, Judge.

19 THE COURT: Mr. Ciantra.

20 MR. CIANTRA: I appreciate the Court's indulgence.  
21 If I could just have a moment, Your Honor, just to underscore  
22 one thing that is absolutely clear from this record from what  
23 we've heard today, which is that there are over a hundred jobs  
24 of folks working at Walter Coke that will go away if this  
25 transaction is not approved. That is absolutely certain.

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1 THE COURT: And that's just there, Mr. Ciantra.  
2 There are other jobs at other locations that are also involved,  
3 and according to my math, the -- in the declaration, it's about  
4 370 jobs total if you look at all the locations.

5 MR. CIANTRA: I agree, Your Honor. I'm here  
6 representing the steel workers. The Coke plant, there is no  
7 other bidder for the Coke plant. It will close.

8 THE COURT: I understand.

9 MR. CIANTRA: Thank you.

10 THE COURT: Thank you, Mr. Ciantra.

11 Anything else from anybody? Mr. Hahn?

12 MR. HAHN: I'll be very brief, Your Honor. We  
13 appreciate the Court's questioning around the bidding  
14 procedures and regarding the additional information that the  
15 debtors and Mr. Ebetino's clients are going to provide.

16 I would just point out that in the bidding -- they  
17 point letter as a offer of conditional funding, and all of the  
18 information Your Honor requested is stuff that should have been  
19 part of the bid -- the package that qualified them to be -- to  
20 bid. They were required to provide these financing sources at  
21 that time. They were required to provide evidence of their  
22 internal resources, proof of unconditional funding commitments,  
23 their current financial statements, a description of their  
24 capital structure. All of that is information that they should  
25 have been able to provide, that they should have already

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1 provided when they qualified to be a bidder. That's all I  
2 have, Your Honor.

3 THE COURT: Thank you, Mr. Hahn. Anything from  
4 anybody else?

5 (No audible response)

6 THE COURT: Okay. With respect to the objections, as  
7 I understand it, pretty much every objection is resolved, save  
8 and except the Marco/Cook objection and the objection of  
9 Pardee, which the objection of Pardee -- and West Virginia, but  
10 -- I'm sorry, Mr. Davies. Would not want to forget the --  
11 Mr. Davies, with all due respect, knows how that's going to go.  
12 So been there, done that.

13 Now, let me get my train of thought back. With  
14 respect to Pardee, I think some of their concerns are  
15 legitimate. I think that just the document that was just  
16 presented goes a long way to establish credibility, as far as  
17 Mr. Ebetino's testimony, but also even if Pardee's numbers that  
18 were thrown out in open court today are accurate, that  
19 commitment alone would more than cover their problem. So I  
20 think that gets us further down the road.

21 With respect to Marco -- the Marco/Cook objection,  
22 first, I'd like to thank Mr. Ferguson and Mr. Cook for the time  
23 and trouble that they have gone to, to participate in this  
24 process. My problem with their objection is I understand that  
25 time was short in terms of what they had to do, what they did

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1 do and what they expected to do, but as I have indicated, I  
2 think even in written opinions in this case, everything in this  
3 case has been expedited, everything in this case has been on a  
4 fast track. I think the expression that I have used that I got  
5 from somebody who was referring actually to a case north of  
6 here is everything in this case has moved at warp speed.

7           Had Marco involved Mr. Garfield and Mr. McArdle early  
8 on, we were here in court in this case, I think, almost every  
9 week since the case was filed in mid July. There would have  
10 been ample opportunity to come forward and say, need an  
11 expedited hearing, need access, need this, need that, we can't  
12 get it, we've got a bid deadline, we need you to require them  
13 to do this. Had that occurred, you would have gotten your  
14 expedited hearing, and perhaps if you didn't get information  
15 that you say you didn't get, which I'm not really convinced of  
16 because nobody else complained -- I understood the testimony  
17 from Mr. Ebetino that his folks had what they needed and  
18 certainly having been involved in a similar process before, he  
19 knew exactly what he needed. I understand Mr. Cook's testimony  
20 that he's bought and sold mines before. Nobody asked him, and  
21 so I don't know whether he's ever done this with the bankruptcy  
22 process before or not, but virtually every bidding process in a  
23 case of this size requires the submission of an APA with the  
24 bid.

25           So the fact that they allege the debtor didn't do

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1 what they were supposed to do is not an excuse for them to then  
2 not comply with the bidding process. And it is my view that  
3 they could have come in and asked for an immediate hearing to  
4 get the access that they say they didn't have, and they didn't  
5 do that. So I'm going to overrule both objections.

6 I'm going to conditionally overrule the objection of  
7 Pardee subject to the additional financial information being  
8 provided. I'm going to grant the motion and authorize the  
9 sale, but I would like to take a few minutes with respect to  
10 the proposed order in the event the financial information comes  
11 in and is substantially the same as that that we expect it to  
12 be and as testified to by Mr. Ebetino.

13 And so, Ms. Moore, I'm assuming that you're my go-to  
14 person on this issue. First, is sort of a generic -- as I  
15 understood this toward the beginning, we referenced non-core  
16 assets, but then there are multiple places where the term  
17 acquired assets still is in here. So if we're going to refer  
18 to these as both non-core assets and acquired assets, then  
19 let's make that definition clear in the beginning paragraph, or  
20 are you going to do a search and replace and make it always  
21 non-core?

22 MR. BENDER: Your Honor --

23 MS. MOORE: Go ahead.

24 MR. BENDER: I think that there are two different  
25 terms.

1 THE COURT: Okay.

2 MR. BENDER: Non-core assets refer to all the assets  
3 that were not among the core assets that Coal Acquisition was  
4 acquiring.

5 THE COURT: Right.

6 MR. BENDER: The acquired assets ties to the APA  
7 before the Court. There are some assets that may be non-core  
8 assets that are not being bought that may be excluded. For  
9 example, there may be contracts that will not wind up being  
10 assumed so --

11 THE COURT: So there are non-core assets -- this is  
12 authorizing the sale of the non-core assets. That's at the  
13 very beginning. I'm looking at the redline, blueline, blue  
14 letter, green letter -- I don't know what you call this thing,  
15 but anyways, the marked-up all in color one. So at the very  
16 beginning, it says, "authorizing the sale of the non-core  
17 assets."

18 MS. MOORE: Right, and that's a defined term in  
19 Footnote 3 of the order.

20 MR. BENDER: And I think what we say there is of the  
21 certain --

22 THE COURT: Exactly.

23 MR. BENDER: In the title, it said certain non-core,  
24 so we'll --

25 THE COURT: So that refers to this group of assets

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1 that you are selling, the four lots, four groups.

2 MS. MOORE: Right.

3 THE COURT: Okay. But elsewhere in here where there  
4 are just dozens of references to acquired assets --

5 MS. MOORE: That's a defined term in the APA, and  
6 they have slightly different meanings depending on how they're  
7 used.

8 THE COURT: Okay.

9 MS. MOORE: We can certainly go back in the order and  
10 try to make crystal clear the definitions of both and what  
11 we're referring to for each one.

12 THE COURT: That would be helpful. That would be  
13 very helpful.

14 MS. MOORE: Okay. We'll go through it again and make  
15 sure we've got everything clear.

16 THE COURT: Okay. And then, another question -- and  
17 I should remember this, and I don't. I remember that we dealt  
18 with Airgas with respect to their cylinders in the prior sale.  
19 Do they have cylinders at any of these locations, as well? In  
20 other words, is Airgas still a part of this?

21 MS. MYERS: Your Honor, just to satisfy the original  
22 objection, we put the language in.

23 THE COURT: Okay.

24 MS. MYERS: But we don't believe that any of the  
25 cylinders are actually at these properties.

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1 THE COURT: Can we drop a footnote there and say that  
2 then?

3 MS. MYERS: Yes.

4 THE COURT: I'm looking at Page 6.

5 MS. MOORE: Uh-huh.

6 THE COURT: Because it's not clear. I mean, I -- for  
7 some reason, I had in my mind that Airgas only cared about the  
8 first group and --

9 MS. MOORE: Right.

10 THE COURT: -- don't care now.

11 MS. MYERS: It didn't.

12 THE COURT: Okay. So maybe we could just drop a --

13 MS. MOORE: To the extent it --

14 THE COURT: -- or something, but --

15 MS. MOORE: Okay.

16 THE COURT: -- when you put it in the text or in the  
17 footnote, I don't care, but let's make it clear that we're not  
18 saying that Airgas has any cylinders on these locations.

19 MS. MYERS: It would not, no. No.

20 MS. MOORE: Sure.

21 THE COURT: Okay.

22 MS. MYERS: And, Your Honor, I would just say also  
23 the non-core assets versus the acquired assets, what we were  
24 saying is that the motion was seeking to sell the non-core, but  
25 what they ultimately agreed to buy was maybe a slightly smaller

1 group, and that's the acquired assets.

2 THE COURT: Okay.

3 MS. MYERS: So if you see, whenever we use non-core  
4 assets, it means globally, the process --

5 THE COURT: Okay.

6 MS. MYERS: -- while acquired assets means  
7 specifically what the buyers are buying.

8 THE COURT: Yeah, a further definition might be  
9 helpful.

10 Ms. MOORE: Sure.

11 THE COURT: All right. And then, there was one other  
12 little something, I think. Again, just to be consistent with  
13 what we've done in the past and what I generally do, if you  
14 would also add, Ms. Moore, something in their about -- at the  
15 beginning where we've relied upon the declaration and the live  
16 testimony of the witnesses, including the objecting parties.  
17 And then, on Page 7, Paragraph J, I would either -- I would  
18 actually cite to the declaration there.

19 MS. MOORE: Okay.

20 THE COURT: And that may be the extent of my  
21 comments, but let me check. Anybody else have anything with  
22 respect to the proposed order in the event we get the financial  
23 information and the conditional approval becomes a final  
24 approval?

25 And then, I guess, too, Ms. Moore, I would add that

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1 as well, that the additional financial information was  
2 provided.

3 MS. MOORE: Okay.

4 THE COURT: And you can indicate that it was at the  
5 Court's request.

6 Mr. Hall.

7 MR. HALL: I'm just confused about the process.  
8 Okay?

9 THE COURT: Okay.

10 MR. HALL: Additional information is going to be  
11 provided to the Court and others.

12 THE COURT: Yes.

13 MR. HALL: And then, what happens?

14 THE COURT: If I deem the information consistent with  
15 Mr. Ebetino's testimony and as consistent as this document --  
16 this Exhibit 1 is, then I'm done. If I find it to be in any  
17 way inconsistent or troubling or problematic, then I will find  
18 a way, probably through debtor's counsel, to let you all know  
19 there's a problem and schedule an immediate telephonic hearing.  
20 That would be my process, Mr. Hall.

21 MR. HALL: Thank you, Your Honor. Thank you.

22 THE COURT: So as soon as we get the financial  
23 information, hopefully if not simultaneously or shortly before,  
24 shortly after, I will also get a revised proposed order, and  
25 then you all will either get notice that there is a telephonic

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1 hearing or you will get a copy -- an email thing saying the  
2 order has been entered. One of those two things will happen,  
3 and that way, you will know the outcome.

4 Anybody have any questions, comments or objections to  
5 that proposed procedure?

6 MR. McARDLE: Your Honor, we object. I believe it  
7 deprives the parties --

8 THE COURT: You need to come to the podium,  
9 Mr. McArdle.

10 MR. McARDLE: It deprives the parties of the  
11 opportunity to cross-examine Mr. Ebetino in regard to the  
12 financial information.

13 THE COURT: Thank you, Mr. McArdle, your objection is  
14 overruled.

15 Mr. Hahn.

16 MR. HAHN: The only question I have, Your Honor, is  
17 that you kind of mentioned those communications are going to be  
18 with debtor's counsel. Is that going to be a full telephonic  
19 hearing or --

20 THE COURT: It will be a tele -- I apologize,  
21 Mr. Hahn. That was somewhat confusing. Either we would just  
22 do something in ECF that set a telephonic hearing or a  
23 telephone call would be made from the courtroom deputy to  
24 debtor's counsel to say, you notice a telephonic hearing. That  
25 would be the communication. It would only be a procedural

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1 issue and not any other kind of communication.

2 MR. HAHN: Thank you, Your Honor.

3 THE COURT: Thank you. Anything else?

4 MR. GARFIELD: Judge, just one request to Mr.

5 Bender --

6 THE COURT: Mr. Garfield, if you don't come to the  
7 podium, folks on the phone can't hear you.

8 MR. GARFIELD: Your Honor, I'm simply going to --  
9 Fred Garfield -- request if Mr. Bender will indulge us, if we  
10 could see a copy of the revised proposed order once it's  
11 submitted.

12 THE COURT: No problem.

13 MR. BENDER: I'll be happy to circulate it.

14 THE COURT: All right. Anything else from anybody  
15 before we adjourn today? Thank you all very much. Appreciate  
16 it. We're adjourned.

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C E R T I F I C A T I O N

I, TRACY A. GEGENHEIMER and ALICIA JARRETT, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Tracy A. Gegenheimer

TRACY A. GEGENHEIMER

/s/ Alicia Jarrett

ALICIA JARRETT

J&J COURT TRANSCRIBERS, INC.      DATE:      February 8, 2016

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

In re:	)	
	)	Chapter 11
	)	
WALTER ENERGY, INC. <sup>1</sup>	)	Case No. 15-02741 (TOM11)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	

**ORDER GRANTING EMERGENCY MOTION FOR A STAY PENDING APPEAL**

Upon consideration of the Emergency Motion for a Stay Pending Appeal [Doc. No. \_\_\_\_] (the “**Motion**”) of the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America 1992 Benefit Plan (together, the “Coal Act Funds”), dated February 9, 2016 for, among other things, entry of an order (the “Order”) granting a stay pending appeal; and the Court having held a [telephonic] hearing on February [\_\_\_], 2016 (the “Hearing”) on the Motion; and the Court having reviewed and considered the relief sought in the Motion, any objections to the Motion, and the arguments of counsel made, and the testimony and evidence proffered or adduced, during the Hearing; and all parties in interest having been heard or having had the opportunity to be heard regarding the relief requested in the Motion and in this Order; and due and sufficient notice of the Hearing and the relief sought therein having been given under the particular circumstances; and it appearing that no other or further notice need be

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<sup>1</sup> 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.

provided; [and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest]; and upon the record of the Hearing and these Chapter 11 Cases, and after due deliberation thereon, and good cause appearing therefor, it is hereby

**ORDERED, THAT:**

1. The Motion is **GRANTED**.
2. The effectiveness of the Non-Core Assets Sale Order (Doc. No. 1863) is hereby **STAYED** pending appeal; all other parties in interest shall refrain from taking any steps to consummate the transaction authorized by the Sale Order pending appeal.
3. The Coal Act Funds shall not be required to post a bond.
4. This Court shall retain jurisdiction with respect to all matters arising from or related to the enforcement of this Order.

Dated: February [\_\_\_], 2016

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TAMARA O. MITCHELL  
United States Bankruptcy Judge