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

In re: Walter Energy, Inc., *et al.*, Debtors.	Case No. 15-02741 (TOM) Chapter 11 Jointly Administered

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE DEBTORS' MOTION FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO ASSUME A RESTRUCTURING SUPPORT AGREEMENT AND (B) GRANTING RELATED RELIEF

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The Official Committee of Unsecured Creditors (the "Committee") of Walter Energy, Inc., *et al.* (collectively, the "Debtors"), by and through its proposed undersigned counsel, hereby files this objection (the "Objection") to *The Debtors' Motion for an Order (A) Authorizing the Debtors to Assume Restructuring Support Agreement and (B) Granting Related Relief* [Docket No. 44] (the "RSA Motion").[1] In support of the Objection, the Committee submits the declarations of Matthew A. Mazzucchi and Edwin N. Ordway, Jr., each filed contemporaneously herewith, and respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. By the RSA Motion, the Debtors are seeking authority to assume a restructuring support agreement (the "RSA") that they purportedly negotiated with certain First Lien Creditors to deleverage their balance sheet and restructure their existing debt. The RSA contemplates a dual-track process, pursuant to which the Debtors will simultaneously pursue a plan of reorganization (the "Proposed Plan") and a sale process pursuant to Bankruptcy Code section 363 (the "363 Sale"). In the event the Debtors fail to meet certain conditions, a "Triggering Event" under the RSA will occur, obligating the Debtors to cease all efforts to obtain approval of the Proposed Plan and focus exclusively on the 363 Sale.

2. The Triggering Events in the RSA are tied to unrealistic deadlines, virtually guaranteeing, as a practical matter, that the Debtors will be required to shift to the 363 Sale process. The proposed 363 Sale promises an even worse outcome for unsecured creditors than the Proposed Plan, as it would require the Debtors to engage in a truncated marketing process while providing completely unnecessary and inappropriate bid protections to the First Lien Creditors, rendering it a near certainty that no other competitive bids will come forward. The proposed 363 Sale would also allow the First Lien Creditors to credit bid the full amount of their

[1] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the RSA Motions.

outstanding debt notwithstanding substantial uncertainty regarding the perfection of the First Lien Creditors' collateral package.

3. Critically, the RSA and Cash Collateral Orders are cross-defaulted. As a result, if the RSA is terminated for any reason—including because the Debtors are presented with a more favorable restructuring proposal requiring them to exercise their "fiduciary out" or because they fail to satisfy any one of a litany of impracticably tight conditions and milestones—the Steering Committee may, in its sole discretion, terminate the Debtors' ability to use Cash Collateral, and the First Lien Parties can proceed to foreclose on all of their collateral almost immediately and without any further order of the Court. The dire consequences that a termination of the RSA would pose for the Debtors' unsecured creditors render the fiduciary out a meaningless gesture. This is especially true where the proposed final order approving the Debtors' use of cash collateral would preclude the Debtors from seeking to use cash collateral on a non-consensual basis.

4. The Committee understands that, prepetition, the First Lien Creditors' preferred course of action was to effectively foreclose on their collateral by exercising their right to credit bid in an expedited section 363 sale, leaving behind any liabilities the First Lien Creditors did not desire to assume and rendering the Debtors' estates administratively insolvent. Rather than simply file for bankruptcy and rely on the protections in the Bankruptcy Code to provide them with the tools necessary to run these cases for the benefit of all creditors, the Debtors instead needlessly surrendered ultimate control over their restructuring efforts to the First Lien Creditors in what appears may have been [redacted]. In doing so, the Debtors have abdicated their fiduciary duties and, if the RSA Motion is approved by the

Court, will be bound to pursue a restructuring transaction that will not—and, by design, cannot—be fair to the interests of the Debtors' general unsecured creditors.

5. In short, the RSA will inevitably culminate in the First Lien Creditors obtaining exactly what they wanted before they entered into negotiations with the Debtors—their collateral, as quickly and cheaply as possible, with the added comfort that the First Lien Creditors will maintain full control over timing and all important business decisions during the pendency of these chapter 11 cases, all while receiving payment of fees and expenses, unnecessary bid protections, and full releases (via the Final Cash Collateral Order), even in the absence of a confirmed plan. In contrast, the only tangible benefit the Debtors are receiving under the RSA is the consensual use of the First Lien Creditors' Cash Collateral. But the conditions placed on the use of that Cash Collateral in the Cash Collateral Orders are far more onerous than those imposed under the Bankruptcy Code for the non-consensual use of cash collateral.[2] In other words, the Debtors and their estates are receiving no benefit whatsoever by entering into the RSA. Under these circumstances, it is difficult to see how the Debtors could possibly believe that entry into the RSA is the "best and most value-maximizing path" for any party other than the First Lien Creditors.

6. Ordinarily, a debtor's decision to assume a restructuring support agreement is subject to the business judgment rule. Here, the Debtors are not entitled to the presumption that they exercised reasonable business judgment because, as set forth above, the RSA provides no benefit to the estates. Therefore, their decision to assume the RSA is lacking in any reasoned business justification. The Debtors' decision to assume the RSA is also subject to heightened

[2] Furthermore, as discussed below (*infra* ¶ 20), in the absence of deposit account control agreements in favor of the First Lien Creditors, the Committee has serious questions regarding whether the Cash Collateral is actually Prepetition Collateral, in which case the Debtors would not need lender consent to use it, nor would they need to hold a hearing to establish the necessity for adequate protection with respect to their use of the cash.

scrutiny because the process through which the Debtors determined to enter into and now seek to assume the RSA was fundamentally flawed, as it was based on inadequate information regarding the claims and causes of action in existence at the time, as well as the impact of the RSA on those claims. Regardless of whether business judgement or heightened scrutiny applies, the Debtors have not satisfied their burden of proof, since they are unable to show that assumption of the RSA will benefit their estates.

7. Not every case can or should be a prearranged one, as these chapter 11 cases prove. That is particularly true where an RSA is tantamount to a *sub rosa* plan that lacks wide-ranging creditor support. The rejection of the RSA by the Court would not represent a step backward in the Debtors' restructuring efforts; it would simply remove a stumbling block that currently stands in the way of allowing the Debtors to engage with all creditor constituencies in a fair and meaningful way. Given the Debtors' liquidity constraints (which are exacerbated greatly by the Debtors' determination to pay to the First Lien Parties nearly $40 million on account of postpetition interest and fees accruing during the first three months of these cases alone, plus additional prepetition interest of between [redacted] under the proposed Cash Collateral Orders), it is in the interests of all creditors to work towards achieving a viable restructuring in the most efficient manner possible. Those efforts will only be hampered by allowing the First Lien Parties to hold veto power over the Debtors' heads as they try to negotiate with other key creditor constituencies in these cases. The Debtors should make use of the benefits and protections afforded under the Bankruptcy Code to facilitate a constructive dialogue among creditors on a reasonable timeline, secure in the knowledge that this Court stands ready to resolve any issues that prove incapable of consensual resolution.

8. Accordingly, as set forth in more detail below, the RSA Motion should be denied.

II. BACKGROUND

A. General

9. On July 15, 2015 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, commencing these cases (the "Chapter 11 Cases").

10. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, neither a trustee nor an examiner has been appointed in these chapter 11 cases.

11. On July 30, 2015, the Bankruptcy Administrator for the Northern District of Alabama (the "Bankruptcy Administrator") appointed the following entities to the Committee in these cases pursuant to section 1102 of the Bankruptcy Code: (i) Carroll Engineering Co.; (ii) Consolidated Pipe & Supply Co., Inc.; (iii) Cowin & Company, Inc.; (iv) Delaware Trust Company, as Indenture Trustee; (v) Hager Oil Company, Inc.; (vi) Industrial Mining Supply Inc.; (vii) Mayer Electric Supply Co., Inc.; (viii) UMB Bank National Association, as Indenture Trustee; (ix) United Mineworkers of America; (x) United Mineworkers of America 1974 Pension Plan and Trust; and (xi) United Steelworkers. See Docket No. 268. On August 4, 2015, the Pension Benefit Guaranty Corporation (the "PGBC") and Nelson Brothers, LLC were added to the Committee. *See* Docket Nos. 336, 342. On August 26, 2015, Cowin & Company, Inc. resigned from the Committee.

B. The RSA

12. On the Petition Date, the Debtors filed the RSA Motion, seeking authority to assume the RSA. The Debtors have advised the Committee that the RSA was amended on August 5, 2015 and August 7, 2015 to revise certain deadlines. The RSA requires that the Debtors must simultaneously pursue: (a) a restructuring (the "Restructuring") pursuant to the

Proposed Plan, which is a pre-negotiated plan between the Debtors and the First Lien Creditors (based on the Plan Term Sheet attached as Exhibit B to the RSA); and (b) the 363 Sale, which is a sale to the Purchaser (*i.e.*, a new company owned by the First Lien Creditors) of all or substantially all of the assets of the Debtors subject to higher and better bids (based on the Sale Term Sheet attached as Exhibit C to the RSA). The RSA permits the Debtors' consensual use of the First Lien Creditors' cash collateral for no more than seven months to allow the Debtors to pursue confirmation of the Proposed Plan. If, however, a "Triggering Event" occurs, the Debtors must abandon the Proposed Plan and exclusively pursue the 363 Sale.

13. The Proposed Plan contemplates a debt-to-equity conversion of over $1.8 billion of the Company's prepetition secured debt for substantially all of the reorganized Debtors' common stock. *See* RSA Motion at ¶ 6. The Proposed Plan also offers up to 10% equity in the reorganized Debtors to senior management under a management incentive plan (the "MIP"), but provides nothing for unsecured creditors. *See* Plan Term Sheet at 10.

14. The 363 Sale contemplates a 3% break-up fee for the Purchaser, despite the fact that the purchase price will consist of a credit bid of the First Lien Creditors' claims, except to the extent cash is necessary to pay professionals' fees or to acquire the assets of foreign subsidiaries and non-collateral assets. *See* Sale Term Sheet at 9-10. The Sale Term Sheet is silent regarding the value attributable to unencumbered assets. *See* Part II.D. *infra*.

15. The RSA defaults to the 363 Sale if any "Triggering Event" occurs, in which case the Debtors are required to withdraw the Proposed Plan. *See* RSA at 10. Triggering Events include each of the following case milestones and events:

- by August 26, 2015 and September 4, 2015, the Debtors must make a proposal under sections 1113 and 1114 to the United Mine Workers of America and the United Steelworks, respectively, in form and substance acceptable to certain of the First Lien Creditors (the "Majority Holders");

- by August 26, 2015, the Debtors must file the Proposed Plan and Disclosure Statement consistent with the Plan Term Sheet and in form and substance acceptable to the Majority Holders and the Debtors;

- by October 21, 2015, the Debtors must file motions seeking approval of settlements with each of their labor unions, retiree groups, and the PBGC, or motion(s) to modify such agreements pursuant to sections 1113 or 1114 of the Bankruptcy Code, as applicable;

- by October 28, 2015, the Debtors must obtain entry of the Disclosure Statement Order in form and substance acceptable to the Majority Holders and the Debtors;

- by January 13, 2016, the Debtors must obtain entry of the Plan Confirmation Order;

- by February 3, 2016, the Proposed Plan must be substantially consummated;

- the occurrence of a strike, work slowdown or other concerted labor activity that lasts for more than three days and reduces production by over 100,000 tonnes, as measured against the Debtors' mining plan; and

- projected non-ordinary course administrative and priority claims exceed $10 million.

See RSA Motion, at 8-11; RSA (as amended) at 10-12.

16. The RSA also contemplates a number of "Support Termination Events," any one of which causes the RSA to terminate immediately, also triggering a default under the Final Cash Collateral Order. *See* RSA Motion, at 11-15. The Support Termination Events include:

- failure of the Debtors to obtain entry of the Final Cash Collateral Order in form and substance acceptable to the Majority Holders and the Debtors by September 4, 2015;

- failure of the Debtors to obtain entry of the Plan Confirmation Order by February 3, 2015, unless a Sale Order is entered prior to such date in form and substance acceptable to the Majority Holders and the Debtors providing that the successor clause contained in the collective bargaining agreement between the Debtors and the UMWA is not enforceable against the purchaser of the Debtors' assets (unless the Bankruptcy Court otherwise grants similar relief under Bankruptcy Code section 1113, which is implemented by the Debtors);

- the Debtors seek to withdraw, waive, amend or modify any term or condition of the RSA, Plan Term Sheet, Proposed Plan (including filing a plan or section 363 sale motion not in accordance with the Restructuring contemplated by the RSA), or Final Cash Collateral Order in a manner not approved by the Majority Holders; and

- a "Termination Event" under and as defined in the Cash Collateral Orders has occurred.

See RSA Motion, at pages 11-15; RSA at 13-16; Second Amendment to RSA.

C. The Cash Collateral Motion

17. On the Petition Date, the Debtors filed a motion seeking authority to use cash that is purportedly the Cash Collateral of prepetition secured parties, including the First Lien Creditors.[3] The Court granted the Cash Collateral Motion on an interim basis on the Petition Date.[4] A final hearing on the Cash Collateral Motion is scheduled to be held on September 2, 2015, contemporaneously with the hearing on the RSA Motion.

18. The Interim Cash Collateral Order (and proposed Final Cash Collateral Order) gives significant control to the First Lien Creditors by including "Termination Events" prompting immediate termination of the Debtors' right to use Cash Collateral without further notice or court proceedings. Those Termination Events are unrelated to a postpetition diminution in value of the prepetition collateral or to any failure of the Debtors to comply with the cash collateral budget. Instead, they relate solely to the RSA, including, for example: (a) failure of the Debtors to obtain approval of the RSA or the RSA Motion within 60 days of the Petition Date; or (b) any breach under the RSA that triggers termination of the RSA—including the exercise by the Debtors of their fiduciary out. *See* Interim Cash Collateral Order at 33. Additionally, the Interim Cash Collateral Order and proposed Final Cash Collateral Order require that the Debtors "not make any decision with regard to the assumption or rejection of executory contracts and unexpired leases regardless of the extent, validity or perfection of any liens thereon without first obtaining the consent of the Steering Committee [of First Lien Creditors]."

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[3] *The Debtors' Motion for Entry of Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363, 507 and 552, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (A) (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Scheduling a Final Hearing; and (B) Granting Related Relief* [Docket No. 42] (the "Cash Collateral Motion").

[4] *Interim Order (A) Authorizing Postpetition Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, (C) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) and (D) Granting Related Relief* [Docket No. 59] (the "Interim Cash Collateral Order").

D. The Debtors' Unencumbered Property

19. The Debtors have granted liens (the "Prepetition Liens") on most of their assets to secure the First Lien Indenture Obligations and the Second Lien Indenture Obligations. *See* Cash Collateral Motion at ¶ 16.[5] Debtor property not subject to the Prepetition Liens includes, at a minimum, the assets of Blue Creek Energy Inc., real property having a value of less than $10 million, leaseholds with annual royalty payments of less than $1.5 million, certain real property comprising the Walter Coke plant, miscellaneous mineral leases and immaterial properties, and Excluded Collateral (as defined in the applicable Prepetition Debt Documents). *Id.* at ¶ 16 n.7. Upon information and belief, the Debtors' unencumbered property also includes equity in the Debtors' Canadian entities, valuable land and mineral leases, and permits that cannot be encumbered by law.

20. The Committee is currently investigating other potential categories of unencumbered Debtor property, including cash and avoidance actions and proceeds thereof. For example, although the Debtors have asserted that they believe all cash is encumbered by the Prepetition Liens, the Debtors admittedly have not executed any deposit account control agreements—the typical method of perfecting security interests with respect to cash held in deposit accounts—in favor of the First Lien Secured Parties or the Second Lien Trustees. Although the Debtors appear to take the position that all cash in their deposit accounts is the proceeds of the First Lien Secured Parties' Prepetition Collateral, that does not appear to be true

[5] The Prepetition Liens are, of course, subject to Committee investigation pursuant to the proposed Final Cash Collateral Order. As noted in the Committee's objection to the Cash Collateral Motion filed concurrently herewith, the proposed Final Cash Collateral Order provides for a wholly inadequate budget and timeline to conduct that investigation—further evidence that the deal embodied in the RSA and Cash Collateral Motion is nothing more than a vehicle to transfer the business to the First Lien Creditors free of liabilities and as quickly as possible.

for the funded debt that was moved into unperfected deposit accounts, as that cash is not "proceeds" as defined under the Uniform Commercial Code.[6]

21. In addition, in connection with the Debtors' entry into the U.S. Guaranty and Collateral Agreement in April 1, 2012, it appears that certain Debtor subsidiaries granted upstream guarantees in favor of certain First Lien Creditors at a time during which they were likely insolvent, and without receiving reasonably equivalent consideration. *See* Declaration of William G. Harvey in Support of First Day Motions [Docket No. 3] at ¶¶ 90-91. As a result, these guarantees may be subject to avoidance as fraudulent transfers.

III. ARGUMENT

A. The RSA Motion Is Subject to the Entire Fairness and/or Heightened Scrutiny Standards of Review

22. The Debtors contend that the RSA Motion is subject to the business judgment standard of review. (RSA Mot. at ¶¶ 14-16.) The business judgment rule is a common law standard of judicial review designed to protect the wide latitude conferred on a board of directors in handling the affairs of a corporation. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 927 (Del. 2003); *FDIC v. Stahl*, 89 F.3d 1510, 1517 (11th Cir. 1996) ("The [business judgment rule] is a policy of judicial restraint born of the recognition that directors are, in most cases, more qualified to make business decisions than are judges. In this light, the [rule] may be viewed as a method of preventing a factfinder, in hindsight, from second guessing the decisions of directors.") (citation omitted). The rule operates as both a procedural guide for litigants and a substantive rule of law.

23. In order for the business judgment rule's presumption to shield corporate decision makers and their decisions from judicial second-guessing, the following elements must be

[6] *See* Ala. Code § 7-9A-102(64).

present: (i) a business decision, (ii) disinterestedness, (iii) due care, (iv) good faith, and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets. *See Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992); *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1461 (11th Cir. 1989) ("Under the business judgment rule, courts presume that directors have acted properly and in good faith. A court will not call upon a director to account for his action in the absence of a showing of abuse of discretion, fraud, bad faith, or illegality."); *In re Health Sci. Prods.*, 191 B.R. 895, 909 n.15 (Bankr. N.D. Ala. 1995) ("When evaluating a request by a trustee or debtor in possession to assume or reject an executory contract or unexpired lease, most courts apply the 'business judgment rule' and approve the decision unless there is bad faith or a gross abuse of discretion.") (citation omitted).

24. In exercising business judgment with respect to assumption of an executory contract, the debtor must demonstrate that assumption will benefit the estate. *Id.* ("In bankruptcy litigation, the issue is presented for judicial determination when a debtor, having decided that assumption or rejection will be beneficial to the bankruptcy estate, moves for court approval. The issue thereby presented for determination by the bankruptcy court is whether the decision of the debtor is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim, or caprice. That issue is one of fact to be decided by the bankruptcy court."); *In re Crystalin, L.L.C.*, 293 B.R. 455, 464 (B.A.P. 8th Cir. 2003); *Bakery, Confectionary and Tobacco Workers Int'l Union v. Kirkpatrick* (*In re Kirkpatrick)*, 34 B.R. 767, 769 (9th Cir. BAP 1983); *In re MF Glob. Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012). If the initial test is met, the bankruptcy court should not interfere with the trustee or debtor-in-possession's business judgment "except upon a finding of bad faith or gross abuse of their 'business discretion.'" *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d

1043, 1047 (4th Cir. 1985). If, on the other hand, the debtor cannot show a benefit to the estate, the bankruptcy court does not need to make a finding of bad faith or gross abuse of discretion. *Four B. Corp. v. Food Barn Stores (In re Food Barn Stores)*, 107 F.3d 558, 567 n.16 (8th Cir. 1997).

25. The business judgment standard also will not apply if it is shown that the debtor is not disinterested. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally."). If the business judgment rule is rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the "entire fairness" of the transaction to the shareholder plaintiff. *Id.* at 361 ("Under the entire fairness standard of judicial review, the defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price."). In examining a proposed transaction for entire fairness, a court must consider the conduct that allowed the presumption to be rebutted, as well as all relevant facts and circumstances supporting the fairness of the transaction. *Weinberger v. UOP*, 457 A.2d at 711.

26. Regardless of which standard of review the Court applies, the Debtors have failed to demonstrate that the assumption of the RSA will benefit the Debtors' estates. But as set forth below, the Debtors did not act with the requisite care and loyalty, nor did they exercise business judgement entitling them to the deference afforded under the business judgment rule.

Accordingly, the Court should review the RSA Motion under the heightened standard of entire fairness.

B. The RSA Is Not the Product of Due Care

27. To obtain the protections of the business judgment rule, an officer or director must diligently and reasonably inform himself or herself of all relevant facts and cannot passively approve important transactions without undertaking any examination of the facts. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985), *overruled on other grounds*, *Gantler v. Stephans*, 965 A.2d 695 (Del. 2009). The Debtors' directors did not satisfy that standard in approving entry into the RSA, or deciding to seek to assume the RSA.

28. One of the most critical features of the RSA is the fact that it is cross-defaulted with the Cash Collateral Orders, such that a termination of the RSA for any reason could result in the termination of the Debtors' right to use Cash Collateral, and nearly immediate actions by the First Lien Creditors to foreclose on their collateral. However, none of the board presentations or minutes in the period leading up to the execution of the RSA[7] [redacted]. Moreover, the approval of the RSA and Cash Collateral Motion will result in the Debtors releasing all claims against the First Lien Creditors well in advance of any confirmed plan (RSA at ¶ 1; Interim Cash Collateral Order at ¶ 5(e)). There is no evidence that the board performed any analysis of potential claims against the First Lien Creditors, or of the potential value of such releases. Nor did the Debtors perform a formal valuation or market test of the Debtors' assets, despite the fact that the RSA binds them to a process that will culminate in either a mandatory equity conversion or a sale process that designates the First Lien Creditors as a stalking horse bidder and affords them bid protections. *See* Plan Term Sheet at 5; Sale Term Sheet at 9-10.

[7] The Debtors have not prepared minutes of the meeting at which the board approved entry into the RSA, and there is no formal resolution reflecting any such vote on that extraordinary transaction.

There is also no evidence that the Debtors compared the costs and benefits of seeking non-consensual use of Cash Collateral to the substantial costs and non-existent benefits of entering into the RSA.

29. The apparent failure of the Debtors' board to evaluate any of these issues indicates that the board was not fully informed and failed to exercise due care in deciding to enter into and assume the RSA. Courts presented with similar facts have found that such procedural shortcomings in connection with a proposed plan support agreement amounted to a lack of due care on the part of the debtors. *See, e.g.*, *In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (part III.F below discusses the similarities between *Innkeepers* and these chapter 11 cases in detail).

C. The RSA Is Not the Product of Good Faith

30. The duty of good faith is subsumed in the duty of loyalty. *See In re Citigroup, Inc. S'holder Derivative Litig.*, 964 A.2d 106, 122 (Del. Ch. 2009). It requires that directors and officers of a corporation act with the reasonable belief that an action taken is in the best interest of the corporation, and to refrain from engaging in activities that permit them to receive an improper personal benefit from their relationship with the corporation. *Alberts v. Tuft (In re Greater Se. Cmty. Hosp. Corp. I)*, 353 B.R. 324, 344 (Bankr. D.D.C. 2006) ("[M]aking a decision that is not in the corporation's best interests . . . is a breach of the fiduciary duty to act in good faith, . . . which is just another permutation of the fiduciary's duty of loyalty.")

31. Here, the Proposed Plan contemplates that the Debtors' management will receive up to 10% of the equity in the reorganized company through the MIP, even though no creditors other than the First Lien Creditors are slated to receive any recoveries at all. *See* Plan Term Sheet at 10. Given the billions of dollars of unsecured claims that are going unsatisfied under the Proposed Plan, this term is premature at best. When combined with the consent rights granted to

the First Lien Creditors under the Cash Collateral Orders with respect to the assumption of executory contracts, including employment contracts, as well as any efforts by the Debtors to seek Court approval of employee incentive or retention plans, Debtors' management has a clear incentive to place the interests of the First Lien Creditors—and by extension, their own interests—above those of other creditor constituencies. *See* Cash Collateral Motion at 18, ¶¶ (g), (h).

32. Because the Debtors were not acting under the direction of disinterested parties who were fully informed, their decision to assume the RSA should be evaluated by the Court under a standard of entire fairness and/or heightened scrutiny.

D. The RSA Does Not Benefit the Debtors' Estates

33. In order to determine whether assumption of the RSA is appropriate, the Debtors must provide evidence to support their determination that the estate will be benefitted as a result of that assumption. *See MF Glob.*, 466 B.R. at 242; *Official Creditors' Comm. v. X10 Wireless Tech., Inc. (In re X10 Wireless Tech.)*, No. 04-1328-PST, 2005 Bankr. LEXIS 3376, at *10-11 (B.A.P. 9th Cir. Apr. 5, 2005). The Debtors have submitted no such evidence. To the contrary, the terms of the RSA make clear that only the First Lien Creditors will benefit from the RSA.

1. The RSA Improperly Hands Control of the Chapter 11 Cases to the First Lien Creditors, Providing the Debtors with No Corresponding Benefit

34. The Debtors assert that "the Restructuring contemplated in the RSA is the best and most value-maximizing path for the Debtors, and their estate and key stakeholders." RSA Motion at ¶ 7. However, the Debtors have failed to demonstrate that the RSA or the transactions contemplated thereunder will promote a successful reorganization.

35. To the contrary, the RSA is cross-defaulted with the Cash Collateral Orders, such that the termination of one gives the First Lien Creditors the right to terminate the other. See

RSA at ¶ 6(e)(xx); Interim Cash Collateral Order at ¶ 12(h)(ii). As set forth below and in the Committee's objection to the Cash Collateral Motion, the termination events under each of the RSA and the Cash Collateral Orders are "hair triggers," such that it is nearly inevitable that the Debtors will default in some manner, and likely sooner rather than later. *See* Ordway Decl. at ¶¶ 18-19. Upon the occurrence of any one of those termination events, the First Lien Creditors will have the power to terminate the Debtors' use of Cash Collateral and foreclose on their collateral.

36. Even in advance of such a default, however, the Debtors have agreed to give the Steering Committee broad consent rights. Among other things, the Debtors propose to give the Steering Committee consent rights with respect to: (i) the assumption or rejection of executory contracts (Interim Cash Collateral Order at ¶ 11(g)); (ii) the terms of any proposals to the labor unions, retiree groups, and the PBGC (RSA at ¶¶ 5(g), (h), and (i)); (iii) the decision to seek Court approval of any employee incentive or retention plans (Interim Cash Collateral Order at ¶ 11(h)); and (iv) the selection of an independent director for Walter Energy Canada Holdings, Inc. if a restructuring of the Canadian Entities is sought (Interim Cash Collateral Order at ¶ 11(l)).

37. Taken together, this package of rights all but hands control of the Debtors cases over to the First Lien Creditors, even before any plan or sale process. This transfer of control to a creditor group that does not have fiduciary obligations to any other party in these cases is simply inappropriate. Moreover, it is likely to hinder rather than help efforts to reach a consensus with key constituents like labor and pension groups, who will have good reason to question whether any settlement proposals are being made by the Debtors in good faith or simply as middlemen for the Steering Committee as the party with ultimate settlement authority. As a

result, the RSA will be counterproductive in reaching an efficient and consensual resolution to these Chapter 11 Cases.

2. The RSA Contains Unreasonable Trigger Events and Milestones

38. At best, the inclusion of the 363 Sale toggle in the RSA is a means to pressure unsecured creditors into accepting the Proposed Plan as the lesser of two evils. At worst, it is a mechanism to accomplish the First Lien Creditors' true objective—the quick, liability-free acquisition of their collateral—as evidenced by the hair trigger conditions in the RSA that turn the plan process off.

39. The Trigger Events and milestones contemplated under the RSA are arbitrary and unrealistic, particularly in light of the fact that many of those Trigger Events and milestones are outside of the control of the Debtors, and various parties have already voiced significant opposition to the proposed restructuring (*e.g.*, the requirement that the Debtors obtain entry of a Court order confirming the Proposed Plan by January 13, 2016).

40. Among other issues, the timeline required by the RSA does not allow the Debtors sufficient time to conduct a true marketing process. This is especially troubling because the Debtors did not undertake any material efforts to market their assets prior to the Petition Date. *See* Mazzucchi Decl. at ¶ 11. A sale process should include analyzing the benefits of seeking to sell assets on a mine-by-mine or individual business line basis. Even if conducted on an extremely expedited basis, it will take more time than currently allotted for the Debtors to identify potential bidders, prepare adequate marketing materials, make all those materials available to potential bidders, respond to additional diligence requests, conduct management meetings, negotiate confidentiality agreements, analyze and compare offers (particularly to the extent potential bids are received for different asset packages), negotiate asset purchase

agreements, conduct any auctions, and obtain court approval of any sales. *See* Mazzucchi Decl. at ¶¶ 12-15.

41. Additionally, the timeline for reaching settlements with the unions and retiree groups appears to be unreasonable. As long as good faith progress in negotiations is being made, the First Lien Creditors should not be given the power to cut those negotiations short if an arbitrary deadline is missed.

42. The Debtors' position that the timeline is dictated by their liquidity shortage is a red herring, since it is largely a manufactured problem. The Debtors decided not to obtain DIP financing to fund these cases, and have agreed to provide adequate protection to the First Lien Creditors in the form of cash payments totaling approximately $10.9 million per month, or one-third of their total budgeted cash burn through November 14, 2015 on account of postpetition accrued interest, as well as a cash payment of between [redacted] on account of prepetition accrued interest. Based on the Debtors' current projections, the estates will be rendered administratively insolvent by [redacted] if they make the proposed adequate protection payments. *See* Ordway Decl. at ¶ 10. If the Debtors were instead to grant adequate protection liens on certain unencumbered property and avoid making adequate protection cash payments at all, they would gain up to an additional six months' of liquidity based on current projections. *See* Ordway Decl. at ¶ 11.

3. The RSA Inappropriately Limits the Ability of the Debtors and the Committee to Carry Out Fiduciary Duties Owed to Unsecured Creditors

43. The Debtors appear to rely on the fiduciary out provision in section 24 of the RSA as evidence that the RSA is reasonable—the silent implication being that, even if it is clear that the Debtors' estates can do better, the RSA should be approved now because the fiduciary out

gives them the opportunity to keep trying. *See* RSA Motion at ¶ 11; RSA at ¶ 24. This argument is misplaced for several reasons.

44. As an initial matter, a debtor cannot justify entering into a transaction that does not otherwise benefit the estate by simply giving itself the potential ability to do something else later on. Moreover, the "fiduciary out" is illusory. In agreeing to hand over control of these Chapter 11 Cases to the First Lien Creditors through granting them broad consent rights and the practical ability to pull the financial plug on these cases, the Debtors have already abdicated their fiduciary duty. Reserving the right to act differently in the future is a meaningless gesture, particularly since the exercise of that right by the Debtors will mean that they lose the right to use Cash Collateral, and the First Lien Creditors will already have received full releases and can take enforcement actions with respect to their collateral almost immediately and without further order of the Court (assuming the Final Cash Collateral Order is entered as currently proposed). Although there are many plan scenarios that could potentially provide better recoveries to more creditor constituents than the RSA, if the onerous terms of the RSA become binding upon the Debtors, it is difficult to imagine the circumstances under which the Debtors could receive a proposal for an alternative restructuring proposal that is so good that it mitigates the consequences of terminating the RSA. As a result, entry into the RSA will render those alternative plan scenarios impossibilities before they have even been proposed, and will eliminate the chance that the Debtors will ever exercise their supposed fiduciary out.

45. Further, section 4(a)(iii) of the RSA contains a "window shop" clause that would prevent the Debtors from actively shopping for a better deal despite the fact that only limited formal marketing efforts have been undertaken to date. In other words, the Debtors can consider better deals that are brought to their door, but cannot affirmatively seek out those deals. There are few reported bankruptcy court decisions on window shop clauses. Such clauses have

generally only been approved when the debtor's assets have already been extensively or exhaustively marketed and the clause was needed to obtain a firm offer. In *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997), the bankruptcy court roundly criticized the window shopping clause granted in that case because: (i) no effort had been made to market the assets; and (ii) the court concluded that the buyer (the debtor's turnaround consultant) was self-dealing. *Id*. at 551-553. In contrast, in *In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992), the court approved a window shop provision in an asset sale agreement where the debtor conducted discussions with 30 potential bidders prior to agreeing to be limited by a window shop clause.

46. The validity of lock-up provisions in general turns on whether they have the effect of maximizing value for creditors and shareholders or, conversely, of precluding bidding. *See* George V. Varallo & Srinivas M. Raju, *A Process Based Model for Analyzing Deal Protection Measures*, 55 BUS. LAW. 1616, 1618 (2000). Here, there is no evidence that the window shop provision will encourage higher and better offers. The Debtors cannot rely on a fiduciary out if they are limited in exercising that out and where they failed to conduct a marketing process that could have made a window shop provision tolerable.

47. The RSA would also inhibit the Committee's ability to carry out its fiduciary duties to unsecured creditors. The unreasonably tight milestones and limited budget contemplated under the RSA mean that cash will go out the door and claims will be released before the Committee is able to complete a thorough investigation of potential claims against the First Lien Creditors. The Committee is sensitive to the need for expediency in these cases, but that need should not trump the fiduciary obligations owed by both the Committee and the Debtors. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063,

1071 (2d Cir. 1983) ("The need for expedition . . . is not [ ] justification for abandoning proper standards.") (citation omitted).

4. The RSA Provides for Unlimited Payment of the RSA Parties' Professional Fees and Expenses Without Oversight or Court Review

48. As set forth above, approval of the RSA where no creditor group other than the First Lien Creditors support the proposed restructuring will not help move these Chapter 11 Cases forward. Nonetheless, the RSA provides that the fees and expenses of the First Lien Creditors who are parties to the agreement must be paid by the Debtors without any review or oversight until such time as the RSA is terminated, which would further deplete the Debtors' available cash. This is despite the fact that, upon termination of the RSA, the Debtors' consensual use of the First Lien Creditors' Cash Collateral will be immediately terminated and the First Lien Creditors can foreclose on their assets without further Court order. The payment of these fees during the pendency of the Chapter 11 Cases is yet another form of unnecessary adequate protection being provided to the First Lien Creditors to ensure that their expenses are fully reimbursed in the event the RSA transactions are not consummated on the exact terms they desire, even though the First Lien Creditors will have already received full releases upon approval of the Final Cash Collateral Order. It is difficult to see how payment of these fees prior to confirmation will provide a benefit to any creditor other than the First Lien Creditors.

49. Further, sufficient protocols are not in place to protect the Debtors from being required to pay potentially substantial sums to reimburse the Holder Parties' legal fees and expenses. Section 16 of the RSA provides that "Notwithstanding . . . the termination of this Agreement in accordance with its terms, the agreements and obligations of the Parties in Sections 4(b) . . . shall survive such sale and/or termination; provided, however, that the Company's obligation to pay fees and expenses as set forth in Section 4(b) shall survive only

with respect to those documented fees and expenses incurred through and including the date this Agreement is terminated." Section 4(b) of the RSA provides that "the Company shall promptly pay in cash all documented fees, costs and expenses" of at least four different professionals. The RSA does not limit the Debtors' payment of the RSA parties' fees or even require that they be reasonable. Without a cap on fees and expenses and/or the ability for the Committee or the Bankruptcy Court to review the fee requests in advance of payment, these costs have the potential to become a significant drain on estate assets, to the detriment of the Debtors' other creditors.

5. The RSA Contains Unnecessary and Overly Broad Bid Protections

50. Although the 363 Sale will be the subject of a separate motion, the RSA obligates the Debtors today to obtain authority to conduct the 363 Sale on specified terms. Among other things, the Sale Order must grant the First Lien Creditors bid protections in the form of the right to credit bid up to the full amount of their claims, as well as the payment of a break-up fee and unlimited reimbursement of expenses. *See* Interim Cash Collateral Order at ¶ 11(d); Sale Term Sheet at 9-10 (Bidder Protections). As an initial matter, the First Lien Creditors' collateral package may be materially deficient. Among other things, the Debtors' cash is admittedly not subject to deposit account control agreements in favor of the First Lien Creditors, the typical method for providing a security interest in cash. The Committee is in the initial phases of investigating whether the First Lien Creditors' have properly perfected security interests in the Debtors' cash by another method. The Committee is also investigating whether the grant of certain liens in favor of the First Lien Creditors under the April 2012 U.S. Guaranty and Collateral Agreement is subject to avoidance as fraudulent transfers. The First Lien Creditors should not be given the right to credit bid—nor should the Debtors agree to such right—unless and until the Committee's investigation has been completed. In addition, the First Lien Creditors

admittedly hold no security interest in a number of unencumbered assets. *See supra* ¶ 19. The First Lien Creditors should not be permitted to credit bid on non-collateral assets.

51. Further, the First Lien Creditors should not be entitled to receive a break-up fee. As was recognized in *Calpine Corp. v. O'Brien Envtl. Energy Corp.* (*In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 528 (3d Cir. 1999), the term "break-up fee" refers to a fee paid by a seller to a prospective purchaser in the event that a contemplated transaction is not consummated. Break-up fees are designed to provide a prospective acquirer with some assurance that it will be compensated for the time and expense it has spent in putting together its offer if the transaction is not completed for some reason, usually because another buyer appears with a higher offer. *Id*. at 535. Such provisions may also encourage a prospective bidder to do the due diligence that is the prerequisite to any bid by assuring the prospective bidder that it will receive compensation for that undertaking if it is unsuccessful. *Id.*

52. The *O'Brien* court held that a "determination whether break-up fees or expenses are allowable under § 503(b) must be made in reference to general administrative expense jurisprudence," and "depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *Id*. *See also In re Bender Shipbuilding & Repair Co.*, No. 09-12626-MAM, 2009 Bankr. LEXIS 4257, at *6-7 (Bankr. S.D. Ala. Dec. 30, 2009) (approving payment of a break-up fee to a stalking horse upon a finding that the fee was, among other things, an actual and necessary cost and expense of preserving the debtor's estate within the meaning of § 503(b), commensurate to the real and substantial benefit conferred upon the debtor's estate by the stalking horse, and necessary to induce the stalking horse to continue to pursue the transaction and to continue to be bound by the purchase agreement). Where a break-up fee would serve to advantage a favored purchaser over other bidders, or where a potential purchaser would bid whether or not break-up fees are offered, the award of a break-up fee cannot

be characterized as necessary to preserve the value of the estate. *O'Brien* at 535. The burden is on the Debtors to prove the necessity of, and benefit to the estates from, the proposed break-up fee. *Id*.

53. Here, the First Lien Creditors are already fully familiar with the Debtors' assets and, because they hold a security interest on the majority of the Debtors' assets, they require no additional incentive to participate in a sale of those assets. Accordingly, the purposes that are ordinarily served by the payment of a break-up fee are inapplicable here. Instead, the payment of a break-up fee would simply chill bidding by raising the amount of the minimum competing bid required to be submitted by any third party, to the detriment of the estates and all of its creditors except the First Lien Creditors. *See, e.g., In re Age Ref., Inc.*, No. 10-50501, 2010 Bankr. LEXIS 5724 (Bankr. W.D. Tex. Dec. 21, 2010) (approving bid procedures providing for selection of a stalking horse and payment of a break up, provided that if a lender submitting a credit bid was selected as the stalking horse bidder, the lender would not be entitled to a break-up fee); *In re Phila. Newspapers, LLC*, No. 09-11204-SR, 2009 Bankr. LEXIS 3167, at *35-36 (Bankr. E.D. Pa. Oct. 8, 2009) (denying bid procedures motion where, among other things, the stalking horse bidder would have received a breakup fee even though it was "comprised of insider individuals and entities which have had 'free' and unfettered access to all information concerning the Debtors, financial and otherwise, since the inception of these Chapter 11 cases and long before that," because such pre-existing knowledge "wholly undercuts any claimed entitlement predicated on expensive due diligence and arms length negotiation"). *See* Mazzucchi Decl. at ¶¶ 17-20. Similarly, providing for the uncapped reimbursement of the First Lien Creditors' expenses is inappropriate, particularly given the First Lien Creditors' extensive prior knowledge of the assets. *See* Mazzucchi Decl. at ¶¶ 18, 20.

54. Of course, the Debtors will posit in response that the Court is not yet being asked to approve bid procedures regarding the 363 Sale. However, the RSA would bind the Debtors to obtain approval of the 363 Sale on terms acceptable to the First Lien Creditors, including, presumably, the bid protections set forth in the Sale Term Sheet and built into the Cash Collateral Orders. If the Debtors fail to obtain Court approval of those terms, the First Lien Creditors have the right not only to terminate the RSA, but also to terminate the Debtors' use of Cash Collateral and to foreclose upon their assets almost immediately. The fact that the Debtors agreed to provide the First Lien Creditors such patently unreasonable benefits and to subject their estates to the risk of draconian consequences if those benefits are not approved by the Court is further evidence that the Debtors failed to exercise any business judgment in deciding to enter into the RSA. The RSA is thus nothing more than a vehicle to deliver the company's keys to the First Lien Creditors on an expedited basis, with the benefit of full releases and while shortening the limitations period for any creditors to assert claims against the First Lien Creditors under state law.

E. The RSA Constitutes an Invalid *Sub Rosa* Plan

55. Where aspects of a transaction dictate the terms of the ensuing plan or constrain parties in exercising their rights in the context of confirmation of a plan, the transaction may be considered a *sub rosa* plan. *See PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.),* 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."); *In re General Motors Corp.*, 407 B.R. 463, 495 (Bankr. S.D.N.Y. 2009). A debtor cannot enter into a transaction that "would amount to a *sub rosa* plan of reorganization" or "attempt[s] to circumvent the chapter 11 requirements for confirmation of a plan of reorganization." *Id.* For the reasons explained above,

if approved, the RSA will impose onerous restrictions on the Debtors that virtually guarantee that the Debtors will end up selling their assets to the First Lien Creditors and releasing all claims against the First Lien Creditors without the benefit of conducting a thorough marketing process or fully vetting potential claims against the First Lien Creditors, all outside of the protections afforded under a plan approval process. Those protections include the requirement that the Debtors satisfy: (i) the disclosure requirements as set forth in Bankruptcy Code section 1125; (ii) the voting requirements under Bankruptcy Code section 1126; (iii) the best interest of creditors test under Bankruptcy Code section 1129(a)(7); and (iv) the absolute priority rule of Bankruptcy Code section 1129(b)(2)(B).

56. As explained above, the RSA serves no legitimate business purpose. Moreover, the Debtors have not yet demonstrated that they cannot wait for the ultimate confirmation of a plan, and must immediately seek a sale of all their assets or face liquidation. In the absence of such a finding, there is no justification for the Debtors to become bound now to an RSA that requires them to run a sale process for the sole benefit of the First Lien Creditors. In the event the Debtors determine that, due to liquidity constraints, it is in the estates' best interest to pursue a sale pursuant to Bankruptcy Code § 363, they can pursue that course of action without the RSA and subject to appropriate oversight by the Court.

F. Case Law Does Not Support Approval of the RSA Motion

57. The list of cases cited in the RSA Motion for the proposition that courts "routinely" approve this type of relief is misleading. The requested relief was uncontested in every case cited in the RSA Motion except for *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 459 (Bankr. S.D.N.Y. 2014).[8] In *Genco*, the court overruled the objections of two equity

[8] A single objection was filed in *In re HMP Servs. Holding Sub III, LLC*, No. 10-13618 (BLS) (Bankr. D. Del. Jan. 20, 2011), but was withdrawn before the hearing (ECF #92). Two limited objections were filed by parties in I*n re NextMedia Group., Inc.*, No. 09-14463 (PJW) (Bankr. D. Del. Jan. 19, 2010), who objected to discrete terms of

holder parties, noting that the restructuring support agreement was supported by the vast majority of the debtors' secured and unsecured creditors, thus forming the basis for a truly global resolution of the debtor's bankruptcy cases. *Id*. at 461. In finding that the debtors had demonstrated that assumption of the agreement would benefit the debtors' estates, the court also highlighted the fact that "the RSA provides for a meaningful recovery for all of the Debtors' stakeholders, including their old equity holders and the full payment of trade creditors through the voluntary agreement by secured lenders to convert their debt to equity as well as a fully backstopped rights offering of $100 million, with the handover of value to unsecured creditors and equity. This is in contrast to the usual practice of secured creditors adhering to a strict waterfall with respect to recovery." *Id*. at 464 (emphasis added). The *Genco* restructuring support agreement stands in stark contrast to the RSA at issue here, which provides nothing for any creditor constituency except the First Lien Creditors.

58. The RSA Motion fails to cite *In re Innkeepers USA Trust*, 442 B.R. 227, in which a bankruptcy court refused to authorize the debtors to assume a plan support agreement that bears a striking resemblance to the RSA. In *Innkeepers*, the bankruptcy court determined that the burdens of assuming the plan support agreement outweighed any benefits the estate would have received. Id. at 234-35. In support of that determination, the *Innkeepers* court took into consideration the following features of the plan support agreement: (i) the plan support agreement was tied to the debtors' use of the plan support parties' cash collateral; (ii) the restructuring transaction embodied in the plan support agreement was not shopped in the marketplace; (iii) the debtor did not contact any potential investors outside the capital structure or engage in meaningful discussions with other creditors about plan proposals; (iv) the debtors failed to perform any valuation of the new equity the plan support parties were to receive under

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the restructuring support agreements, but did not oppose assumption of the agreements as a general matter.

the proposed plan; (v) the debtors were limited in their ability to discuss other restructuring proposals; (vi) the secured creditor exercised disproportionate leverage in negotiations; (vii) there was little justification for the debtors locking themselves into a particular plan without first seeking higher or better offers or negotiating with its other existing creditors; (viii) the plan support agreement was supported by no creditor groups other than the single group that was a party to it; and (ix) the plan support agreement contained broad termination events that would permit the secured lender to "walk away and terminate the consensual use of its cash collateral upon the occurrence of a laundry list of different events, even in a variety of situations over which the debtors have no control," and would provide the secured lender with immediate stay relief, which would permit it to exercise any and all remedies with respect to its collateral without further court approval.

59. Taking all of these factors into consideration, the *Innkeepers* court found that the plan support agreement did not reflect a business decision entitled to deference, noting that "exclusivity should not be employed as a tactical device to put pressure on parties to yield to a plan they consider unsatisfactory. The PSA has had such an effect on the Debtors' estates by tying all parties to a plan which lacks support from nearly the entire capital structure and preventing the Debtors from negotiating in good faith with their numerous constituents who will eventually be required to vote on a plan." *Id*. at 234. The RSA proposed by the Debtors shares all of these features that were so disturbing to the *Innkeepers* court, and should be rejected for the same reasons.

60. Notably, the plan contemplated under the *Innkeepers* PSA would have provided unsecured creditors with estimated recoveries of 5%-8%. After the *Innkeepers* court refused to approve the debtors' motion to assume the PSA, the debtors entered into negotiations with their various creditors and conducted a full marketing process and auction of the debtors' assets. Just

ten months after approval of the PSA was denied, the *Innkeepers* court confirmed a plan that paid the majority of general unsecured creditors in full.[9] Thus, the *Innkeepers* case serves as a model for how this Court should treat the Debtors' premature, ill-conceived, and unfair RSA (*i.e.*, by denying it unequivocally). Just as importantly, it is an example of how a clear directive from the Court can refocus the Debtors' attentions on achieving an equitable result for all creditors and dramatically shift the direction of these cases for the better.

IV. CONCLUSION

As set forth above, the RSA will not benefit the Debtors' estates or maximize value for any creditors but the First Lien Creditors. Thus, the Debtors have not carried their requisite burden of proof under either the business judgment standard or a heightened scrutiny/entire fairness standard of review.

WHEREFORE, the Committee respectfully requests that the Court deny the RSA Motion and grant such other and further relief as the Court may deem just and proper.

[9] *See In re Innkeepers USA Trust, et al.*, No. 10-13800 (Bankr. S.D.N.Y. June 29, 2011), ECF No. 1804.

Dated: Birmingham, Alabama
August 26, 2015

CHRISTIAN & SMALL LLP

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Proposed Counsel for the Official Committee of Unsecured Creditors

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

In re: Walter Energy, Inc., et al., Debtors.	Case No. 15-02741 (TOM) Chapter 11 Jointly Administered

DECLARATION OF MATTHEW A. MAZZUCCHI IN SUPPORT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO EACH OF (1) THE DEBTORS' MOTION FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO ASSUME A RESTRUCTURING SUPPORT AGREEMENT AND (B) GRANTING RELATED RELIEF AND (2) THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS UNDER 11 U.S.C. §§ 105, 361, 362, 363, 507 AND 552, BANKRUPTCY RULES 2002, 4001, 6003, 6004 AND 9014 (A) (I) AUTHORIZING POSTPETITION USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, AND (III) SCHEDULING A FINAL HEARING; AND (B) GRANTING RELATED RELIEF

I, Matthew A. Mazzucchi, declare under penalty of perjury:

1. I am a Managing Director at Houlihan Lokey, Inc. ("Houlihan Lokey"), an investment banking and financial advisory firm with principal offices located at 10250 Constellation Blvd., 5th Fl., Los Angeles, CA 90067. The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors") has selected Houlihan Lokey as its investment banker, and I am authorized to make this declaration on behalf of the Committee in support of the Committee's objections (the "Objections")[1] to each of (1) *The Debtors' Motion for an Order (A) Authorizing the Debtors to Assume Restructuring Support Agreement and (B) Granting Related Relief* [Docket No. 44] (the

[1] Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the applicable Objection.

"RSA Motion") and (2) *The Debtors' Motion for Entry of Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363, 507 and 552, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (A) (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Scheduling a Final Hearing, and (B) Granting Related Relief* [Docket No. 42] (the "Cash Collateral Motion"). Unless otherwise stated in this declaration, I have personal knowledge of the facts set forth herein.[2]

QUALIFICATIONS

2. Houlihan Lokey is an internationally recognized investment banking and financial advisory firm with 17 offices worldwide with more than 950 professionals. Houlihan Lokey provides financial advisory services and execution capabilities in the areas of financial restructuring, investment banking, business and securities valuation, and litigation support. In the area of financial restructuring, Houlihan Lokey has provided financial advice, valuation analyses, and investment banking services to debtors, bondholder groups, secured and unsecured creditors, acquirers, employee stock ownership plans, equity holders, and other parties-in-interest involved with financially troubled companies both in and out of bankruptcy. The Houlihan Lokey Financial Restructuring Group has a staff of more than 170 professionals dedicated solely to financial restructuring engagements.

3. I am a Managing Director at Houlihan Lokey, a senior banker in the firm's Financial Restructuring Group, and Co-Head of the firm's Energy Group. I am based in the firm's Dallas office. I graduated with a B.A. in Business Economics from the University of Minnesota. Since joining Houlihan Lokey in 1997, I have led and advised on many of the firm's largest and most complicated coal and energy industry M&A, restructuring, and financial

[2] Certain disclosures herein relate to matters within the personal knowledge of other professionals at Houlihan Lokey and are based on information provided by them.

advisory assignments, as well as significant restructuring assignments outside of the energy sector. Selected noteworthy energy industry engagements that I have personally worked on include Aquila Inc.; Calpine Corp.; Cap Rock Energy Corp.; Champion Energy Corp.; CIC Energy Corp.; Commonwealth Edison Co. (Exelon); Covanta Energy Corp.; Dynegy Inc.; Eagle Energy Partners/Lehman Brothers Holdings Inc.; Edison Mission Energy Company; Elkhorn Coal, Enron Corp.; Energy Future Holdings Corp.; Entegra Power Group; Entergy Corp.; Florida Public Utilities Co.; Klamath Falls Cogeneration Project; Longview Power/Mepco Coal; Mayflower Energy Inc./Kelson Holdings LLC; MidAmerican Energy Holdings Co./PacifiCorp; Midland Cogeneration Venture; Mirant Corp. (MAGI); NiSource, Inc.; NorthWestern Energy Corp. (Montana Power Co.); NRG Energy Inc.; Patriot Coal Corp; Reliant Energy Channelview LP; SemGroup Corp.; Stream Energy; Westmoreland Coal; and Xinergy Ltd., among others.

4. A number of these engagements involved representing parties in chapter 11 proceedings, including Westmoreland Coal (representing the debtor), Patriot Coal (representing the official unsecured creditors' committee), Longview Power/Mepco Coal (representing a secured creditor), and Xinergy Ltd. (representing a secured creditor). Accordingly, I have experience advising parties on bankruptcy-related issues including issues arising in connection with efforts by debtors to obtain relief under Bankruptcy Code sections 1113 and 1114, and the provision of adequate protection pursuant to Bankruptcy Code sections 361 and 363. In addition, many of the energy industry engagements I have worked on involved M&A transactions, including Eagle Energy Partners/Lehman Brothers Holdings Inc., Enron Corp., Energy Future Holdings Corp., and SemGroup LP, among others. As a result, I have extensive experience advising parties in connection with the marketing and sales process related to complex assets in this industry.

5. I am a frequent speaker on energy, coal and financial restructuring topics, including at seminars on distressed mergers and acquisitions and on board of director best practices in restructurings. I previously served on the Board of Directors of BosPower Partners, LLC an 800 megawatt gas-fired merchant power producer in Texas, upon its emergence from chapter 11 until its sale to Calpine in October 2012. I was certified as an expert witness in bankruptcy court proceedings of SemGroup Corp. As Co-Head of Houlihan Lokey's Energy Group focusing on the power and coal sub-sectors, I am also co-organizer and moderator of our annual Energy Conference which features panels and industry executives, markets consultants, investors and speakers in the coal, power, oil and gas exploration & production and oilfield services sectors. Additional details regarding my professional experience are described in the curriculum vitae, attached hereto as Exhibit A.

BACKGROUND

6. By the RSA Motion, the Debtors are seeking authority to assume a restructuring support agreement (the "RSA") that they purportedly negotiated with certain First Lien Creditors to deleverage their balance sheet and restructure their existing debt. The RSA contemplates a dual-track process, pursuant to which the Debtors will simultaneously pursue a plan of reorganization (the "Proposed Plan") and a sale process pursuant to Bankruptcy Code section 363 (the "363 Sale"). However, in the event the Debtors fail to meet any of the following conditions a "Triggering Event" under the RSA will occur, obligating the Debtors to cease all efforts to obtain approval of the Proposed Plan and focus exclusively on the 363 Sale.

Proposed Deadline	Triggering Event(s)
August 19, 2015	Commence 363 Sale marketing process
August 26, 2015	Make initial proposal to UMWA File the Proposed Plan and Disclosure Statement

Proposed Deadline	Triggering Event(s)
September 4, 2015	Make initial proposal to USW
October 21, 2015	File Exhibits to the Disclosure Statement File section 1113/1114 motions or labor settlement, retiree settlement, and agreement with the Pension Benefit Guaranty Corporation
October 28, 2015	Obtain Court approval of the Disclosure Statement
November 4, 2015	Commence solicitation of the Proposed Plan
November 11, 2015	Commence section 1113/1114 hearings or obtain Court approval of a labor settlement or retiree settlement
December 9, 2015	Obtain court approval of section1113/1114 relief
December 30, 2015	Implementation of approved section 1113/1114 agreements
January 13, 2016	Confirmation of the Proposed Plan
February 3, 2016	Substantial consummation of the Proposed Plan

7. In addition, with respect to the required 363 Sale process, a failure to achieve any of the following 363 Sale Milestones will constitute a "Termination Event" at which time the Debtors' ability to use Cash Collateral shall terminate.

Proposed Deadline	Milestone(s)
August 19, 2015	Commence Marketing Process
September 9, 2015	Execute Stalking Horse Credit Bid APA File 363 Motion
September 30, 2015	Bid Procedures Hearing
December 14, 2015	Qualified Bid Deadline
January 6, 2016	Conduct Auction Commence Sale Hearing
January 13, 2016	Sale Order Entered
February 3, 2016	Consummate Sale Transaction(1)

(1) February 3, 2016 closing date subject to one 30 day extension if Regulatory Approvals have not been obtained

ANALYSIS

A. The Triggering Events under the RSA Are Unreasonable and Present a Significant Risk of Immediate Conversion to an Exclusive 363 Sale Process

8. The Debtors are required to meet no less than thirteen deadlines and adhere to other limitations outside of their direct control. In particular, the Debtors are required to obtain a final ruling from this Court or settlement granting an unspecified level of relief associated with a section 1113/1114 process on or before December 9, 2015 (less than three and a half months from now). We understand that the Debtors have yet to commence negotiations on this complex process.

9. Among the non-timing related Triggering Events, a strike, work slowdown or other concerted labor activity would also cause a Triggering Event that would require the Debtors to cease any efforts to pursue a plan process and focus exclusively on consummating the 363 Sale. A strike, work slowdown or other concerted labor activity that would be considered a Sale Triggering Event is defined as a work slowdown or other concerted labor activity that lasts for more than three days and reduces production by over 100,000 tonnes, as measured against the Company's mining plan.

10. In addition, the ability of the Debtors to avoid nearly every single Triggering Event is contingent upon the "form and substance" of nearly all related filings, relief sought, relief granted, plan provisions and related terms being acceptable to the Majority Lenders. In effect, any relief granted (or not granted) or papers filed that are not acceptable to the Majority Lenders could force the Debtors to cease Proposed Plan efforts and focus exclusively on the 363 Sale. As a result, a conversion to a 363 Sale is nearly a *fait accompli* if the Majority Lenders require it.

B. The Proposed Sale Timeline Is Too Brief and Should Only Be Pursued After Basic Operating Profile and Cost Structure Are Discernable

11. To the best of my knowledge, the Debtors have only just begun the marketing process and have not yet provided any material information, beyond a three-page public information "teaser", to third parties in connection with a sale of the entire company or as a series of discrete asset sales.

12. The Debtors operate a complex network of mining-related assets with operations in three countries. The Debtors operate and have investments in ten coal mines in the United States primarily involved in the production and mining of metallurgical coal, with select thermal coal operations and a mineral reserve division, three surface mine operations in Canada, and one underground reserve mine in the United Kingdom. The Debtors also maintain coking operations which consist of three batteries with a total of 120 coke ovens, and oversee the operations of 1,748 methane gas wells.

13. Adding to the complexity of the Debtors' various assets are a host of labor, retiree, tax, environmental and potential regulatory issues that have yet to be fully understood and vetted by the Debtors, let alone by potential bidders, the Committee and other stakeholders in these cases. Importantly, not even the Debtors know yet what form potential section 1113/1114 relief may take, assuming such relief is even attainable, nor have they determined what other actions will be taken with respect to the assumption and rejection of executory contracts or corporate cost savings initiatives and resultant impact on mine operation and reclamation activities. These unknowns are expected to have meaningful impacts on most aspects of the Debtors' business operations, financing needs and exit capital structure, and would form the basis of any going concern bid(s) by potentially interest parties.

14. As the 363 Sale timeline is currently structured, even if all of these variables were known and implemented today, potential buyers have at best less than 120 days to understand and incorporate the financial and operating impacts into any bid, and potentially as little as five days to understand and incorporate the same for any labor and benefits related relief, as the bid deadline of December 14, 2015, falls just 5 days after the deadline to obtain a global labor settlement or Court Order granting relief under Bankruptcy Code section 1113/1114. In fact, launching a 363 Sale effort now, prior to any market understanding of the impact or resolution at all, of these key variables—even before such sequencing and truncated timeline is paired with the overhang of a looming, competitive credit bid for assets and associated break-up fee (addressed below)— will likely result in a significant reduction in the willingness of potentially interested parties to devote their time, money and resources to committing, or even engaging in a preliminary process, to provide a competing bid.

15. It has been my professional experience that it is beneficial to provide parties with as much time as reasonably possible to explore and develop going-concern alternatives in order to ensure that value is maximized for all creditor constituencies. Without a careful and thorough marketing process that allows sufficient time to reach all potential purchasers (both strategic and financial) and complete the requisite due diligence, it is my view that the Debtors will severely limit their chances of obtaining the highest and best offer that the market will produce for its assets.

16. Given that the Debtors' marketing process has only just begun and bids for a complex set of assets (and potential liabilities) are due in only sixteen weeks, a longer marketing timeframe is essential to enable the Debtors' investment banker to solicit potential purchasers, negotiate confidentiality agreements, and prepare one or more confidential information memoranda for the Debtors' various assets. Interested parties that intend to pursue a transaction

will require a more reasonable amount of time than currently allotted to meet with management, conduct diligence including discussions with the company's various labor groups, conduct physical inspections and environmental diligence, make arrangements for obtaining necessary financing for a bid, and procure any requisite deposits. In my experience, truncated sales processes are only beneficial when the asset being sold is a "melting ice cube" with rapidly diminishing value or an impending liquidity crisis. As set forth in the declaration of Edwin N. Ordway submitted contemporaneously herewith (the "Ordway Declaration"), there is no evidence that the value of the Debtors' assets is rapidly diminishing, particularly if the Debtors do not make the proposed cash adequate protection payments. As a result, at present this case presents no risk of rapidly diminishing value or an impending liquidity crisis (excluding one of the Debtors' own making). Accordingly, it is my belief that the current milestones contained in the RSA with respect to the 363 Sale are unlikely to foster a value maximizing transaction.

C. The Bid Protections Only Serve To Enrich the First Lien Creditors and Will Not Promote Competitive Bidding

17. Bid protections, such as a breakup fee and expense reimbursement, should be provided to a stalking horse bidder in order to compensate them for remaining committed to a pre-existing asset purchase agreement that it is able to execute and which will potentially foster higher and better bids, thereby maximizing value for a debtor's estate. Under the current circumstances, I do not believe the proposed bid protections result in any benefit to the Debtors' estates.

18. The First Lien Creditors are already fully familiar with the Debtors' assets and, because they purportedly hold a security interest on the majority of the Debtors' assets, require no additional incentive to participate in a sale of those assets. Accordingly, the purposes that are ordinarily served by the payment of a break-up fee are inapplicable here. Instead, the payment of

a break-up fee would simply chill bidding by raising the amount of the minimum competing bid required to be submitted by any third party, to the detriment of the estates and all of its creditors except the First Lien Creditors.

19. Further, because of the highly truncated time period for due diligence and marketing dictated by the Sale Term Sheet (as well as other features of the proposed sale process that will chill bidding, as discussed herein), the Debtors likely will not be able to attract the full universe of potentially interested parties to submit overbids, thus depriving the Debtors of the value for which they are paying by providing a break-up fee.

20. It has been my experience that parties will be more willing to participate in a section 363 auction and sale process when they believe that they have an equal and fair opportunity to bid for the assets. I am concerned that the bid protections create an uneven playing field that will serve as a disincentive for outsiders to participate in an auction for the Debtors' assets. As noted above, to my knowledge the Debtors' assets were not marketed extensively before the Petition Date and bidders would only be given an eleven-week timeframe in which to put together a Qualified Bid even though the Purchaser has been in negotiations with Debtors since as early as April 2015. With incomplete information about the Debtors' assets, bidders are being placed at a significant disadvantage from the outset, and are then being further disadvantaged because they must top the highly conditional, and as of yet undefined, bid by a 3% breakup fee plus an uncapped expense reimbursement. In my opinion, the Sale Term Sheet, as currently constructed, signals to the marketplace that the Debtors are not interested in fostering a competitive and open auction process. Accordingly, the Purchaser should not be entitled to such bid protections, particularly to the extent it is credit bidding.

D. The Overly Generous Adequate Protection Package Significantly Burdens Liquidity, Debtor Options and Case Timing

21. The Debtors decided not to obtain DIP financing to fund these cases, and have agreed to provide adequate protection to the First Lien Creditors in the form of cash payments totaling approximately $10.9 million per month, an amount that for some periods exceeds the Debtors' monthly budgeted operating cash burn. The Debtors currently estimate that they will fall below their minimum liquidity requirements as early as mid-December. As set forth in the Ordway Declaration, if the Debtors do not make the proposed adequate protection cash payments, the Debtors could potentially gain up to an additional six months of operating liquidity. Any meaningful additional time afforded by the elimination of such cash interest could be utilized wisely by the Debtors to pursue desired corporate restructuring, cost cutting, and curtailment negotiations and measures. Importantly, that additional liquidity would also provide the Debtors with much-needed time to pursue stand-alone reorganization alternatives, and eliminate altogether the need for a potentially value-minimizing truncated sale process, or, at minimum, allow a sale process to take place after the core asset operating costs and profiles proposed to be sold are known.

E. The Debtors Have Not Performed an Analysis Regarding the Potential Diminution in Value of the Prepetition Secured Parties' Collateral

22. I understand from my discussions with counsel to the Committee that a party proposing to provide cash payments or other relief to adequately protect a secured lender against diminution in the value of its collateral during a chapter 11 case (as set forth in Bankruptcy Code sections 361 and 363) bears the burden of establishing the necessity for and appropriate amount of any such adequate protection payments. To date, neither I, nor anyone else on the Houlihan Lokey team has seen any analysis prepared by the Debtors or any of the First Lien Secured

Parties estimating the level of payments—if any—required to protect the First Lien Secured Parties from a diminution in the value of their collateral during the pendency of these cases.

23. The most direct way of determining the expected diminution in the value of a secured creditor's collateral during a chapter 11 case would be to perform a valuation of the collateral as of the debtor's petition date and then forecast the expected value of the collateral as of the debtor's emergence from bankruptcy. The difference between these numbers, assuming that the petition date value exceeds the emergence date value, represents the decrease in the value of the secured lenders' collateral during the cases and would establish an outside boundary of the amount of adequate protection payments to which the secured creditor may be entitled. Where the expected emergence date is unknown, this calculation can become more complicated. However, where the petition date and mandatory emergence date are known, the calculation only requires a projection of the value of the collateral through the fixed emergence date.

24. It is my understanding that the Debtors have not conducted a valuation of the Prepetition Secured Parties' collateral and, consequently, I do not believe that they could have conducted the above-referenced analysis in assessing the proposed adequate protection payments in this case. As indicated above, I am also not aware of any other analysis by the Debtors or any of the First Lien Secured Parties that would identify the appropriate amount of any adequate protection payments, if any, to the First Lien Secured Parties.

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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.

Dated: August 26, 2015

Matthew A. Mazzucchi
Managing Director
Houlihan Lokey, Inc,

EXHIBIT A

HOULIHAN LOKEY

Curriculum Vitae
of
Matthew A. Mazzucchi

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Updated as of: August 26, 2015

Summary and Professional Biography

Mr. Mazzucchi is a Managing Director in the Dallas office of Houlihan Lokey, Inc., a senior banker in the firm's Financial Restructuring Group, Co-Head of the firm's Energy Group, and Head of its Power & Utilities Group. As part of delegated sector responsibilities, Mr. Mazzucchi and Power & Utilities Group bankers are responsible for the firm's coverage of and investment banking activities in the coal sector.

Through 17 worldwide offices, Houlihan Lokey has served approximately 800 clients annually over the past several years. The firm was ranked the #1 M&A advisor for U.S. transactions under $5 billion in size in 2014 and has been the #1 M&A advisor for U.S. mid-cap transactions every year for the last nine years (2006-2014). The firm also has one of the largest, most experienced restructuring practices globally, having advised on more than 1,000 restructuring transactions, including 12 of the 15 largest U.S. bankruptcies, since 2000. In 2014, Houlihan Lokey was ranked as the #1 global financial restructuring advisor, and in 2013 was recognized as the Global Restructuring Advisor of the Year by the International Financing Review.

During his 18-year career at Houlihan Lokey, Mr. Mazzucchi has led and advised on many of the firm's largest and most complicated coal and energy industry M&A, restructuring and financial advisory assignments, as well as significant restructuring assignments outside of these sectors including for companies exposed to commodity risk (inc. oil & gas, paper, pulp and steel). He personally worked on four of the largest 15 U.S. bankruptcies mentioned above, and on more than two dozen restructurings in the energy and coal sectors since 1997. Mr. Mazzucchi is a frequent speaker on energy, coal and financial restructuring topics and previously served on the Board of Directors of BosPower Partners LLC, an 800 megawatt gas-fired merchant power producer in Texas from its emergence from chapter 11 until is sale to Calpine in 2012. Mr. Mazzucchi has been certified and testified as an expert witness in the bankruptcy case of SemGroup L.P., testified before the Bankruptcy Court in the Enron Corp. chapter 11 case with respect to a Sec. 363 sale effort, and provided a declaration and was deposed, but did not testify, in the Patriot Coal Chapter 11 case. In 2012, Mr. Mazzucchi was named a finalist for the "40 Under 40" M&A Advisor Recognition Awards.

Professional Experience

- **Houlihan Lokey, Inc. (NYSE "HLI") 1997 – Present**
- Co-Head Energy Group and Head, Power & Utilities Group (2012 – Present)
- Managing Director, Financial Restructuring Group (2010 – Present)
- Co-Head, Power Group (2009 – 2012)
- Director, Financial Restructuring Group (2007 – 2010)
- Vice President / Senior Vice President, Financial Restructuring Group (2004 – 2007)
- Associate / Senior Associate, Financial Restructuring Group (2000 - 2004)
- Financial Analyst / Senior Financial Analyst, Financial Restructuring Group (1997 – 2000)

Coal and Energy Industry Restructuring, M&A and Financial Advisory Experience

- Aquila, Inc.
  (Company, Financial Advisory)
- BrightSource Energy, Inc.
  (Investor, Financial Advisory)
- Calpine Corp.
  (Secured Creditor Group, Chapter 11)
- Camden County Energy Recovery Associates, L.P.
  (Company, M&A)
- Cap Rock Energy Corp.
  (Company, M&A)
- Champion Energy Corp.
  (Lehman Official Committee of Unsecured Creditors, Chapter 11)
- CIC Energy Corp
  (Company, Financial Advisory)
- Commerce Energy
  (Company, Financial Advisory)
- Commonwealth Edison Co.
  (Company, Financial Advisory)
- Covanta Energy Corp.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Dynegy, Inc.
  (Ad Hoc Noteholder Group, Chapter 11)
- Eagle Energy Partners
  (Lehman Official Committee of Unsecured Creditors, Chapter 11)
- Edison Mission Energy Co.
  (Company and later Ad Hoc Noteholder Group, Financial Advisory and Chapter 11)
- Elkhorn Coal Co.
  (Company, M&A)
- Energy Future Holdings Corp.
  (TCEH Noteholder Group, Co-Plan Sponsors, Chapter 11)
- Enron Corp.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Entegra Power
  (Company, Chapter 11)
- Entergy New Orleans
  (Secured Noteholders, Chapter 11)
- Entergy Corp.
  (Company, Financial Advisory)

- Florida Public Utilities Co.
  (Company, M&A)
- Glacial Energy
  (Company, M&A and Chapter 11)
- Honiton Energy Group
  (Company, M&A)
- INGENCO, Inc.
  (Investor, M&A)
- Kaneb Pipeline Partners, L.P.
  (Company, Financial Advisory)
- Klamath Falls Cogeneration Project
  (Secured Noteholders, Out-of-Court Restructuring)
- Longview Power LLC / Mepco Coal LLC
  (Secured Creditor Group, Chapter 11)
- Mayflower Energy Inc. / Kelson Holdings, LLC
  (Company, Chapter 11)
- MidAmerican Energy Holdings Co. / PacifiCorp
  (Company, M&A)
- Midland Cogeneration Venture
  (Company, Financial Advisory)
- Mirant Corp.
  (MAGI Official Committee of Unsecured Creditors, Chapter 11)
- MXenergy, Inc.
  (Company, Financial Advisory)
- NiSource, Inc.
  (Company, Financial Advisory)
- NorthWestern Energy Corp.
  (Official Committee of Unsecured Creditors, Chapter 11)
- NRG Energy, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11 and thereafter Company, Financial Advisory)
- Patriot Coal Corp.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Reliant Energy Channelview LP.
  (Company, M&A and Chapter 11)
- SemGroup L.P.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Stream Energy
  (Company, M&A)
- TC Pipelines, LP
  (Company, Financial Advisory)
- Teco-Panda L.P.
  (Company, Chapter 11)
- TXU Energy
  (Company, Financial Advisory)
- Westmoreland Coal
  (Company, Chapter 11)
- Xinergy Ltd
  (Secured Creditor Group, Chapter 11)

Other Selected Restructuring Experience

- Alabama River Pulp
  (Secured Creditor, Out-of-Court Restructuring)
- Alabama Pine Pulp
  (Secured Creditor, Out-of-Court Restructuring)
- American Fiber Resources
  (Company, Financial Advisory)
- AMRESCO
  (Official Committee of Unsecured Creditors, Chapter 11)

- Great Lakes Pulp & Fibre
  (Company, Chapter 11)
- Gulf States Steel
  (Official Committee of Unsecured Creditors, Chapter 11)
- Heilig-Meyers, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11 and thereafter, Company, M&A)
- Home Holdings, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Laidlaw, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Levitz Furniture
  (Official Committee of Unsecured Creditors, Chapter 11)
- Loewen, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- LyondellBasell Industries AF S.C.A.
  (Bank Debt Agent, Chapter 11)
- Metal Management, Inc.
  (Company, Chapter 11)
- Payless Cashways, Inc.
  (Company, Chapter 11)
- Pioneer Companies, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- PennCorp Financial
  (Official Committee of Unsecured Creditors, Chapter 11)
- Purina Mills, Inc.
  (Company, Chapter 11)
- Refco, Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Shepherd Tissue, Inc.
  (Company, Chapter 11)
- Smurfit-Stone Inc.
  (Official Committee of Unsecured Creditors, Chapter 11)
- Uniforet, Inc.
  (Ad Hoc Noteholders, CCAA Restructuring)
- Wilshire Financial
  (Ad Hoc Noteholders, Chapter 11)
- Wise Metals Group
  (Company, Recapitalization)

Additional Information

- Certified and testified as expert witness in SemGroup L.P. (SemCrude L.P.) chapter 11 bankruptcy case

Select Past Speaking engagements include:

- ABI Annual Spring Meeting: Power Sector Restructurings, Lessons Learned from the Last Wave
- University of Wisconsin School of Business Directors' Summit:
  The Board's Role in Strategy, M&A and Restructuring
- Fulbright Forum: Acquiring Distressed Assets
- Akin Gump Straus Hauer & Feld LLP: Current Issues in Energy Company Restructurings

- Credit Suisse Annual Global High Yield Conference: Energy Sector Restructuring Issues
- Barclays Capital: Trends and Opportunities in Energy Restructurings
- UBS Dinner Forum: Coal Sector Opportunities and Issues
- Houlihan Lokey Annual Energy Conference, New York

- Independent Member, Board of Directors, BosPower Partners, LLC (2011 – 2013)
- Finalist, The M&A Advisor, Top 40 Under 40 Awards, Central Region (2012)
- Registered with FINRA (formerly the NASD) as a General Securities Representative (Series 7, 63 and 79)

Education

Bachelor of Arts in Business Economics, University of Minnesota, Twin Cities, where he was a James S. Kemper Scholar