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

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

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO 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

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Walter Energy, Inc. (9953); Atlantic Development and Capital, LLC (8121); Atlantic Leaseco, LLC (5308); Blue Creek Coal Sales, Inc. (6986); Blue Creek Energy, Inc. (0986); J.W. Walter, Inc. (0648); Jefferson Warrior Railroad Company, Inc. (3200); Jim Walter Homes, LLC (4589); Jim Walter Resources, Inc. (1186); Maple Coal Co., LLC (6791); Sloss-Sheffield Steel & Iron Company (4884); SP Machine, Inc. (9945); Taft Coal Sales & Associates, Inc. (8731); Tuscaloosa Resources, Inc. (4869); V Manufacturing Company (9790); Walter Black Warrior Basin LLC (5973); Walter Coke, Inc. (9791); Walter Energy Holdings, LLC (1596); Walter Exploration & Production LLC (5786); Walter Home Improvement, Inc. (1633); Walter Land Company (7709); Walter Minerals, Inc. (9714); and Walter Natural Gas, LLC (1198). The location of the Debtors' corporate headquarters is 3000 Riverchase Galleria, Suite 1700, Birmingham, Alabama 35244-2359.

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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 undersigned proposed counsel, hereby files this objection ("Objection")[2] to 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 "Motion"). In support of the Objection, the Committee submits the Declaration of Edwin N. Ordway, Jr. (the "Ordway Declaration") and the Declaration of Matthew A. Mazzucchi (the "Mazzucchi Declaration"), each filed contemporaneously herewith, and respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. By the Motion, the Debtors seek authority to grant significant protections to the Prepetition Secured Parties in exchange for the continued use of Cash Collateral.[3] Notably, the relief sought in the Cash Collateral Motion is linked to, and is a condition of, the Debtors' motion [Docket No. 44] (the "RSA Motion") for authority to assume a restructuring support agreement with certain of the Prepetition Secured Parties (the "RSA"). The RSA contemplates a dual-track process in which the Debtors will pursue either a plan or a sale, where, under either scenario, the Prepetition Secured Parties will wind up owning the business. If the Debtors fail to meet certain conditions under the RSA (including meeting incredibly tight milestones), then the Prepetition Secured Parties may terminate the Debtors' use of Cash Collateral immediately and foreclose on their collateral on only four business days' notice without further order of the Court.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Proposed Order.

[3] While the Committee assumes that the Debtors' cash is subject to valid, perfected liens in favor of the Prepetition Secured Parties solely for purposes of the Objection, it has not yet formulated a view as to whether that is the case and, in fact, subject to further investigation, believes there is a material chance it is not.

2. In agreeing to the terms of the RSA and consensual use of Cash Collateral, the Debtors have effectively ceded complete control of these cases to the Prepetition Secured Parties, to the detriment of unsecured creditors. The Proposed Order is problematic in a number of respects and should not be approved as currently proposed.

3. First, the adequate protection proposed to be granted to the Prepetition Secured Parties under the Proposed Order is grossly excessive. If, as the Debtors assert, the Prepetition Secured Parties are in fact drastically undersecured and very few unencumbered assets are available to satisfy the claims of unsecured creditors (a position the Committee is investigating), then the continuing operation of the Debtors' businesses inures exclusively to the Prepetition Secured Parties' benefit. That should be adequate protection enough. Nonetheless, the Debtors are seeking authority to provide the Prepetition Secured Parties with an adequate protection package that is nothing short of egregious. If the Proposed Order is entered, the Prepetition Secured Parties would receive, among other things, (i) adequate protection payments of approximately $10.9 million per month on account of post-petition accrued interest (an amount that for some periods exceeds the Debtors' monthly budgeted operating cash burn); (ii) adequate protection payments totaling at least an additional $[redacted] million payable [redacted] on account of pre-petition accrued interest; (iii) payment of their professional fees, estimated by the Debtors at over $[redacted] million; (iv) adequate protection liens and superpriority claims on substantially all of the Debtors' assets, including Prepetition Collateral and Unencumbered Assets (including avoidance actions and the proceeds thereof); and (v) additional adequate protection liens on intercompany notes that are created by the use of Cash Collateral. Such generous adequate protection is utterly unwarranted where, as here, the Prepetition Secured Parties appear to be undersecured, their Prepetition Liens remain subject to challenge, and they

are neither providing new money in the form of postpetition financing nor are they being primed by any third-party financing. Indeed, had the Debtors sought authority to use Cash Collateral on a non-consensual basis (and there is no evidence that the Debtors ever evaluated this possibility), they could not have done worse.

4. Second, the Proposed Order gives the Prepetition Secured Parties control over the Debtors' restructuring process by allowing them to terminate the Debtors' use of Cash Collateral and foreclose on their collateral almost immediately upon the occurrence of certain events, including termination of the RSA. The Proposed Order also gives the Prepetition Secured Parties unprecedented control over the Debtors' day-to-day business operations by granting them consent rights over everything from management incentive plans to the assumption and rejection of all executory contracts. These extensive controls highlight the fact that (i) the Debtors are operating their business for the sole benefit of the Prepetition Secured Parties such that they are not entitled to the massive adequate protection package proposed by the Debtors, and (ii) the negotiations with respect to both the Proposed Order and the RSA were hardly arms' length.

5. Third, the termination events under the Proposed Order have hair triggers that fail to make allowances for the fact that, although historically the Debtors' receipts and disbursements are predictable over the longer term, on a week-to-week basis they are subject to wide variances. Thus, notwithstanding the unprecedented amount of control the Prepetition Secured Parties would be given upon entry of the Proposed Order, it is almost guaranteed that the Debtors will violate at least one of the budget covenants, giving the Prepetition Secured Parties the further ability to pull the plug virtually at will and convert a sham "plan process" into an unfettered seizure of the Debtors' assets.

6. The Prepetition Secured Parties apparently were not satisfied with these broad protections, because the Proposed Order also contains a number of provisions that appear to be designed to limit the ability of unsecured creditors to protect their own rights. For example, the Proposed Order includes provisions that unduly restrain and obstruct the Committee's ability to fulfill its duties under section 1103(a)(2) of the Bankruptcy Code by, among other things, limiting the budget and time period for the Committee to conduct its investigation of the liens of, and any claims against, the Prepetition Secured Parties. Given the magnitude of the liens that must be reviewed and the scope of the investigation the Committee must undertake, the Committee should be provided with no less than 120 days and a $750,000 budget to conduct its investigation. As a further example of the Debtors' efforts to unduly restrict the Committee's ability to participate in these Chapter 11 cases, the Debtors' Budget contains a $50,000 aggregate monthly cap for all of the fees and expenses for all committee advisors, including any advisors hired by the Committee, the Section 1114 Committee, and any other committee that is appointed in these cases. This limitation is particularly egregious when considered in light of the fact that the projected fees, costs, and expenses for the advisors to the Debtors, the Prepetition Secured Parties and others exceeds $[redacted] million in the aggregate through February 2016 according to the projected monthly restructuring professional fee detail supporting Budget (as compared to the $350,000 allocated to all professionals retained by both this Committee and the Retiree Committee). If that weren't enough, the Prepetition Secured Parties attempt to rewrite the Bankruptcy Code by limiting the payment of the Committee's professionals' fees even out of unencumbered assets.

7. Finally, certain other provisions of the Proposed Order are unreasonable and should be modified as described below.

8. In the absence of any additional financing, it is without question that the Debtors require the ability to use Cash Collateral in order to continue operating and preserve the value of the estate during these cases. Collectively, however, the expansive rights afforded to the Prepetition Secured Parties under the RSA and Proposed Order will provide no benefit to any party except the Prepetition Secured Parties, and will reduce unsecured creditors' recoveries. As such, they represent an abuse of the Debtors' discretion and a waste of corporate assets, and must be carefully scrutinized by the Court. The Committee respectfully submits that, unless the Proposed Order is substantially modified to address the Committee's concerns, the Motion should not be granted.

II. BACKGROUND

9. On July 15, 2015, each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors' chapter 11 cases are being jointly administered pursuant to Bankruptcy Rule 1015 [Docket No. 54].

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 15, 2015, the Court entered its *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 Order"). A hearing to consider a final order on the Motion (such order, the "Proposed Order")[4] was scheduled for August 18–19, 2015, and subsequently

[4] While the Proposed Order has not yet been filed with the Court, the Debtors indicated in the Motion that the terms of the Proposed Order will "be substantially similar to the terms of the Interim Order." For purposes of this Objection, the Committee will refer to the terms of the Proposed Order based on the Debtors' representation that it will be substantially the same as the Interim Order.

adjourned to September 2–3, 2015, at 10:00 a.m. prevailing Central time at the request of the Committee.

12. 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 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.

III. ARGUMENT

A. The Proposed Order Is an Exploitation of the Bankruptcy Process by the Prepetition Secured Parties

13. The Proposed Order is far from a standard cash collateral order. Instead, it is tied to the RSA through cross-default provisions. If granted, the Proposed Order will place control of the Debtors' cases and the operation of their business during and following their exit from bankruptcy squarely in the Prepetition Secured Parties' hands. As a result, the Prepetition Secured Parties will be able to exploit the bankruptcy process for their own benefit, by preserving the value of their Prepetition Collateral through the continued operation of the Debtors' business as a going concern, while extracting value in the form of excessive and unwarranted adequate protection payments to the detriment of unsecured creditors. Moreover, if

a termination event under either the RSA or the Proposed Order occurs, the Prepetition Secured Parties will have the ability to terminate the Debtors' use of Cash Collateral and foreclose on their Prepetition Collateral almost immediately and without further order of the Court. These dire consequences will effectively constrain the ability of the Debtors to even consider alternative restructuring options that could provide a better recovery for unsecured creditors.

14. The Debtors assert that the relief set forth in the Proposed Order is in the best interests of all creditors. However, their arguments in support of this statement all boil down to the same point—the Debtors' liquidity constraints have left them with no other option. This argument is belied by the facts, however, which suggest that the Prepetition Secured Parties are calling the shots, even in advance of Court approval of the Motion and RSA. If the Debtors wanted to turn over their assets to their secured creditors, they could have done so outside of this bankruptcy court process. Instead, through the RSA and overreaching Proposed Order, the Prepetition Secured Parties chose to take advantage of the benefits and protections of the Bankruptcy Code, while at the same time eviscerating the provisions of the Bankruptcy Code that offer counterbalancing protections for unsecured creditors.

15. The Debtors elected not to seek debtor-in-possession financing, relying instead solely on the available cash on hand,[5] which the Debtors contend constitutes the Prepetition Secured Parties' collateral. Courts recognize that "debtors-in-possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a pre-petition lien on cash collateral." *Resolution Trust Corp. v. Official Unsecured Creditors' Comm. of Defender Drug Stores, Inc. (In re Defender Drug Stores, Inc.)*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992). *See also In re The Colad Grp., Inc.*, 324 B.R. 208, 219 (Bankr. W.D.N.Y. 2005) (noting that the

[5] *See* Transcript of Hearing, July 15, 2015 (the "July 15 Hrg. Tr."), at 46:9-46:11 ("The debtor is entering this Chapter 11 with over $250 million in cash reserves so we're not seeking a DIP at this time.").

proposed postpetition lender, also the debtor's prepetition lender, was in a position to dictate terms, and thus the proposed postpetition financing facility did not represent fair terms). As a result, courts should be cautious not to approve financing terms that are considered harmful to the estate and creditors. *See, e.g., In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting that "the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest"). Thus, while certain terms favorable to a lender may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts have not approved financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole (or primary) benefit of the lender. *See In re Tenney Vill. Co.*, 104 B.R. 562 (Bankr. D.N.H. 1989); *In re Defender Drug Stores, Inc.*, 145 B.R. at 317 ("[W]hile certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender.").

16. The Proposed Order is a clear product of overreaching by the Prepetition Secured Parties, coupled with the complete capitulation by the Debtors, created by the kind of imbalance in negotiating leverage cautioned against in the foregoing cases. The Proposed Order benefits only the Prepetition Secured Parties by giving them full control over the Debtors' actions. Specifically, in return for providing "consensual" use of approximately $200 million of cash on hand (per most recent budget dated August 20, 2015, with no evidence that all of this cash is the

collateral of the Prepetition Secured Parties), the Debtors agreed to give the Prepetition Secured Parties the following:

- Adequate Protection Payments: The Debtors propose to make payments solely to the First Lien Secured Parties in the amount of 80% of the accrued but unpaid postpetition interest at the non-default rate under the First Lien Credit Documents and First Lien Indenture Documents. These $10.9 million monthly payments make up approximately [redacted] of the Debtors' total cash burn under the most recent Budget (dated August 20, 2015) and result in payments of postpetition interest in excess of $65 million from the Petition Date through January 2016. In addition, the Debtors propose to make an additional payment to the First Lien Secured Parties of at least $[redacted] million [redacted] on account of accrued but unpaid prepetition interest at the non-default rate under the First Lien Credit Documents and First Lien Indenture Documents.[6]

- Adequate Protection Liens and Superpriority Claims: The Debtors propose to grant the Prepetition Secured Parties:

    - superpriority claims in connection with any diminution of value in their Prepetition Collateral; and

    - superpriority claims and liens on substantially all of the Debtors' assets, including Prepetition Collateral, commercial tort claims, avoidance actions, and proceeds of avoidance actions.

- Payment of Prepetition Secured Parties' Fees and Expenses: The Debtors propose to pay the fees, costs, and expenses for the first lien administrative agent, first lien indenture trustee, Steering Committee members, and certain of their various advisors.

- Consent Rights: The Debtors propose to grant the Prepetition Secured Parties consent rights with respect to the assumption or rejection of any executory contracts or unexpired leases by the Debtors, as well as any decision by the Debtors to seek approval of employee incentive or retention plans.

- Restrictions on the Use of Collateral or Cash Collateral: The Debtors will agree that any payments made by the Debtors for the benefit of its foreign or non-debtor affiliates or subsidiaries (with certain exceptions) must be made pursuant to senior secured notes that must be pledged to the First Lien Secured Parties, regardless of whether it proves to be the Prepetition Secured Parties' collateral.

- Remedies: The Debtors propose to grant the Prepetition Secured Parties the right upon the occurrence of a termination event (including termination of the RSA) to foreclose on their Prepetition Collateral on four business days' notice without further Court order.

[6] The Debtors have produced documents containing conflicting amounts for the accrued pre-petition interest that the Debtors propose to pay to the First Lien Secured Parties, ranging between $[redacted] million and $[redacted] million. *See* Ordway Decl. ¶ 10.

- Full Releases: The Debtors propose to grant the Prepetition Secured Parties full releases of any and all claims related to the Prepetition Debt Documents (subject to the Committee's challenge rights) upon entry of the Proposed Order.

17. As set forth in more detail below, even as the Proposed Order provides all of these benefits to the Prepetition Secured Parties, the Debtors' other creditors are being disadvantaged through, among other things, an inappropriate section 506(c) waiver, the unreasonable capping of fees and expenses incurred by Committee professionals, and severe limits on the Committee's ability to conduct an investigation of potential claims against the Prepetition Secured Parties. Such provisions unfairly limit the Committee's rights and threaten to diminish any potential recovery to unsecured creditors.

18. The Committee strenuously objects to this perversion of the bankruptcy process and requests that the Court modify the Proposed Order as recommended by the Committee below to prevent further harm to the interests of unsecured creditors.

B. The Proposed Order Is Not the Product of Sound Business Judgment and Should Be Carefully Scrutinized by the Court

19. The Debtors assert that the terms of the Proposed Order "were negotiated in good faith and at arm's length," are "fair and reasonable," and are the product of the sound exercise of their business judgment. Motion at ¶¶ 27-28. The facts and circumstances surrounding the Proposed Order demonstrate that this is not the case and, as a result, each of the terms of the Proposed Order should be carefully scrutinized by the Court to assess the potential detrimental impact on unsecured creditors, who were not a party to the process through which the order was developed.

1. The Debtors Failed to Act on a Fully Informed Basis

20. Business judgment requires, among other things, that officers and directors of a company act on a fully informed basis. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985),

overruled on other grounds, *Gantler v. Stephans*, 965 A.2d 695 (Del. 2009). It does not appear that the Debtors' board acted on a fully informed basis in evaluating the terms of the Proposed Order.

21. The Debtors are not required to obtain the Prepetition Secured Parties' consent to use Cash Collateral. Rather, section 363 of the Bankruptcy Code provides that a debtor may not use, sell, or lease cash collateral unless "(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." Section 361 of the Bankruptcy Code further provides that adequate protection may be provided by any of cash payments, the grant of additional or replacement liens, or the grant of such other relief as will result in the creditor realizing the "indubitable equivalent" of its security interest. *See* 11 U.S.C. 361; *see also In re Coker*, 216 B.R. 843, 855 (Bankr. N.D. Ala. 1997).

22. The adequate protection package the Debtors "negotiated" is far more generous than the protection the Debtors would be required to provide if they were to use Cash Collateral on a non-consensual basis. An election by the Debtors to seek non-consensual use of Cash Collateral also likely would have resulted in (i) fewer operating restrictions and consent requirements in favor of the Prepetition Secured Parties, (ii) no RSA and therefore no milestones, (iii) the retention of the Debtors' ability to use their discretion in terms of timing and key decisions impacting these chapter 11 cases, and (iv) a requirement that the Prepetition Secured Parties seek relief from the automatic stay from this Court before foreclosing on their Prepetition Collateral. Despite the staggering cost of entering into the RSA and seeking consensual use of Cash Collateral, there is no evidence that the Debtors ever performed an analysis that compared the costs and benefits of the proposed consensual terms versus the cost of seeking non-

consensual use of Cash Collateral. In light of the Debtors' inadequate decision-making process, the Debtors' assertions that the Proposed Order will benefit the estates are not entitled to deference by the Court.

2. The Proposed Order Constitutes an Abuse of Discretion and Gives Rise to a Waste of Corporate Assets

23. Business judgment also requires that officers and directors make a business decision that does not constitute an abuse of discretion or give rise to a waste of corporate assets. *See, e.g., Cottle v. Storer Commc'n, Inc.*, 849 F.2d 570, 574 (11th Cir. 1988) (holding that transactions that are the result of "fraud, bad faith or an abuse of discretion" are not protected by the business judgment rule). *See also Cox Enters., Inc. v. News-Journal Corp.*, No. 6:04-CV-698-ORL-28KRS, 2008 WL 5142417, at *9 (M.D. Fla. Dec. 5, 2008) ("Transactions that constitute waste, however, are not entitled to the protection of the business judgment rule and are generally considered void"); *In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) ("The business judgment rule's presumption shields corporate decision makers and their decisions from judicial second-guessing only when" there is "no abuse of discretion or waste of corporate assets." (citing *Official Comm. of Subordinated Bondholders v. Integrated Res.* (*In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992)).

24. The Debtors decided to align themselves with the Prepetition Secured Parties and agreed to make exorbitant adequate protection payments and then complain about the liquidity constraints that they created. This decision significantly impacts the runway the Debtors have in which to accomplish a restructuring that benefits all creditors of the estates. *See* Ordway Decl. at ¶¶ 10-11 (comparing when liquidity runs out under current projections versus liquidity if no adequate protection payments are made, even taking into account higher restructuring costs due to a contested cash collateral hearing). It is difficult to see how such a decision does <u>not</u> amount

to a waste of corporate assets. Again, these inherent flaws in the Debtors' decision to agree to the terms in the Proposed Order require the Court to carefully scrutinize each of the provisions to determine whether they are truly in the best interests of the Debtors and their creditors.

C. The Proposed Adequate Protection is Excessive and Detrimental to Unsecured Creditors

25. As noted above, Bankruptcy Code section 361 provides that adequate protection for the use of cash collateral may be provided by cash payments, the grant of additional or replacement liens, or the grant of such other relief as will result in the creditor realizing the "indubitable equivalent" of its security interest. *See* 11 U.S.C. § 361; *see also In re Coker*, 216 B.R. at 855. The purpose of adequate protection is to maintain the status quo and protect secured creditors from a diminution or loss in the value of their collateral during the chapter 11 cases. *See In re 354 E. 66th St. Realty Corp.*, 177 B.R. 776, 782 (Bankr. E.D.N.Y. 1995) ("[t]he purpose or intent of granting adequate protection . . . [is] to maintain the status quo for that creditor and to protect the creditor from diminution or loss of the value of its collateral during the ongoing Chapter 11 case"); *In re Pine Lake Vill. Apartment Co.*, 19 B.R. 819, 824 (Bankr. S.D.N.Y. 1982) ("Neither the legislative history nor the Code indicate that Congress intended the concept of adequate protection to go beyond the scope of protecting the secured claim holder from a diminution in the value of the collateral securing the debt.").

26. The Debtors propose to grant the Prepetition Secured Parties adequate protection for any postpetition diminution in the value of their Prepetition Collateral during these chapter 11 cases to the extent such diminution results from (i) the Debtors' use, sale, or lease of the Prepetition Collateral, (ii) the subordination of the Prepetition Liens to the Carve Out, or (iii) the imposition of the automatic stay.

27. The burden is on the Debtors as the moving party to show that the adequate protection is necessary and appropriate. *See In re Cont'l Airlines, Inc.*, 146 B.R. 536, 539 (Bankr. D. Del. 1992) ("Post-*Timbers* courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral.") (citing *In re Forest Ridge II, Ltd.*, 116 B.R. 937, 950 (Bankr. W.D.N.C. 1990)). The Debtors have submitted no evidence demonstrating that the proposed adequate protection is necessary to protect the Prepetition Secured Parties from the diminution in the value of their collateral. As set forth below, the Debtors' proposed adequate protection package is plainly excessive, particularly in light of the fact that (i) it appears that the Prepetition Secured Parties are undersecured, (ii) the Prepetition Liens remain subject to challenge, and (iii) the Prepetition Secured Parties are only providing use of Cash Collateral postpetition (*i.e.*, they are not providing debtor-in-possession financing nor are they being primed by any third-party financing, which might warrant additional protection).

1. The Proposed Adequate Protection Payments Are Excessive

28. Case law establishes that the continued operation of a debtor's business can itself constitute adequate protection, where that operation serves to protect the value of the collateral. *See, e.g.*, *In re Wrecclesham Grange, Inc.*, 221 B.R. 978, 981 (Bankr. M.D. Fla. 1997) ("as long as the debtor generates a continuous income stream, the debtor's use of the rental income does not diminish the value of the collateral"); *In re 499 W. Warren St. Assocs., Ltd. P'ship*, 142 B.R. 53, 56 (Bankr. N.D.N.Y. 1992) (finding a secured creditor's interest in collateral adequately protected when cash collateral was applied to normal operating and maintenance expenditures on the collateral property); *In re Cardinal Indus. Inc.*, 118 B.R. 971, 981 (Bankr. S.D. Ohio 1990) (ruling that secured lenders were adequately protected by debtor's use of funds to maintain and manage encumbered properties); *In re Mullen*, 172 B.R. 473, 478 (Bankr. D. Mass. 1994) ("If the rents were not used to pay for management, taxes and maintenance of the properties, the

value of [the secured lender's] mortgage interest would rapidly decline."); *In re Salem Plaza Assocs.*, 135 B.R. 753, 758 (Bankr. S.D.N.Y. 1992) (holding that a secured creditor was adequately protected when cash collateral was used to pay necessary operating expenses).

29. This principle was recently upheld by the court overseeing the bankruptcy of the Patriot Coal Corporation—a coal company that is facing the same economic challenges caused by depressed coal prices as those that drove the Debtors to seek bankruptcy protection in this Court. *See* Transcript of Hearing, *In re Patriot Coal Corp*., No. 15-32450 (KLP) (Bankr. E.D. Va. June 3, 2015). The *Patriot* court overruled the objection of the agent for one of the debtors' financing facilities, which argued against the proposed senior secured debtor-in-possession financing on the basis that the interests of the agent and lenders were not being adequately protected. After reviewing extensive testimony regarding the devastating impact to the debtors' mines and equipment if the financing was not approved and the company had to suspend operations, the court found that the preservation of the debtors' going concern value through their continued operations adequately protected the secured lenders' interests such that no additional protection against diminution in value was required. *See Id*. at 132:6-7, a excerpt of which is attached as **Exhibit A**.[7]

30. The reasoning relied on by the *Patriot* court applies equally here, where the Debtors admit that "the use of Cash Collateral will enable the Debtors to preserve value by maintaining their properties and businesses." Motion at ¶ 26. If the Debtors cannot use the Cash Collateral to continue to operate the business and are forced to cease operations and liquidate, the value of the Prepetition Collateral will decrease precipitously, far outweighing any diminution in value that will be suffered if the businesses continue to operate. *See* Ordway Decl. at ¶¶ 12-17.

[7] A copy of the complete transcript is available upon request.

Further, the Debtors have failed to provide any evidence whatsoever that the value of the Prepetition Collateral other than the Cash Collateral will actually decrease during these cases. To the contrary, the continuation of mining operations actually converts reserves—upon which the Committee anticipates its investigation will reveal the Prepetition Secured Parties' liens never attached due to restrictions in the underlying leases—into "as-extracted collateral" on which the Prepetition Secured Parties are more likely to hold validly perfected liens.

31. The Debtors fail to carry their burden to explain why additional adequate protection is necessary to protect the Prepetition Secured Parties' interests, much less provide any evidence in support of such arguments. In fact, it appears that the Debtors performed no valuation of their business as a going concern prepetition, and, as a result, the Debtors do not even have a baseline against which to measure any diminution in the value of the Prepetition Collateral taken as a whole. *See* Mazzucchi Decl. at ¶¶ 28-29. Presumably, the Debtors will point to the fact that, notwithstanding continued operations, they project that they will be cash flow negative during these cases. Indeed, the Debtors have made clear from the outset of these cases that they suffer from serious liquidity issues and may in fact run out of cash before the end of 2015. *See* July 15 Hrg. Tr. at 46:11-46:16 ("We have financing through agreement with our cash collateral -- with our lenders to hopefully take us through the end of this case, although we still risk exhausting our liquidity by year end if we can't move the case through the way we hope. And so we may have to seek some additional financing towards the end of the case."). The Debtors' longer-term monthly financial projections reflect that the Debtors will be rendered administratively insolvent by [redacted] (or possibly earlier), assuming they make the proposed adequate protection payments. *See* Ordway Decl. at ¶ 10. But as noted above, the Prepetition Collateral will maintain more value if the business continues operating as a going

concern (even if at a loss) than if no Cash Collateral is used at all. Moreover, [redacted] It defies common sense that a decrease in cash caused by making adequate protection payments to secured parties should entitle those same secured parties to yet more adequate protection.

32. Accordingly, the Committee submits that maintaining the Debtors' ongoing operations is itself sufficient adequate protection, and, in the absence of any evidence that the overall value of the Prepetition Collateral will decrease in value during these chapter 11 cases, the Prepetition Secured Parties are not entitled to any additional cash payments, much less payments equal to 100% of accrued but unpaid pre-petition interest and 80% of post-petition interest.[8]

2. The Prepetition Secured Parties Should Not Receive Adequate Protection Liens and Superpriority Claims on Unencumbered Assets

33. In the Motion, the Debtors concede that the following assets are unencumbered: (i) the assets of Blue Creek Energy, Inc., (ii) certain real property and leaseholds, (iii) certain equity in Canadian subsidiaries, (iv) proceeds of avoidance actions, and (v) certain cash held in investment and deposit accounts (collectively, the "Unencumbered Assets"), although they are careful in not placing a value on the Unencumbered Assets. *See* Motion, at n. 7. The Debtors' proposal to grant the Prepetition Secured Parties adequate protection liens and superpriority claims on the Unencumbered Assets (in addition to the myriad grants of additional adequate

[8] As set forth above, it is the Committee's position that the Debtors and Prepetition Secured Parties have failed to show that they are entitled to any adequate protection payments. To the extent such payments are authorized, however, the Committee requests that any payment of postpetition interest and fees be subject not only to recharacterization, but also disgorgement in the event that the Prepetition Secured Parties are found to be grossly undersecured or their liens are invalidated due to avoidance actions. *See, e.g.*, *In re Capmark Fin. Group Inc.*, No. 09-13684 (Bankr. D. Del. Dec. 22, 2009) [Docket No. 517] ¶ 7(d) (cash collateral order requiring lenders receiving adequate protection payments to execute stipulations in respect of any future disgorgement action, including with respect to ability to repay, consent to jurisdiction, and waiving certain potential defenses); *In re TOUSA, Inc.*, No. 08-10928 (Bankr. S.D. Fla. June 20, 2008) [Docket No. 1226] ¶ 7(d) (same).

protection) puts the recoveries available to unsecured creditors precariously at risk by inequitably shifting the value of those Unencumbered Assets from the Debtors' general unsecured creditors to the Prepetition Secured Parties as a result of the Debtors' continued operation of these cases for the primary benefit of the Prepetition Secured Parties.

34. The proposed granting of liens on avoidance actions and proceeds thereof is particularly egregious because it is well established that avoidance actions are not property of a debtor or debtor-in-possession and, thus, a debtor may not convey an interest in those causes of actions, including a security interest. *See e.g.*, *In re Worldcom, Inc.*, 401 B.R. 637, 646-47 (Bankr. S.D.N.Y. Feb. 26, 2009) (holding that chapter 5 claims do not belong to the debtor); *Texas Gen. Petroleum Corp v. Evans* (*In re Texas Gen. Petroleum Corp.)*, 58 B.R. 357, 358 (Bankr. S.D. Tex. 1986) ("neither a trustee in bankruptcy nor a debtor-in-possession can assign, sell, or otherwise transfer, the right to maintain a suit to avoid a preference. If a trustee or a debtor-in-possession makes such an assignment, the assignment is of no effect."); *accord Mellon Bank v. Glick (In re Integrated Testing Prods. Corp.)*, 69 B.R. 901, 904 (D.N.J. 1987) ("It is well settled that generally it is the trustee alone, acting on behalf of all the creditors, that has a right to recover payments made as preferences. And this right cannot be assigned.").

35. Instead, avoidance actions are statutory powers granted to the debtor or trustee, exercised for benefit of the debtor's estate and all of its creditors. *See, e.g., Bethlehem Steel v. Moran Towing (In re Bethlehem Steel Corp.)*, 390 B.R. 784, 786-87 (Bankr. S.D.N.Y. 2008) ("Avoidance actions brought pursuant to the Bankruptcy Code never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession . . . ."); *Nordberg v. Arab Banking Corp.* (*In re Chase & Sanborn Corp.)*, 904 F.2d 588, 600 (11th Cir. 1990) (in an avoidance action, trustee represents the interests of creditors); *Davis v. Farmers*

Home Admin. (*In re Davis)*, 785 F.2d 926, 927 (11th Cir. 1986) ("the trustee acting under section 544 represents the creditors") (citing *Am. Nat'l Bank v. Mrtg. Am. Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983)); *Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000) ("The purpose of fraudulent conveyance law is to make available to creditors those assets of the debtor that are rightfully part of the bankruptcy estate, even if they have been transferred away. When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer.") (citation omitted).

36. Courts commonly hold that, absent exigent circumstances or consent, avoidance actions should not be burdened by liens or superpriority lender claims.

> Courts have refused to allow assignment or sale of avoidance claims by the Trustee because such transfers would run contrary to two primary policies underlying the Bankruptcy Code. First, the Code allows only the trustee or debtor-in-possession to sue on a preference because only that trustee or debtor-in-possession represents the interests of all creditors in maximizing the value of the debtor's estate. . . . Second, permitting trustees alone to sue on a preference 'facilitate[s] the prime bankruptcy policy of equality . . . .

McCarthy v. Navistar Fin. Corp. (*In re Vogel Van & Storage, Inc.*), 210 B.R. 27, 33 (N.D.N.Y. 1997), *aff'd*, 142 F.3d 571 (2d Cir. 1998) (citations omitted); *In re Integrated Testing Prods. Corp.*, 69 B.R. at 905 (refusing to permit secured creditor to recover the proceeds of preference actions); Transcript of Hearing at 14:22-15:4, *In re Innkeepers USA Trust*, No. 10-13800 (SC) (Bankr. S.D.N.Y. Sept. 2, 2010) [Docket No. 433] ("Regarding the committee's objection to the granting of superpriority claims with respect to avoidance actions or the proceeds thereof, I agree with the committee's position and decline to grant the superpriority claims. Even though their [re]quest for liens on the avoidance actions was withdrawn, I believe the committee's objection

should be sustained as the withdrawal of the request for liens gives relatively empty protection if the superpriority claims still remain.").

37. Based on the Committee's limited, preliminary review, it appears there may be grounds for asserting significant avoidance claims against parties, including the Prepetition Secured Parties, that could provide substantial recoveries to general unsecured creditors. Despite the precipitous drop in the price of metallurgical coal commencing in 2011 through the present, the Debtors continued to incur massive amounts of secured debt leading up to the Petition Date, including the First Lien Indenture Obligations and Second Lien Indenture Obligations, to pay down existing secured debt and, more importantly, to provide cash infusions to Walter Energy, Inc. for general corporate purposes. *See* Declaration of William G. Harvey in Support of First Day Motions [Docket No. 3] (the "First Day Declaration") at 29-39. It is unclear to the Committee what, if any, consideration each of the Debtors' subsidiary guarantors received in exchange for the guarantees and security interests they granted to the Prepetition Secured Parties, which raises substantial questions regarding the extent and validity of those liens and guarantees. *See* First Day Decl. at 90-91.

38. Moreover, the Committee has not yet had the opportunity to investigate whether the Prepetition Secured Parties have properly perfected their interests in any of the Prepetition Collateral, including without limitation, (i) the cash held at various banks other than the collateral agents identified in the Prepetition Debt Documents, which accounts are admittedly not protected by account control agreements,[9] (ii) various parcels of real property, and (iii) various mineral leaseholds and other mineral rights, which interests may in fact be limited by the terms of the applicable leases or by state law. After investigation, the Committee may determine that

[9] *See* Motion at n. 8.

these interests are not properly perfected, thereby uncovering substantial sources of value recoverable through avoidance actions. Under the Proposed Order, that value would be hijacked by the Prepetition Secured Parties' adequate protection liens and superpriority claims on substantially all of the Debtors' assets (including unencumbered assets, avoidance actions, and the proceeds thereof).

39. The Debtors and the Prepetition Secured Parties have not identified any exigent circumstances that require the granting of adequate protection liens or superpriority claims on unencumbered assets, including, in particular, avoidance actions or the proceeds thereof. Accordingly, the Committee submits that no such liens should be provided in this case.[10]

D. Certain of the Termination and Remedies Provisions in the Proposed Order Are Inappropriate

40. The Proposed Order gives significant control over these chapter 11 cases to the Prepetition Secured Parties by allowing them to terminate the Debtors' right to use Cash Collateral upon the occurrence of certain events that are unrelated to a postpetition diminution in the value of the Prepetition Collateral or any failure of the Debtors to comply with the Budget. Instead, these termination events relate solely to the RSA, including, for example: (i) the failure of the Debtors to obtain approval of the RSA or the RSA Motion within 60 days of the Petition Date; or (ii) the occurrence of any event that triggers termination of the RSA—including, for example: (a) the exercise by the Debtors of their "fiduciary out" if presented with a more favorable restructuring proposal, or (b) the Debtors' failure to satisfy any one of a litany of impracticably tight conditions and milestones. *See* Interim Cash Collateral Order at 33.

[10] To the extent the Court overrules the Objection and determines that the Prepetition Secured Parties should receive liens on the Unencumbered Assets, including avoidance actions, the Committee submits that any provision that provides that the Prepetition Secured Parties are not subject to the equitable doctrine of "marshaling" should be stricken.

41. As described in the Committee's objection to the RSA Motion, the Committee believes that the RSA is not in the best interests of the Debtors' estates and has requested that the Court deny the RSA Motion. Whether or not the RSA Motion is approved, however, any termination events relating to the RSA should be stricken from the Proposed Order. Allowing the Debtors' use of Cash Collateral to remain tied to the RSA renders the Debtors utterly beholden to the Prepetition Secured Lenders, parties who—unlike the Debtors—do not owe fiduciary duties to any other creditors. Accordingly, the Proposed Order and the RSA should not be approved by the Court unless they are delinked.

42. The Proposed Order further provides that, upon a termination event, the Prepetition Secured Parties may, in their sole discretion, terminate the Debtors' ability to use Cash Collateral and exercise any remedies available to them under the Proposed Order or applicable nonbankruptcy law—including foreclose on all of the Prepetition Collateral—on only four business days' notice (the "Remedies Notice Period") and without any further order of the Court. *See* Proposed Order ¶ 13. The Proposed Order also provides that the only permissible basis for the Debtors, the Committee, or the Bankruptcy Administrator to challenge or object to the Prepetition Secured Parties' enforcement notice is solely with respect to the validity of the termination event—*i.e.*, whether a termination event validly occurred and had not been cured or waived. *Id*. The Debtors, the Committee, and the Bankruptcy Administrator are not permitted, consistent with their rights set forth in Bankruptcy Code section 363(c)(2), to seek nonconsensual use of Cash Collateral and are not permitted to seek prevention of any such foreclosure on any other grounds. *Id*. Taken together, these provisions grant the Prepetition Secured Parties unfettered discretion to simply pull the plug on these cases and take their collateral upon an event of default and without any recourse on the part of the Debtors. Such

actions are completely contrary to the fundamental principles underlying the Bankruptcy Code, which are intended to prevent one creditor from taking an action that would result in unfair harm to another.

43. The Debtors' continued operations are important to the numerous vendors that provide services to the company, as well as to the people of Alabama and West Virginia, where the Debtors employ approximately 2,300 individuals and thousands of additional retirees reside (*see* First Day Decl. at ¶ 76). In light of that importance, to the extent the Prepetition Secured Parties wish to foreclose on their collateral, they should be required to give adequate notice of their intention to do so and to come before the Court and establish why cause exists to justify relief from the automatic stay. Accordingly, the Prepetition Secured Parties' rights and remedies upon an Event of Default should be revised to (i) extend the Remedies Notice Period to ten (10) business days; (ii) limit the remedies of the Prepetition Secured Parties solely to terminating the Debtors' use of Cash Collateral; (iii) expressly provide that the Prepetition Secured Parties may not foreclose on the Prepetition Collateral without further order of the Court; and (iv) provide that the Debtors may seek to continue using Cash Collateral on a nonconsensual basis.

E. The Proposed Order Gives the Prepetition Secured Parties Inappropriate Control Over the Debtors' Bankruptcy Cases

44. The Committee further objects to entry of the Proposed Order because it provides the Steering Committee and other Prepetition Secured Parties absolute control over nearly all aspects of the Debtors' cases and ongoing business operations. The controls that the Steering Committee and Prepetition Secured Parties seek to impose through the Proposed Order are far-reaching and permeate every aspect of the Debtors' restructuring efforts.

45. The Prepetition Secured Parties' excessive control over the Debtors' bankruptcy cases is plainly evident by the Steering Committee's (and in some cases, other Prepetition

Secured Parties') numerous consent rights over all aspects of the Debtors' business, including: (i) the Debtors' ability to seek approval of any employee incentive or retention plans (¶ 11(h)) or make key employee retention payments (¶ 11(e)); (ii) the issuance, renewal, or replacement of any letters of credit, surety bonds, or workers' compensation obligations, regardless of the size of such obligations (¶ 11(e)); (iii) any decision with regard to the Debtors' assumption or rejection of executory contracts and unexpired leases (¶ 11(g)); (iv) the Debtors' ability to make any payments whatsoever for the benefit of its foreign and non-debtor affiliates or subsidiaries (¶ 11(j)); and (v) the selection of an independent director for to the board of Walter Energy Canada Holdings, Inc., (¶ 11(l)). The limitation on the Debtors' ability to assume or reject executory contracts and unexpired leases is particularly offensive, as it improperly limits the Debtors' most basic rights under Bankruptcy Code section 365 to assess their contractual rights and relieve themselves of burdensome obligations. Through provisions such as this one, the Prepetition Secured Parties are seeking to replace the business judgment of fiduciaries—the Debtors—with the self-serving motivation of a non-fiduciary, in clear violation of the principles underlying the Bankruptcy Code.

46. The Prepetition Secured Parties, and, namely, the Steering Committee, have sought and received consent rights on nearly every order entered to date in these bankruptcy cases.[11] Notwithstanding the Prepetition Secured Parties' immersion in every aspect of these cases, the Prepetition Secured Parties now seek a finding in the Proposed Order that

[11] *See, e.g.* [Docket No. 506] (requiring Debtors to obtain the Prepetition Secured Parties' consent to provide cash collateral to secure obligations related to the Debtors' surety bonds, or to renew, replace, or increase any letters of credit related to the Debtors' surety bonds); [Docket No. 332] (requiring Debtors to obtain the Prepetition Secured Parties' consent to open any new bank accounts or transfer funds for the benefit of any foreign subsidiary); [Docket No. 68] (requiring Debtors to obtain the Prepetition Secured Parties' consent to enter into any premium financing arrangement program related to the Debtors' insurance policies); [Docket No. 61] (requiring Debtors to obtain the Prepetition Secured Parties' consent to post cash collateral to secure the Debtors' obligations to regulators and agencies related to the Debtors' workers' compensation programs).

> the Prepetition Secured Parties shall not be deemed to be in control of the operations of the Debtors or to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 29 U.S.C. §§ 9601 et seq. as amended, or any similar federal or state statute), nor shall they owe any fiduciary duty to any of the Debtors, their creditors or estates, or shall constitute or be deemed to constitute a joint venture or partnership with any of the Debtors. Furthermore, nothing in this Interim Order shall in any way be construed or interpreted to impose or allow the imposition upon the Prepetition Secured Parties of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors and their respective affiliates (as defined in Bankruptcy Code section 101(2)).

Proposed Order ¶ 24. The Committee disagrees with the Prepetition Secured Parties' position that they are not "in control of the operations of the Debtors" when they seek to impose their consent and veto rights on the majority of the Debtors' operations, even those decisions limited in scope and value. Who knows what evidence will ultimately come to light during the Committee's investigation?[12]

47. For these reasons, the Committee requests that the Court strike any provisions of the Proposed Order that provide the Prepetition Secured Parties with such extensive and unilateral control over the Debtors' rights and assets, as well as the finding in paragraph 24 of the Proposed Order.

F. The Proposed Order Unduly Restricts the Committee's Ability to Carry Out Its Fiduciary Duties to Unsecured Creditors

48. Under Bankruptcy Code section 1103(c)(2), one of the duties of a Committee is to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the formulation of the plan." 11 U.S.C § 1103(c)(2). These statutory

[12] The Committee understands that the Debtors determined not to seek restrictions on the trading of claims (as opposed to the trading of interests) at the insistence of the Steering Committee. If true, this is evidence that the Steering Committee has forced the fiduciary for all unsecured creditors to jeopardize the value of its NOLs—valuable assets—in order to preserve the freedom of the Steering Committee's members to sell out of their positions.

duties clearly encompass the investigation of the purported liens of, and potential claims against, the Prepetition Secured Parties. The Proposed Order, however, includes extensive budgetary and other restrictions that unduly restrain and obstruct the Committee's ability to fulfill its duties. It is disappointing to say the least that the Debtors completely abdicated any responsibility whatsoever for ensuring that the unsecured creditors' interests will be safeguarded under the proposed budget, instead advising the Court that the Committee would fend for itself in negotiations for a suitable budget.[13]

1. Investigation of Prepetition Liens

49. The Proposed Order severely hampers—and in reality, eliminates altogether—the Committee's ability to fulfill its fiduciary duties by severely limiting the budget and time period for the Committee to undertake its investigation regarding the extent and validity of the Prepetition Liens.

50. First, the Proposed Order limits the Committee to an Investigation Budget of only $25,000 to investigate (but not prepare, initiate, or prosecute) any Claims and Defenses against the Prepetition Secured Parties. In a case of this magnitude and complexity, where the Committee's investigation will require, among other things, the preparation of extensive diligence requests and the review and analysis of, at a minimum, tens of thousands of pages of financing and security documents, lien and title searches, account agreements, and valuation materials, it is patently unreasonable to handicap the ability of the Committee to complete a full investigation of those materials. The investigation will necessarily encompass the review of hundreds of lease documents and consents, mortgages, fixture filings, cash account details and cash transfer records, and other materials. That review is solely to determine the extent of the

[13] July 15 Hrg. Tr. at 55:14-19 ("We have negotiated carve-outs for the committee, unsecured creditors committee. Those are numbers. They're place holders. We do not try to preempt the committee's negotiation of that on their own so when a committee is formed, they'll be able to come in and talk about those things pending a final hearing.")

Prepetition Secured Parties' collateral, and does not include activities in connection with the investigation of the recent debt issuances and grant of subsidiary guarantees. Accordingly, the Committee seeks to increase the Investigation Budget to $750,000. Courts in recent cases, including cases involving much smaller coal companies, have approved comparable budgets. *See, e.g.*, *In re Molycorp, Inc.*, No. 15-11357 (CSS) (Bankr. D. Del. July 24, 2015) [Docket No. 278] (approving $250,000 investigation budget, an increase from $50,000 proposed by the debtors); *In re Patriot Coal Corp.*, No. 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) [Docket No. 230] (approving $250,000 investigation budget for the Committee to conduct an investigation with an agreed-upon limited scope addressing only a subset of the debtors' pre-petition transactions with secured lenders); *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del Jun. 6, 2014) [Docket No.856] (approving $500,000 investigation budget, an increase from $175,000 proposed by the Debtors); *In re The Great Atlantic & Pacific Tea Company, Inc.*, No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 11, 2011) [Docket No. 479] (approving $250,000 investigation budget, an increase from $100,000 proposed by the debtors); *In re Saint Vincent's Catholic Medical Centers of New York*, No. 10-11963 (CGM) (Bankr. S.D.N.Y. May 17, 2010) [Docket No. 285] (approving $200,000 investigation budget, an increase from $20,000 proposed by the debtors).

51. Second, the time period by which the Committee must commence a challenge—sixty days after appointment of the Committee (the "Challenge Period")—is unreasonably short.[14] The Committee will need time to analyze, among other things, whether the Debtors' interests in cash, real property, and mineral rights are properly perfected, which will necessitate a

[14] As of the filing of this Objection, approximately 26 days after the formation of the Committee, the Debtors still have not produced any materials relevant to the Committee's investigation of the Prepetition Secured Parties' liens and claims, as they have understandably focused their production to date exclusively on matters concerning the Motion and the RSA Motion.

review of filings related to properties and minerals located in at least six jurisdictions, including Alabama, West Virginia, North Carolina, and New York.[15] The Committee will also need to undertake a fact-intensive investigation of the Debtors' secured financings that occurred during 2013 and 2014, long after the price of metallurgical coal had commenced its precipitous fall of more than two-thirds, during which the majority of the Debtors' subsidiaries issued guaranties and security interests in exchange for limited, if any, value.

52. In sum, the Committee must be provided with a meaningful opportunity to investigate the validity and perfection of the Prepetition Secured Parties' liens, which will require, at a minimum, an expanded Investigation Period and Investigation Budget. Given the significant issues to be addressed in the Committee's investigation, (i) the Investigation Budget should be increased to $750,000 and any language in the Proposed Order preventing the Committee's fees and expenses in excess of the Investigation Budget from being allowed, treated, or payable as an administrative expense claim should be stricken; (ii) the Challenge Period should be extended to at least 120 days from the date of Committee formation (with the proviso that the extension shall be without prejudice to the rights of the Committee to obtain further extensions of the Challenge Period by agreement of the parties or for cause shown),[16] and (iii) the Committee should be granted standing to pursue any challenge during the Challenge Period.[17]

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[15] *See* Monthly Bankruptcy Administrator Form for the Period Ended July 31, 2015 at [Docket No. 524], at 11-12 (identifying states in which the Debtors hold bank accounts).

[16] The proposed increased Challenge Deadline is comparable to the challenge period afforded to committees in similar cases. *See, e.g.*, *In re Energy Future Holdings Corp.*, No. 14-10979 (Bankr. D. Del Jun. 6, 2014) [Docket No. 855] (final cash collateral order increasing proposed challenge period from 60 days after formation of the committee to 135 days after entry of the interim order); *In re Molycorp, Inc.*, No. 15-11357 (CSS) (Bankr. D. Del. July 24, 2015) [Docket No. 278] (extending challenge period from 60 days after committee formation to 103 days after the petition date).

[17] Alternatively, the Committee proposes that the 120-day Challenge Period be a deadline for the Committee to file a motion seeking standing to bring causes of action, and that the Challenge Period shall be tolled until five (5)

2. Monthly Budget for All Committees' Professionals

53. The Debtors' Budget for the Proposed Order contains a $50,000 aggregate monthly cap for all fees and expenses for all committee advisors, including those hired by the Committee, the Section 1114 Committee, and the professionals of any other committee that is appointed in these cases. This limitation is particularly offensive when considered in light of the projected fees, costs, and expenses for the advisors to the Debtors, the Prepetition Secured Parties, and others, which the Debtors expect to exceed $[redacted] million in the aggregate through February 2016, according to the monthly restructuring professional fee projection detail supporting the Budget as follows (reflects professional fees on an "as incurred" basis):

[redacted]

The $350,000 allocated to all committees' professionals for the same period is less than [redacted]% of that total amount.

54. In a case of this magnitude, the proposed $50,000 monthly cap for all committee advisors effectively handcuffs the Committee's ability to effectively advocate on behalf of its constituents. The actions taken by any one party in the case will necessarily impact the amount of professional fees incurred by other parties in responding to those actions. Accordingly, the

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business days after adjudication of such motion, which will be heard at the next omnibus hearing at least fourteen (14) calendar days following the filing of the motion or as determined by the Court.

Committee suggests that implementing a single aggregate budget item for all retained professionals would be a more reasonable and appropriate approach to managing case expenses.

3. Disallowance of Fees and Expenses Incurred in Connection with Bringing a Challenge

55. In addition, the Proposed Order provides that any claims by the Committee for fees and expenses incurred in connection with bringing a challenge against the Prepetition Secured Parties "shall not be allowed, treated or payable as an administrative expense claim for purposes of section 1129(a)(9)(A) of Bankruptcy Code." *See* Interim Order ¶ 10(a)(iii). This provision is egregious in that it would disallow entirely any claims by the Committee's professionals for fees and expenses incurred in prosecuting claims against the Prepetition Secured Parties, rather than simply providing that any such excess fees and expenses are not payable out of Cash Collateral. *See Id*. Such a provision is wholly inappropriate to the extent it seeks to bar payment of Committee fees and expenses even out of unencumbered assets. This complete bar on Committee expenditures would completely eviscerate the Committee's ability to bring a challenge of the Prepetition Liens, regardless of whether the services performed by the Committee's professionals are actual, necessary, and reasonable, as required for the allowance of professional fees under Bankruptcy Code sections 330(a) and 503(b).

56. While the Committee is confident that its professionals can manage their costs under a fair and appropriate budget, the Committee and its professionals are concerned that the Prepetition Secured Parties by design and in bad faith are unnecessarily limiting the Committee's ability to recover its fees in the event that the case is more complex and/or litigious than originally contemplated in the Budget. The Committee's advocacy on behalf of unsecured creditors should not be constrained by the Debtors' and Steering Committee's unfair and

disproportionate allocation of resources among the various professionals. Accordingly, this provision should be stricken from the Proposed Order.

G. The Debtors Should Not Waive the Protections of Bankruptcy Code Section 506(c) for the Benefit of the Prepetition Secured Parties

57. Bankruptcy Code section 506(c) provides that a debtor-in-possession "may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim...." Bankruptcy Code section 506(c) "is designed to prevent a windfall to the secured creditor at the expense of [a] claimant." *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) (citation omitted); *In re Spa at Sunset Isles Condominium Ass'n, Inc.*, 454 B.R. 898 (Bankr. S.D. Fla. 2011). As the Third Circuit explained in *Visual Industries*, section 506(c) "understandably shifts to the secured party, who has benefited from the claimant's expenditure, the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate . . . ." *In re Visual Indus., Inc.*, 57 F.3d at 325. "Failing that, the costs of preserving the security for the secured party's benefit would otherwise fall on the warehouseman, auctioneer, appraiser, etc."—or, in this case, local vendors, employees, and holders of unsecured funded indebtedness, among others. *Id.*

58. The Committee objects to the Debtors' waiver of their rights to seek a surcharge against the Prepetition Collateral pursuant to Bankruptcy Code section 506(c) without the prior written consent of the Prepetition Secured Parties because it will effectively and improperly shift all of the risk in these chapter 11 cases to unsecured creditors. The proposed waiver is particularly objectionable in light of the fact that the Debtors have raised concerns regarding the lack of liquidity needed to carry these chapter 11 cases through a plan process. Accordingly,

without the ability to surcharge the Prepetition Secured Parties for the costs incurred in administering their Prepetition Collateral, it is unclear whether the Debtors will be able to reorganize or pursue a reasonable sale process for their businesses.

59. Courts within this Circuit have recognized that section 506(c) was specifically enacted to prevent unsecured creditors from bearing these risks and costs. *See In re Topgallant Lines, Inc.*, No. 89-41996, 1996 WL 33402828, at *2 (Bankr. S.D. Ga. Dec. 23, 1996) ("Section 506(c) is the vehicle to prevent costs of preserving collateral from being shifted from the secured party to the estate. *It insures that unsecured creditors generally will not bear the costs of preserving collateral in which they have no interest*.") (emphasis added); *see also In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) ("The underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs.").

60. Because the mandate of section 506(c) is narrowly tailored and based in equitable principles, courts must approve a section 506(c) waiver only sparingly. Indeed, the Supreme Court in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000), warned that such waivers should never be lightly granted, nor may the management of a debtor-in-possession agree to such a waiver for anything but the most compelling of reasons, because immunizing provisions such as these are binding on all the parties in interest. *Id.* (debtor's decision to waive rights under section 506(c) must be made in a manner consistent with its obligations "to seek recovery under the section whenever his fiduciary duties so require").

61. Courts have routinely rejected the waiver of surcharge rights under section 506(c). *See, e.g.*, Transcript of Hearing at 212:18-22, 213:21-22, *In re Energy Future Holdings*

Corp., No. 14-10979 (CSS) (Bankr. D. Del. June 5, 2014) (Court: "what would occur in the event there was some sort of collateral shut down or collateral transfer to the first lien lenders, and what would that leave behind, and where would the—where would that leave the estate. So, I am not going to approve a 506(c) waiver . . . . I won't approve a 506(c) waiver and if that's a problem, we'll deal with it."); *Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (B.A.P. 8th Cir. 1998) (provision in financing order that purports to immunize post-petition lender from Bankruptcy Code section 506(c) is unenforceable); *Kivitz v. CIT Grp./Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md. 2000) (Section 506(c) of the Bankruptcy Code exists so "that unsecured creditors are not required to bear the cost of protecting collateral that is not theirs and to require the secured party to bear the costs of preserving or disposing its own collateral"); *In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993) (absolute waiver of 506(c) surcharge rights "[wa]s against public policy and unenforceable per se"); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (cash collateral order unenforceable to the extent its provisions attempted to immunize post-petition lender from surcharge payment obligations pursuant to section 506(c) of the Bankruptcy Code).

62. In the circumstances presently before the Court, it is entirely improper to place additional risk on unsecured creditors that are being set up to receive limited recoveries in these chapter 11 cases, if any. This is especially true where, as set forth above, these chapter 11 cases are being administered for the benefit of the Prepetition Secured Parties. The Prepetition Secured Parties recognize that the value of the Debtors' business as a going-concern is much greater than the value of the Debtors' business in a liquidation scenario. Accordingly, the Prepetition Secured Parties sought to enter into the prepetition RSA in an effort to direct a

chapter 11 proceeding and thereby preserve the value of their collateral. The Prepetition Secured Parties are assuredly benefitting from keeping the Debtors' businesses operating in chapter 11, and as such should also have to pay the costs associated with maintaining the Debtors' going concern value. *See In re Willingham Invs., Inc.*, 203 B.R. 75, 79 (Bankr. M.D. Tenn. 1996) (refusing to grant a 506(c) waiver because to hold otherwise would "foreclose the possibility of liquidating the debtor's business as a going concern."); *Daniel v. AMCI, Inc. (In re Ferncrest Court Partners, Ltd.)*, 66 F.3d 778, 782 (6th Cir. 1995) ("[R]ecovery [under § 506(c)] may be had where the claimant establishes that the secured party directly or impliedly consented or caused the expense."). Because the Prepetition Secured Parties are effectively using chapter 11 to liquidate their collateral as a going-concern, they must "pay the freight." Otherwise, they can seek stay relief and liquidate their collateral outside of the Bankruptcy Court to their own detriment.

63. Further, the proposed 506(c) waiver is a virtual (and unacceptable) rewriting of the Bankruptcy Code. The Prepetition Secured Parties should not unilaterally be permitted to usurp the estates' statutory rights to require secured creditors to pay costs associated with the preservation and disposition of their collateral and thrust additional costs and risks onto unsecured creditors. *See In re Colad Grp., Inc.*, 324 B.R. at 224 ("The debtor and its secured creditor do not constitute a legislature. Thus, they have no right to implement a private agreement that effectively changes the bankruptcy law with regard to the statutory rights of third parties . . . By its language section 506(c) speaks only to the payments of reasonable and necessary costs. This court can discern no basis to allow a secured creditor to avoid its application.").

64. In this case, neither the Debtors nor the Prepetition Secured Parties have demonstrated any extraordinary circumstances that would justify a waiver of the Debtors' Bankruptcy Code section 506(c) surcharge rights. To the contrary, it is clear that a section 506(c) waiver is not warranted, as this case presents exactly the kinds of risks that section 506(c) is intended to address. Consequently, no such waiver should be granted, and a provision expressly preserving the estates' rights under section 506(c) of the Bankruptcy Code should be added to any final order entered in connection with the Motion.

H. The Releases in the Proposed Order are Inappropriately Broad

65. The Proposed Order provides that each of the Debtors release, to the maximum extent permitted by applicable law, each of the Prepetition Secured Parties (and certain related parties) from any and all claims relating to the Prepetition Debt Documents, including any (i) so-called "lender liability," equitable subordination, equitable disallowance, or recharacterization claims; (ii) any claims arising under the Bankruptcy Code; and (iii) any claims regarding the validity, priority, perfection or avoidability of the Prepetition Liens and the Prepetition Obligations. Proposed Order ¶ 5(e). The Proposed Order further provides that:

> the Debtors' acknowledgments, stipulations, and releases shall be binding on the Debtors and their respective representatives, successors and assigns and, only subject to [a challenge brought within the Challenge Period] on each of the Debtors' estates, all creditors thereof and each of their respective representatives, successors and assigns, including, without limitation, any trustee or other representative appointed by the Court, whether such trustee or representative is appointed in cases under chapter 11 or chapter 7 of the Bankruptcy Code."

Proposed Order ¶ 5(e) (emphasis added).

66. The Committee submits that the proposed release is overbroad and unnecessarily limits the ability of any future chapter 7 or chapter 11 trustee to maximize value for unsecured creditors. In fact, at the first day hearing, the Court addressed this very provision, noting that it

would be difficult to convert the cases to chapter 7 down the road if the parties are already eliminating the chapter 7 trustee's rights and remedies at this juncture. *See* July 15 Hrg. Tr. at 67:4-67:22 ("I might dismiss [the cases] but I'm not likely to convert it and tell a Chapter 7 trustee, okay, you don't have any rights or remedies."). The Court even noted the risk of potential conversion on the record, referencing other coal cases that have failed to emerge from bankruptcy. *See Id.* at 68:11-68:15 ("But so long as everybody understands if I do that in the final order, it will have consequences if we get to the end of the case and the case is going south, which coal cases sometimes do. Been there, done that.").

67. The Debtors admittedly are suffering from a lack of liquidity, and there is a material risk that these cases will convert to cases under chapter 7 in the event the Debtors cannot obtain sufficient financing or other liquidity to operate pending the consummation of a plan or sale. Furthermore, the Debtors have not provided a single shred of evidence concerning any investigation or analysis (or even recognition of) the claims to be released. Accordingly, the Court should not permit the Debtors to tie the hands of any future trustee at this juncture.

I. Other Provisions Contained in the Proposed Order Are Unreasonable

68. In addition to the objectionable provisions of the Proposed Order noted above, the Committee believes that certain other provisions must be modified in the Proposed Order to clarify the parties' rights. Some of these proposed changes are highlighted below for the Court:

- Credit Bids.
    - The Proposed Order permits the Prepetition Secured Parties to credit bid the full amount of any remaining Prepetition Obligations and any superpriority claims in a sale of any Prepetition Collateral. The Prepetition Secured Parties' rights to credit bid should remain subject to the power of the Court granted in Bankruptcy Code section 363(k) to restrict credit bidding for cause. *See, e.g.*, *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014) (denying credit bid where credit bidding would freeze competitive bidding altogether); *In re Free Lance Star Publ'g Co. of Fredericksburg Va.*, 512 B.R. 798 (Bankr. E.D. Va. 2014) (cause existed to limit creditor's right to bid at auction sale even as to assets

to which creditor has security interest); *In re RML Dev., Inc.*, 528 B.R. 150, 156 (Bankr. W.D. Tenn. 2014) (limiting secured creditor's ability to credit bid because a "bona fide dispute exists to the extent of the amount of that claim").

- Budget.
  - The Proposed Order contains strict variance limitations relating to the Budget that should be revised. In particular, the Debtors are not permitted to allow "(i) 'Cumulative Net Cash Flow' for the relevant Testing Period to have a negative variance of more than $20 million from the 'Cumulative Net Cash Flow' line item set forth in the [applicable] Budget and (ii) 'Cumulative Disbursements' for the relevant Testing Period to have a negative variance of more than the greater of (a) $7.5 million and (b) 5% of 'Cumulative Disbursements' set forth in the [applicable] Budget for the relevant Testing Period from the 'Cumulative Disbursements' line item set forth in the [applicable] Budget."
  - The Committee suggests that a more appropriate Cumulative Disbursements Covenant would utilize 10% to 15% of budgeted cumulative disbursements on which to calculate the permitted variance, in order to protect the Debtors against a technical default. *See* Ordway Decl. at ¶ 20. Specifically, the Committee is seeking to alleviate the risk that the Debtors will suffer a technical default due to the potential for timing differences related to disbursements, lower production levels due to geological or equipment issues, potential delays on coal shipments, demurrage charges associated with the potential delayed receipt of shipments by customers, and/or potential further metallurgical coal pricing declines.
- Carve Out.
  - The Proposed Order contains several limitations in the Carve Out that should be revised. In particular:
    - The Carve Out is limited to professionals' fees and expenses incurred by the Committee subject to the monthly cap. For the reasons stated above, the Committee's professionals should be permitted to share in the Carve Out with all other professionals in these cases on a pro rata basis.
    - The Carve Out should be modified to include the allowed out-of-pocket expenses incurred by individual Committee members in connection with the performance of their duties pursuant to section 1103 of the Bankruptcy Code.
- Reporting.
  - The Proposed Order should be revised to expressly provide that the Committee is an additional recipient of any and all budgets, reports, and forecasts and is also permitted reasonable access to the Debtors' books and records.
- Section 552(b)/ Equities of the Case Exception.
  - The Proposed Order provides that the "equities of the case" exception of Bankruptcy Code 552(b) is waived by all parties, but it should be revised to provide that it is waived only by the Debtors. As with other equitable doctrines,

the Court should not preordain at this early stage of the case that such doctrine will be inapplicable, even if the result would be inequitable. *See In re Metaldyne Corp.*, No. 09-13412 MG, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) ("the waiver of an equitable rule is not a finding of fact . . . and the Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make. If, in the event, the Committee or any other party [in] interest argues that the equities of the case exception should apply to curtail a particular lenders' rights, the Court will consider it."); *see also In re iGPS Co. LLC*, No. 13-11459 (KG) 2013 WL 4777667, at *5 (Bankr. D. Del. July 1, 2013) (no waiver of the "equities of the case" exception with respect to creditors committee); *In re Residential Capital, LLC*, No. 12-12020 MG, (Bankr. S.D.N.Y. June 25, 2012) [Docket No. 491] (providing that the "equities of the case" exception contained in section 552(b) of the Bankruptcy Code is waived only by the debtors with respect to the prepetition collateral).

- Proposed Payment of Prepetition Secured Parties' Fees, Costs, and Expenses as Adequate Protection.
    - Moreover, the Debtors' propose to pay fees, costs, and expenses under the First Lien Credit Documents and First Lien Indenture Documents for (i) the Administrative Agent and its counsel, (ii) the First Lien Trustee and its counsel, (iii) the Steering Committee members, (iv) the Steering Committee Advisors, and (v) the consultants or other advisors retained by the Steering Committee in connection with the restructuring (Proposed Order ¶ 11(b) and (c)) as some additional form of adequate protection. The Debtors propose to do so with no oversight, accountability, or limitations. Specifically, the Proposed Order authorizes the Debtors to pay these parties "promptly . . . upon presentment of an applicable invoice to the Debtors (with a copy of such invoice to be presented contemporaneously to both the Bankruptcy Administrator and counsel for the Creditors' Committee, if any)." (Proposed Order ¶ 11(c).) The Proposed Order also sets no limit on the number of advisors that may be retained by the Steering Committee and requires the Debtors to pay for all such advisors. Without any restrictions on the amount of fees and expenses to be paid or the number of professionals to be retained by the Steering Committee, and without the ability of the Bankruptcy Administrator and the Committee 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' unsecured creditors.
    - For these reasons, the Committee requests that the Court (i) authorize the Debtors to pay such fees, costs, and expenses within ten (10) calendar days after delivery of an invoice to the Bankruptcy Administrator and Committee, which will provide the Bankruptcy Administrator and the Committee a ten (10) day period in which to object to the amount of the fees and expenses proposed to be paid, and (ii) if the parties are unable to resolve any such objection, hear and determine the dispute. To the extent any portion of any invoice is subject to an objection, the Debtors should be permitted to pay only that portion of the invoice that is not subject to objection, and the remainder should be paid only upon resolution of the dispute.

IV. CONCLUSION

69. The Committee respectfully requests that the Court condition approval of the Motion on changes being made to the Proposed Order as set forth herein.

WHEREFORE, the Committee respectfully requests that the Court: (i) deny the Motion, or (ii) modify the Proposed Order as set forth herein, and (iii) grant such other and further relief as the Court may deem just and proper.

Dated: Birmingham, Alabama
August 26, 2015

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Proposed Counsel for the Official Committee of Unsecured Creditors

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA (RICHMOND)

In re	Case No. 15-32450(KLP)
	Richmond, Virginia
PATRIOT COAL CORPORATION, et al.,	
	June 3, 2015
Debtors.	1:10 PM

TRANSCRIPT OF HEARING
DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO ENTER INTO AND PERFORM UNDER COAL SALE CONTRACTS IN THE ORDINARY COURT OF BUSINESS AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING (A) DEBTORS TO PAY CERTAIN PRE-PETITION CLAIMS OF TRADE CLAIMANTS AND (B) PROCEDURES RELATED THERETO, AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) PAY PRE-PETITION WAGES, SALARIES, OTHER COMPENSATION, REIMBURSABLE EXPENSES, AND DIRECTOR OBLIGATIONS, (B) CONTINUE AN ORDINARY COURSE INCENTIVE PROGRAM FOR NONINSIDERS, (C) CONTINUE EMPLOYEE BENEFITS PROGRAMS, (II) ALLOWING EMPLOYEES AND RETIREES TO PROCEED WITH OUTSTANDING WORKERS' COMPENSATION CLAIMS, AND (III) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) HONOR PRE-PETITION OBLIGATIONS TO CUSTOMERS IN THE ORDINARY COURSE OF BUSINESS AND (B) CONTINUE CUSTOMER PRACTICES, AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO (A) CONTINUE AND RENEW THEIR LIABILITY, PROPERTY, CASUALTY, AND OTHER INSURANCE PROGRAMS AND HONOR ALL OBLIGATIONS IN RESPECT THEREOF AND (B) CONTINUE AND RENEW THEIR PREPETITION INSURANCE PREMIUM FINANCING AGREEMENTS, AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION TAXES AND FEES, AND (II) GRANTING RELATED RELIEF FILED BY PATRIOT; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES, (II) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICES, (III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT, AND (IV) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL

ORDERS (I) ESTABLISHING NOTIFICATION AND HEARING PROCEDURES FOR TRANSFERS OF CERTAIN EQUITY SECURITIES AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO OBTAIN POST-PETITION FINANCING, (B) AUTHORIZING USE OF CASH COLLATERAL, (C) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (D) GRANTING ADEQUATE PROTECTION, (E) MODIFYING THE AUTOMATIC STAY, (F) SCHEDULING A FINAL HEARING, AND (G) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE RETENTION AND COMPENSATION OF PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) ESTABLISHING INTERIM COMPENSATION PROCEDURES AND REIMBURSEMENT OF EXPENSES FOR RETAINED PROFESSIONALS AND (II) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) SETTING BAR DATES FOR FILING PROOFS OF CLAIM, INCLUDING REQUESTS FOR PAYMENT UNDER SECTION 503(B)(9) OF THE BANKRUPTCY CODE, (II) SETTING A BAR DATE FOR THE FILING OF REQUESTS FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIMS, (III) ESTABLISHING THE AMENDED SCHEDULES BAR DATE AND THE REJECTION DAMAGES BAR DATE, (IV) APPROVING THE FORM OF AND MANNER FOR FILING PROOFS OF CLAIM, INCLUDING 503(B)(9) REQUESTS, (V) APPROVING NOTICE OF BAR DATES, AND (VI) GRANTING RELATED RELIEF; DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION OF KIRKLAND & ELLIS LLP AND KIRKLAND AND ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE NUNC PRO TUNC TO THE PETITION DATE; DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO EMPLOY AND RETAIN KUTAK ROCK LLP AS CO-COUNSEL EFFECTIVE NUNC PRO TUNC TO THE PETITION DATE; DEBTORS' APPLICATION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE EMPLOYMENT AND RETENTION OF CENTERVIEW PARTNERS LLC AS INVESTMENT BANKER EFFECTIVE NUNC PRO TUNC TO THE PETITION DATE, (II) APPROVING THE TERMS OF THE CENTERVIEW AGREEMENT, (III) WAIVING CERTAIN TIME-KEEPING REQUIREMENTS, AND (IV) GRANTING RELATED RELIEF; DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO (I) RETAIN ALVAREZ & MARSAL NORTH AMERICA, LLC TO PROVIDE THE DEBTORS A CHIEF RESTRUCTURING OFFICER AND CERTAIN ADDITIONAL PERSONNEL AND (II) DESIGNATE RAYMOND EDWARD DOMBROWSKI, JR. AS CHIEF RESTRUCTURING OFFICER FOR THE DEBTORS NUNC PRO TUNC TO THE PETITION DATE

BEFORE THE HONORABLE KEITH L. PHILLIPS,
UNITED STATES BANKRUPTCY JUDGE

THE COURT: If you have satisfied all of the U.S. Trustee's concerns, I'll ask if there's anyone else that wishes to address or hear any of these retention applications?

MR. VAN ARSDALE: Robert Van Arsdale for the U.S. Trustee.

Your Honor, in particular, as to the Kirkland & Ellis application, the Office of the U.S. Trustee was provided with extensive additional information and supplemental declarations. And everything that the U.S. Trustee needed, she received, and we are now able to be comfortable with that employment.

As is always the case, should other facts or other disclosures arise during the course of the case, the U.S. Trustee may ask the Court to review the employment at some future date. But I am very complimentary of the effort that counsel put in to making sure that we were satisfied at this stage.

THE COURT: All right, thank you. So U.S. Trustee's Office is supporting the approval of the applications for Kirkland & Ellis, Kutak Rock, Centerview Partners LLC as investment banker, and Alvarez & Marsal?g

MR. VAN ARSDALE: As all those have been negotiated over the last few weeks, yes, sir.

THE COURT: And you'll endorse the employment orders?

MR. VAN ARSDALE: Yes, sir.

THE COURT: All right.

All right, thank you. They'll be approved.

MR. HESSLER: Thank you very much, Your Honor.

We are now at the DIP, last item on the agenda. We took it out of order, but it's the final item to be addressed today. And I will yield the podium to my partner, Mr. Kwasteniet.

MR. KWASTENIET: Good afternoon, Your Honor. Ross Kwasteniet from Kirkland & Ellis on behalf of the debtors.

The last item on the agenda today is the debtors' DIP financing motion. There were --

THE COURT: And you drew that straw?

MR. KWASTENIET: What's that?

THE COURT: That's your -- you got to handle that, huh?

MR. KWASTENIET: Yeah. Well --

THE COURT: You're the lucky guy?

MR. KWASTENIET: -- it was a fair tradeoff. It was either that or some of the de minimis sale procedure. I drew the short straw on this one, Your Honor.

So we are here today seeking entry of a final order approving the DIP financing. Your Honor, I'll note that there were four objections filed: one by the official committee of unsecured creditors, one by a group of surety bond providers, another by Barclays as agent for the LC, the debtors' pre-

petition letter of credit lenders, and then also an objection filed late last night by the nonunion VEBA.

I'm pleased to report that through negotiations and revisions to the order, which we have a blackline of the order marked against the interim order, Your Honor, that we're prepared to hand up and walk you through a little later in the hearing, the form of order has been agreed to by all parties, including Barclays as LC agent. And the objections of the official committee of unsecured creditors, of the surety bond providers, and of the nonunion VEBA have been resolved.

What we are down to, Your Honor, is a remaining objection by Barclays that the final DIP order be adjourned. Again, to be clear, we don't have a dispute with Barclays, and we have negotiated with them, and all the debtors' other pre-petition secured lenders and the creditors' committee and various other parties, a form of order that is acceptable to everybody. The remaining question and what Barclays is pursuing here today, as I understand it, Your Honor, is whether that order needs to be entered today or whether entry of that order can be put off until a later date.

Your Honor, it's the debtors' position that we should go forward and enter the final DIP order today. First, we don't see any utility in continuing to wait. We've got a form of order that's been negotiated and agreed upon, and we also see significant harm in adjourning. Your Honor, we get access

to an incremental twenty million dollars in availability under the DIP facility once the final order is entered.

But Your Honor, we think to really address the objections of Barclays as to the need for the entry today, that this probably does require evidence. And we are prepared to call two witnesses in support of the entry of the final DIP order today.

Your Honor, those witnesses are familiar to the Court. It's Mr. Dombrowski, who's the debtors' chief restructuring officer from Alvarez & Marsal. Mr. Dombrowski submitted the first-day declarations in support of all of the debtors' first-day motions, including the DIP financing. And then, also, Your Honor, Mr. Marc Puntus from Centerview Partners, the debtors' investment banker. Mr. Puntus also submitted a declaration in connection with the DIP financing motion, originally. But because some of the issues that we understand will be raised by Barclays, are different than and aren't covered necessarily by the original declarations, which are now three weeks dated, we are prepared to call and to put on direct examinations of both Mr. Dombrowski and Mr. Puntus and to make them available for cross-examination, following which, Your Honor, I think, our arguments from counsel should round out the presentation of the final DIP order for today.

THE COURT: All right, thank you.

Anyone wish to make a preliminary statement on behalf

of Barclays Bank?

MR. ZIMAN: Good afternoon, Your Honor. Ken Ziman of Skadden, Arps on behalf of Barclays.

I think Mr. Kwasteniet sort of summed it up pretty much right. I think our position here today is that there's a lot going on in this case. They spent a lot of time. They've got multiple presentations. It's very highly technical. I didn't bring mine. But they want to get a lot done, and it seems that this DIP financing marries up with that sales process. And our view is that we're getting primed by it; that they can't actually adequately protect us as the law would require; that we're not saying, no, don't do it. We're saying, hey, you've already incurred thirty million dollars. If there was a need for a small incremental amount to bridge to a hearing where we deal with the bid procedures and the sales process and the DIP at the same time, we'd probably be able to reach agreement on that basis. I understand the DIP lenders have not agreed to do that, and the company might have its own reasons why it doesn't want to do that. But that's not really the issue.

The issue is can they provide the adequate protection the law requires today. The answer, we say, is no. You'll hear the evidence; you'll make a decision of whether you agree with me or with them. But really, at the end of the day, we're not looking to shut the company down. We're looking to

find a path that marries up the substance of what's going on here, and my clients don't feel that they should be primed to the potential extent of a hundred million dollars, which is what would be potentially possible, until we understand the path forward is.

And if you put it all in context and you take Mr. Marinuzzi's comments, he wants a different process. He wants a longer process even, which is even more scary, potentially, from the perspective of those at the senior end of the capital structure. So I think we've had this conversation around and around among the parties here. I think we are where we are, and so the path of proceeding, as Mr. Kwasteniet outlined, is fine.

I would say that if they'd like to proffer their evidence, I'd be fine with a proffer.

THE COURT: Are you opposing the approval of the final order on the DIP, or are you asking that it be delayed or --

MR. ZIMAN: Well, I think, in the first instance, we'd like it to be delayed. But it's between approval and denial, then it's denial.

THE COURT: All right. And when you say "delayed", how long are you proposing it be delayed?

MR. ZIMAN: Look, there's a bunch of different factors at issue. The company says it needs money in a

certain period of time. They've got a June 19th deadline, I believe, for their entry of final order under the terms of their financing. We're fairly flexible. If there was -- I think the 23rd is the day on which they propose to come back on the bid procedures. That's what Mr. Hessler said. I mean, that's a fine date. If it has to be --

THE COURT: What do you --

MR. ZIMAN: -- a week earlier --

THE COURT: What do you hope to accomplish --

MR. ZIMAN: -- it could be a week earlier.

THE COURT: In the meantime, what is it that you --

MR. ZIMAN: Have a better understanding that the path forward that's been outlined in this process is actually the right path to be pursued and that it's on terms that works from top to bottom.

They're proposing a plan that treats claims of my client's. That's effectively what that sales process does. I mean, they're going to give a stalking horse a bid protections -- stalking horse title and bid protections to the buyer, assuming they get to a final definitive agreement, that would reward that buyer if some other path were pursued.

Again, that's something we want to do lightly. It's all actually a package in our view, Your Honor, and so we're just saying what's the harm in considering it together. So that's where we are right now.

THE COURT: All right.

MR. QUSBA: Good afternoon, Your Honor. Sandy Qusba, Simpson, Thacher & Bartlett, counsel for Deutsche Bank as administrative agent on the ABL facility.

As Mr. Ziman pointed out, Your Honor, the DIP financing is very entwined with the sales process articulated by Mr. Hessler at the beginning of the hearing. And I wanted to make sure that the Court is aware that the sale process and the Blackhawk term sheet in particular, which we only received twenty-four hours prior to its filing, provides treatment for my client, the asset based revolving lenders, that's unacceptable. And accordingly, I want to make sure Your Honor understood that the DIP financing and the sales process and the Blackhawk term sheet, in particular, as intertwined as they are, is problematic from our perspective.

First of all, the asset based revolving lenders, just to step back for a moment, have a first priority lien with respect to current assets, liquid assets, receivables, in particular, inventory, and cash. And right now, as acknowledge in the proposed final DIP order, we're oversecured. The borrower has also acknowledged we're oversecured in the form of borrowing based certificates that they give us on a periodic basis. And accordingly, we're money good.

And the term sheet that they've attached

provides -- the Blackhawk term sheet provides that, in the event that the market isn't able to raise new financing to take my clients out and others in the capital structure, the expectation, the desire is for Blackhawk to have the ABL lenders, the asset based revolving lenders, together with the existing letter of credit lenders, who are Mr. Ziman's clients, to roll into paper that is issued by Blackhawk.

Now, the ABL is being asked to -- as far as the way the term sheet is drafted, the ABL is being asked to leave what it has now, which is money good collateral, current assets, very liquid assets, and become part of a larger credit facility, which is secured by something other than current assets. That would not be an acceptable consensual resolution from our perspective, and we don't think we could be compelled to take that type of resolution, either.

So there's a lot of wood to chop with Blackhawk, with any other purchaser who might emerge. And I just wanted to make sure the Court was aware, because these two documents are so intertwined -- the DIP financing and the Blackhawk sales process -- that there was no misunderstanding from our perspective that, as it stands today, the Blackhawk term sheet does not work for us. Nevertheless, we recognize and also acknowledge that obviously the company needs liquidity, and we have resolved and have a consensual DIP financing order. But just to make sure that the Court is aware, we are not there

with respect to the Blackhawk term sheet as its proposed treatment provides -- as the proposed treatment for the ABL lenders as provided in that term sheet.

Obviously, this is not the bid procedures hearing, and I understand and appreciate that. But just to counter Mr. Hessler's sort of set up with respect to the bid procedures and the Blackhawk term sheet, I just wanted to give a little bit of a countervailing argument as well.

THE COURT: All right. So you're making sure counsel knows that you're not comfortable with the bid procedures that are proposed sales from the standpoint of your client, but you're not objecting to the DIP facility being approved today?

MR. QUSBA: That's right, Your Honor.

THE COURT: All right, thank you.

MR. KWASTENIET: Ross Kwasteniet from Kirkland & Ellis, again, for the record, Your Honor.

To be clear, we are not asking today for approval of the bidding procedures. We're not asking today for approval of the Blackhawk transaction. These documents, we were still negotiating later last night than I would have cared for, Your Honor. They came together and were filed sometime after midnight last night.

The bidding procedures aren't going to be up for three weeks. We've already heard some feedback. We're going to continue to work with our lenders, work with our proposed

stalking horse bidder to refine the bidding procedures. We have time to do that, Your Honor.

What we are here for today, though, is we've got a little bit of a chicken and an egg issue. We don't think that we get to the Blackhawk transaction; we don't think we get much further down the field without further access to DIP financing, Your Honor. And so I think that's what our two witnesses today would like to address. We understand that the lenders have questions; the lenders may have concerns. Your Honor, there's no reason today -- given the progress we've made since we filed these cases, even from before we filed these cases, in negotiating the proposed stalking horse transaction, there's no reason to think that this is the end of the line or that we're not going to build further consensus.

We've done a very good job building consensus to date. The fact that we have consensus on the form of a final DIP order, Your Honor, that involves priming different constituents -- and it's a 115-page document. I think that you can take by that that there an incredible amount of back and forth and negotiation and protection and reservations of rights built into it. I think we've done a pretty good job trying to balance a lot of competing objectives and concerns here, Your Honor, but our overarching concern is moving this case forward and continuing to make progress.

And if you are hearing from our main creditor constituents or some of them today that they've got questions and concerns, that's natural, Your Honor. We gave them a document twenty-four hours ago. They haven't had a chance to review it, and they really haven't to this point been really involved in the negotiation of that. I think that'll change. That'll open up going forward.

But what we are here for today, Your Honor, is for access to incremental financing, for entry of the final DIP order that will allow us to continue down the path that we've already made a lot of progress on. And I think it's simply way too early to call it off today.

I heard Mr. Ziman say that, if given the choice, he would suggest denial of the DIP facility. We think that's a cavalier approach. We think that once you hear from our witnesses that that would have catastrophic results, not just for all the junior creditors, not just for the employees, not just for the prospects of our sale proceeding, but also likely for the LC lenders themselves, Your Honor. That's not a bluff that I think we should entertain today.

We think that we should get the final DIP order entered. We should give the company access to the next slug of liquidity. And Your Honor, it's not approving a hundred million dollars today. There are further milestones, and that's part of the presentation. We will get into those, Your

Honor. The milestones are attached now to the final DIP order, and we can go through those. We're going to have to continue to make progress, and we're going to continue to have to satisfy Your Honor that we're making progress towards an approvable transaction in order to continue to gain access to liquidity.

This isn't a hundred-million-dollar blank check given today. What we're looking for is to get past today, to get access to the next slug of liquidity to allow us to continue to pursue the negotiations that we've already made a lot of progress on and that we really, firmly believe gives this company the best opportunity to maximize value for all creditors.

And Your Honor, unless there's any other preliminary remarks, I think -- I turn it over to my colleague, Mr. Hackney, and we'd like to present our witnesses and let you hear it directly from our --

THE COURT: Well, Mr. Ziman's concern, I guess, is that the financing's tailored to this proposed transaction and, apparently, doesn't work otherwise and that there may be concerns about the transaction. But he mentioned that his client lacks adequate protection in connection with the approval.

So how do you propose to address that?

MR. KWASTENIET: We propose to address that through

the evidence that we'll put on and then also through argument following the evidence. We just don't agree that his client's not --

THE COURT: You contention is that his client is adequately protected in connection with --

MR. KWASTENIET: Yes, Your Honor.

THE COURT: All right. Well, he indicated that he wouldn't object to a proffer. Now, I'm fine with you putting your witnesses on.

MR. KWASTENIET: Your Honor, we've prepared the witnesses, and I think it'd be useful for you to hear directly from Mr. Dombrowski, who's on the ground at the company and dealing with these issues, and then directly from Mr. Puntus, who's been involved in the negotiations to date.

THE COURT: All right.

MR. KWASTENIET: We think that that --

THE COURT: Put your witnesses on.

MR. KWASTENIET: Thank you, Your Honor.

MR. HACKNEY: Your Honor, good afternoon. We would start by calling Mr. Ray Dombrowski to the stand. My name is Stephen Hackney.

THE COURT: Mr. Dombrowski, if you would come forward and take --

THE COURT OFFICER: Come forward, please.

THE COURT: -- the stand, please.

THE COURT OFFICER: Stand here in front of me, if you would. Raise your right hand.

(Witness sworn)

THE COURT OFFICER: This way, please.

DIRECT EXAMINATION

BY MR. HACKNEY:

Q. Good afternoon, Mr. Dombrowski.

A. Good afternoon.

Q. Can you state your name for the record, sir?

A. Full name is Raymond Edward Dombrowski, Jr.

Q. Are you presently the chief restructuring officer for the debtors?

A. I am.

Q. And are you also a partner at Alvarez & Marsal?

A. I am.

Q. Can you describe the business of Alvarez & Marsal for the Court?

A. We are a global turnaround restructuring firm.

Q. How long have you been with Alvarez?

A. Since the spring of 2001.

Q. And could you describe for the Court your educational background?

A. Undergraduate degree in engineering, United States Merchant Marine Academy. I have both a JD and an LLM in taxation from Temple University.

Q. And could you now describe for the Court your professional experience, personally, in the restructuring industry?
A. If I go back, I ran structured finance for Bell Atlantic Corporation, mostly as a lender and did structured finance work and had the unfortunate issues from time to time of some of those investments not working out and had work-out experience in that regard.
I was the chief financial officer and chief restructuring officer of Ogden Corporation for two and a half years after that, and then immediately joined Alvarez & Marsal at the conclusion of that engagement.
Q. Have you previously served as a CRO on behalf of other restructuring companies?
A. Yes.
Q. And how many times have you done that?
A. More than -- I don't know.
Q. Many, many times?
A. Many times.
Q. And have you ever worked on a troubled mining client before?
A. Yes.
Q. How many times have you done that?
A. This is the fourth time.
Q. When did you become the CRO of the debtors here?

A. My first day on the ground was April 1st of this year.
Q. And between April 1st and the present, have you taken steps to familiarize yourself with the debtors' business?
A. I have.
Q. Can you give the Court a brief overview of the debtors' business?
A. The debtors' business is a coal mining operation centered around two types of coal: metallurgical coal, which is used in the manufacture of steel, and thermal coal, which generally is used to be burned in power plants for electric generation.
Q. And about how many employees do the debtors have?
A. Roughly 2,800.
Q. And how many operating mining complexes do they have?
A. Nine mining complexes, roughly twenty mines.
Q. Now, have you also taken steps to familiarize yourself with the debtors' financial position?
A. I have.
Q. And have you and your team developed a so-called thirteen-week financial forecast?
A. Yes, we have.
Q. And is that something that you updated even as recently as this week?
A. Correct, we update it weekly.
MR. HACKNEY: Your Honor, if I could approach the witness? And I also have a copy for the Court.

THE COURT: You can hand it to the CSO.

MR. HACKNEY: One for the witness and one for the Court.

Is one copy good enough for you, Your Honor?

THE COURT: Yes.

THE WITNESS: Thank you, sir.

THE COURT: All right. This is marked as Exhibit 1, called "Patriot Coal Thirteen-Week Cash Flow Forecast".

(Patriot Coal's thirteen-week cash flow forecast was hereby marked for identification as Debtors' Exhibit 1, as of this date.)

MR. HACKNEY: That's correct. Thank you, Your Honor.

Q. And Mr. Dombrowski, is this the current version of the thirteen-week cash flow forecast?

A. Yes.

Q. And did you or someone at your direction prepare this document?

A. They did.

MR. HACKNEY: And Your Honor, we would offer it.

THE COURT: Any objection?

It'll be admitted.

(Patriot Coal's thirteen-week cash flow forecast was hereby received into evidence as Debtors' Exhibit 1, as of this date.)

Q. Mr. Dombrowski, what is the debtors' current cash

position as we stand here today?
A. When I looked last night, we had bank cash of sixty-four million dollars. Against that, we have roughly seven million dollars that is blocked, in my mind, for the professional fee account, which is yet to be set up, as well as the utility deposits account. So we had fifty-seven million dollars of bank cash. We roughly run on float at this point in time about two million dollars. So I would say that we have about fifty-five million dollars in cash.
Q. And let's give the Court a sense of the scale that we're talking about. What are the annual revenues, roughly, of this business?
A. Roughly one billion dollars.
Q. Okay. Now, does the thirteen-week forecast contain a projection of how much cash the debtors will have at the end of June?
A. Yes, it does.
Q. And can you show myself and the Court where we can find that number on this thirteen-week forecast?
A. Yes. If you would go down to the bottom of the page, there is a gray highlighted line, called "Ending Cash Balance/Book", and it would be the fourth number over the 35,241,000.
Q. And that's probably -- I guess, for precision sake, that's actually the amount as of about June 26th. Is that

correct?
A. That is correct.
Q. Now, are you aware that the debtors have entered into a post-petition financing facility that the Court approved on an interim basis and that we're discussing as to whether it should be approved on a final basis?
A. Yes, I am. Can I just make one clarifying statement, if I could?
Q. Sure.
A. On that thirty-five million dollars, I would note that twenty million of that is assumed to be drawn under the DIP.
Q. Well, that's what we're about to get to right now.
So are you familiar with the terms of the post-petition facility?
A. Yes, I am.
Q. And do you understand that it's a so-called delayed draw facility, under which you can only draw additional cash on -- when you hit certain milestones?
A. Yes, I am.
Q. And you're smiling a little bit. I take it that you're -- as a CRO --
A. We refer to it as something different.
Q. Okay. I won't make you state that on the record.
Do you understand that the next major milestone is that -- is the achievement of a final DIP order by the debtors

in order to borrow the next twenty million dollars?
A. Correct. It is -- that is exactly the next milestone for the drawn --
Q. Okay.
A. -- and it is twenty million.
Q. Under the DIP, it is correct that the latest that can occur is by June 19th?
A. That is correct.
Q. If you don't achieve it by June 19th, you are in default of the DIP, correct?
A. That is correct.
Q. However, there's nothing in the DIP that stops you from trying to achieve it earlier, say today. Is that correct?
A. Correct.
Q. When you do achieve the milestone, you then have the right to draw the cash. Is that also correct?
A. That is exactly correct.
Q. Now, just to tie up your clarification, when we showed the Court that thirty-five-million-dollar number, as of June 26, did that include the incremental twenty million dollars tied to a final DIP order draw or not?
A. It does.
Q. Okay. So if you --
A. And you can see that -- if you were to go two lines above, you will see two ten-million-dollar draws under the

DIP -- the line reads "DIP loan funding", and there are two ten-million-dollar numbers: one in the first week, one in the fourth week.

Q. Okay. So I guess an obvious point is if you were to take that out, because we did not achieve a final DIP order, what would this projection show in terms of cash on hand at the end of June?

A. Fifteen million dollars.

Q. Okay. So -- and I take it as a chief restructuring officer, it is prudent to maintain some level of cash cushion to account for contingencies?

A. Yes.

Q. And does the size of that cash cushion ultimately relate to the nature of the business and, for example, the size of the costs and the revenues of the business?

A. Size of the business, the working capital swings associated with the business, because of the nature of the industry, yes.

Q. In your --

A. Those are all pieces that are taken into account.

Q. I'm sorry to interrupt you. In your view as a restructuring professional, is the fifteen million dollars amount, as of the end of June, an adequate cash cushion for a company of this size and complexity?

A. It makes me extremely nervous.

Q. Now, I want to ask you some questions about what would happen if the DIP were not approved at all and this company ran out of cash. Can you tell the Court, what do you do if you're a mining company and you run out of cash?

A. All right. Well, in order to maximize value the way I -- I take my job fairly seriously in that regard for all constituencies. I kind of look at three groups that are critical to get that done: my customers, my vendors, my employees. If we don't have a DIP, we won't have customers, revenue line will go away. Our vendors will have a run, so the cash that we have now will be depleted. I would note that, post-petition, our AP number, as of two days ago, is just under eighteen million dollars.

The employees, I think it would send a message that they're not available. So I would look at -- you know, that they're not being valued, that there's no job there. We're already dealing with a very, very fragile employee base. I say that as background, because if I had -- if you had to do that, you are putting down operations. The first question I've got is, okay, you're going to lay off people. I need people if I'm going to start a liquidation, and I'm not sure that they'll be there.

I don't know that the vendors will supply the materials that are necessary in order to properly secure the mines for both environmental reasons and for the safety of the workers

that are there.

And without the customers, there is not topline revenue to supply any of that. At the same time, when you're doing that, these mines in particular, which are under -- there are underground mines that have significant assets that are sitting below the ground. To take those out and bring them to a point where you could protect them for the benefits of the creditors so that there would be some value to them is a multiple month, probably three-month plus exercise. And without employees, I don't know how you do that.

The value of the mines at that point, you have to dewater in order to keep the mine up and operating or, if you go into what is known cold idle, you wouldn't do that. The mines will flood quickly. They will start with methane gas because of the lack of ventilation. So effectively and in very short order, very significant assets that are underground, that are there for the benefit of the estate will be lost.

Q. And let me -- before I ask you your next question, can you take a look under your podium there and see whether or not you are kicking a wire?

A. There is --

Q. Okay.

A. No, there is no wire.

Q. Okay. It's not --

A. Sorry.

Q. I think when you are getting close to the microphone, you may be triggering some feedback, so --
A. I'm sorry.
Q. No, that's quite all right.
You referenced the term "cold idle", and I want to understand a little bit better when a coal mine runs out of cash. So I guess the first, most basic question is, if you don't have any cash, what happens to your employees?
A. They're gone.
Q. Okay. If your employees are gone, what happens to the longwall mining equipment that is in the mine?
A. The longwall mining equipment is what I refer to as the underground equipment that would take to deconstruct and bring out probably three months in order to preserve it in a meaningful way. It would be abandoned. And as the mine deteriorates, by flooding and methane gas, it's left there, and it is effectively abandoned. And that equipment, new, goes between 100 and 150 million dollars.
Q. And give you the Court a picture of what are we talking about here in terms of this longwall mining equipment? How big a piece --
A. It's --
Q. -- a machinery --
A. -- a couple hundred feet plus across. I mean, if you can just think of a mine face, you're taking -- in a cube, you're

taking a slice as you're going, with a big cutter just going right along and going back.

Q. How do you even get a piece of equipment that big into a mine?

A. It is taken down in pieces and assembled on the face, and, interestingly enough, one of the reasons that we're here is that last year there was a problem moving that type of equipment from one spot in a mine to the new spot in the mine to get it properly assembled. And it cost the company at least fifty million, if not a hundred million dollars.

Q. If you don't have cash to operate the pumps for methane and water, what happens to the mines?

A. It will flood and it will fill with methane gas.

Q. And the impact of that flooding on the longwall equipment that's been abandoned there?

A. Destroys it.

Q. Now, at some point after this has happened and the mine is flooded and the workers are gone, if somebody comes along and decides that they want to like restart this mine and turn it into a viable entity, what are the costs associated with undoing all the things that have happened because you ran out of cash?

A. Well, the first thing you would need to do is you've got to get -- for lack of a better phrase -- a SWAT team of coal miners. They go down in full hazardous gear, because of the

methane issue. So they have -- sorry. They have masks and are fully hooded, and they've got to get the methane out so that people can work safely. This is not reconstituting a mining crew, this is a special group -- task force that goes down and basically makes the mine safe to enter.

You would -- the question would be, how quickly and how poorly the mine has deteriorated with respect to water and how much pumping would have to be done to get it out of the mine in order for it to then be in a position where you could start to do regular mining operations.

At that point, you would have to ensure that you got proper permitting from the state authorities and then reconstitute your mining crew to bring them back to start operations.

Q. And what about equipment?

A. Well, if you're going to go back to doing longwall equipment, you're going to have to buy the equipment as well.

Q. Okay. So you have to make the mine safe again from the methane. You have to pump out all the water. Do you have to get out the destroyed long-mining equipment that's been submerged there for a period?

A. You'd have to do something with it in order to continue to get at where the coal lies, because it's sitting on the face.

Q. You have to acquire new longwall equipment --

A. And you have to acquire new long equipment. I mean, I

would assume that what you would do is go in and dynamite that, take that piece out, is all you would do. And that equipment would just be hauled away with the dynamite -- with the dynamited refuse.

Q. And the last thing you'd have to is presumably reconstitute your work force?

A. Correct.

Q. So put all of those components aside, just take the new longwall mining equipment, what's the -- what's a ballpark estimate of the cost to purchase new longwall mining equipment.

A. I'd say new, 150 million dollars.

Q. And is that per mine?

A. Per long -- per longwall that you wanted to use, yeah. Correct.

Q. And how many longwall mines are we --

A. We have two -- we have two.

Q. So based on your experience in the mining industry and at Patriot Coal specifically, can you give the Court an economic -- an estimate of the economic impact of a cold idle of these mines that would obtain running out of cash?

A. I mean, you're going to lose -- you're going to lose the value of the -- of the two longwall mines. You lose the value of the operations. I mean, it's -- it's conservatively 200-million-dollars'-worth of assets that are lost, and then

untold value in terms of the going-concern value, and the loss of jobs.

Q. In your view, does entering into the DIP today on a final basis represent the sound exercise of the debtors' business judgment?

A. It does.

Q. Now, are you aware that a firm named Black Diamond has made a one-paragraph -- or one-page nonbinding indication of interest to make a DIP loan?

A. I am. It was addressed to me.

Q. You understand that if the judge gavels the DIP order today on a final basis, you get an additional twenty million dollars in cash?

A. Correct.

Q. So as the CRO of the company, which would you rather have in terms of the best interests of the company? Would you rather have the additional liquidity today or the opportunity to potentially go out and negotiate a new DIP with Black Diamond?

A. I would rather have the liquidity today. I believe that the deal that we have on the table is superior.

Q. Why can't we just wait two weeks? Why do you want to do it today? As the guy who's on the ground and running this business, why do you want to do it today?

A. I think if you -- if you look two weeks on the cash flow

forecast that I've given you and that we have in front of us, that ending cash balance in two weeks is 20,906,000 dollars, and includes a 10-million-dollar draw. So you're now asking me to try to run a business with ten million dollars in cash where payroll and benefits on a weekly basis is seven million dollars alone.

I think with -- I don't think it is prudent. I think it sends -- quite frankly, I think sitting here and having to have this discussion, sends the wrong message to our customers and our vendors. I think it was critically important, and they took a lot of solace and comfort in the fact that we had 100-million-dollar DIP, and it is largely why we've been able to reestablish on a rational basis the supply chain. And I think any disturbance from that right now puts this thing on a very, very fragile platform that quite frankly, I'm not comfortable with.

Q. Do you understand that the Black Diamond DIP proposal or indication of interest, is itself subject to a due diligencing (sic) out?

A. Yes.

Q. And do you presently have the human resources to conduct a new diligencing process for the DIP?

A. I wish I did, but no. I mean right now, I find it remarkable. In my experience, it's been very unusual that the staff at the company is available at 7 o'clock at night on a

regular basis, available on weekends. When the company was headquartered in St. Louis, they moved to Scott Depot, almost the entirety of the finance group did not come. So what you are dealing with are people that have very, very limited experience with the company. They are struggling to keep up, and God bless them, they're doing a great job. But they really have no -- there's no additional bandwidth here.

Q. And are you aware that Barclays has also objected and complained regarding the level of access to information that it's received?

A. Yes, I'm aware that they have made that claim.

Q. And have you personally responded to diligence requests from Barclays or its advisors?

A. I have.

Q. And how would you characterize the level of access that Barclays has been granted compared to other creditors in the case?

A. They have gotten as much if not more than anyone else.

Q. Who is Barclays' financial advisor in this --

A. FTI.

Q. And have you dealt personally with FTI?

A. I have.

MR. HACKNEY: If I could hand the witness a second document, Your Honor, or tender one to the deputy -- marshal?

Thank you, sir.

THE COURT: This document's identified as Exhibit 2. It's an e-mail dated May 22nd, 2015 from Christie Harman (ph.).

MR. HACKNEY: Yeah, to be clear, Your Honor, as a convenience, we forwarded this to someone today, so that it could be printed, but the interesting part of the e-mail is the one that's from Quinn Roussel at FTI Consulting to Mr. Dombrowski. So I apologize there's that part at the top.

THE COURT: All right. Okay.

Q. Is this an e-mail that you received from Mr. or Ms. Roussel at FTI Consulting on or about May 22nd, 2015?

A. Yes, at twenty of 8 at night on the Friday before Memorial Day weekend. I remember this well.

Q. All right, I don't detect any bitterness in your voice about that.

Now the -- is it -- and your understanding, I think, is that FTI is in the case for Barclays?

A. That is correct.

MR. HACKNEY: And, Your Honor, we would offer this as Exhibit 2.

THE COURT: Any objection?

No objections.

(5/22 e-mail to Mr. Dombrowski from FTI was hereby received into evidence as Debtors' Exhibit 2, as of this date.)

Q. Okay. If you see, the first sentence says: "Thank you in advance for taking the time to provide the data requests listed below." Do you see that?
A. Yes, sir.
Q. It says: "We expect that this request will be able to satisfy most if not all of our current diligence." And then there are a list of different things there.
A. That is correct.
Q. And with respect to all of these items except for the actuarial reports, which is the last one, have you obtained this information from FTI -- for FTI?
A. From -- yeah. All of the information actually on this list has been posted to the data room. And they have access to it. And with respect to the actuarial report, I had a discussion with them. The actuarial reports contain a provision where the actuaries will not release to third parties the report without their prior consent.

There are pre-petition amounts owed to these individuals, and at the current time we had no reason to pay them, so I saw no reason to make the payment. I communicated that to FTI. They had asked for an alternative to that provision, and that was posted this morning.

Q. As you sit here today, are you aware of any diligencing requests from FTI that that have gone unsatisfied by you or your team?

A. Unaware of any.
Q. In your view, Mr. Dombrowski, is the judge's entry of a final order on the DIP loan in the best interests of the company and all of its stakeholders, including the objecting creditors?
A. I firmly believe it is in the best interest of this estate and all of its stakeholders.
MR. HACKNEY: Your Honor, I'll pass the witness subject to redirect.
THE COURT: Cross examination?
MR. ZIMAN: Absolutely.
CROSS-EXAMINATION
BY MR. ZIMAN:
Q. Mr. Zombrowski, the cash number you gave me for -- gave the Court as of today was fifty-seven million, I believe, subject to about two million of float?
A. Correct.
Q. Where does that number appear on the chart here?
A. It wouldn't. These are week-ending numbers.
Q. Okay. So the numbers you have for the week ending 6/5 of 41 -- I'm before financing -- of 41.742 -- I should say before incremental financing -- and 43.858, I'm sorry, I'm not seeing those numbers. Can you tell me --
A. Ending cash balance --
Q. -- where you are?

A. I'm in the line "Ending cash balance book".
Q. Okay. If they were week end -- if today was the end of the week, the fifty-seven would appear on that line, if today were the --
A. No, sir. No, sir. The comparable number is the ending cash balance book of 56.09. That is four lines down below.
Q. Fifty-six -- that's after ten million dollars of additional borrowings?
A. That is correct. But that --
Q. So --
A. -- but I'm -- but apples-to-apples, that's the number.
Q. But so -- somewhere this week then, you are anticipating spending another seventeen plus ten -- another twenty-seven million dollars to reconcile your fifty-seven to that fifty?
A. We have -- we have anticipated to spend additional money, yes.
Q. You went through a parade of horribles that would happen if the company were out of money?
A. Correct.
Q. Have you ever had a conversation with any of the L/C -- well, with Barclays regarding financing a wind-down of the company?
A. That specifically? No.

Q. You talked about the due diligence issue and the ability

to provide due diligence to Black Diamond, were it to continue its inquiry or pursuit of an alternative DIP financing. You're familiar with the -- I want to say it right -- the Blackhawk transaction generally?

A. Generally.

Q. You're aware that that has a due diligence out?

A. We understand that.

Q. The company will have the resources, though, to address those diligence issues?

A. It has -- we are going to do our best to do that, but we can't do both.

MR. ZIMAN: Okay, that's all I have, Your Honor.

THE COURT: Thank you.

Redirect?

MR. HACKNEY: No, sir.

THE COURT: All right, you may step down, sir.

MR. HACKNEY: Your Honor, Stephen Hackney again. We would next call Mr. Puntus.

THE COURT OFFICER: Please come forward.

(Witness sworn)

DIRECT EXAMINATION

BY MR. HACKNEY:

Q. Good afternoon, Mr. Puntus.

A. Good afternoon.

Q. Could you state your name for the record?

A. Marc David Puntus.
Q. By whom are you employed?
A. Centerview Partners, LLC.
Q. And what is the business of Centerview?
A. Centerview is an independent investment bank that advises companies and other stakeholders in connection with mergers and acquisition transactions, as well as restructurings.
Q. And what's your role at Centerview?
A. I am the co-head of the debt advisory and restructuring practice at Centerview.
Q. Can you describe for the Court your personal educational background?
A. Sure. I have an undergraduate degree in financing from Georgetown University and a law degree, a J.D., from Boston University.
Q. And can you also describe for us your professional experience in the restructuring space?
A. Yes. I've been a restructuring professional since 1993. The first part of my career, seven and a half years, I was a lawyer, an attorney at Weil Gotshal, ultimately a partner. And for the balance of my career, I've been an investment banker in the restructuring space, first at Dresdner Kleinwort Wasserstein, next at Miller Buckfire which was a spinoff of Dresdner Kleinwort Wasserstein, and for the last four years, with a group -- a team of professionals at Centerview

Partners.
Q. And how many debtors have you worked on, whether it's in court our out of court?
A. Many.
Q. How many acquisitions or divestitures have you negotiated in your career?
A. Many.
Q. And how many DIP loans have you sourced in your career?
A. Many.
Q. Many. When were you retained by the debtors in these cases, Mr. Puntus?
A. Centerview was originally retained in the back half of 2014. The original mandate was to assist the company in trying to negotiate a merger or an acquisition transaction, a highly structured one, with a strategic competitor of Patriot's. That mandate continued through the end of the year. By the end of the year or the beginning of 2015, it became pretty clear that we were not going to be able to effectuate that transaction.

At that point, or around that time, the mandate shifted to more of a restructuring mandate. The company was facing pressures from a cash perspective. Coal prices took a big turndown in February. The company had received notice from its auditors that it likely would be unable to get a clean audit opinion. All of this became a little more public which

further pressured the company's liquidity. And so in mid-March -- I think officially in mid-March, we were retained for a broader restructuring mandate which included M&A as well as financing.

Q. And so let's -- if you would, describe for the Court what your and Centerview's principal activities have been since the engagement shifted into the more distressed context than previously?

A. I like to think we've been involved in everything. But the two workstreams which we've led are: one, seeking to assist the company in raising financing for the Chapter 11 debtor-in-possession financing; and two, assisting the company in trying to negotiate a stalking horse agreement for as much of the debtors' operations on a going-concern basis as possible to provide a foundation for the Chapter 11 to allow the debtors to effectively have a soft landing in Chapter 11.

Q. Okay. We'll talk about both of those things in a moment. I take it you have taken time to familiarize yourself with the debtors' operations and business. Is that right?

A. I have.

Q. And have you also familiarized yourself with the debtors' financial position?

A. I have.

Q. So taking the first silo of work that you referenced, which was the need for liquidity, at some point, did you come

to understand that the debtors would require a post-petition loan facility in order to fund these Chapter 11 cases?

A. Yes.

Q. Okay. And so tell the Court what efforts you took -- you and Centerview took in order to secure that DIP loan.

A. Sure. I think it's worth stepping back for a minute.

The company today, before the DIP facility, has approximately 800 million dollars of secure debt. That's the ABL facility, the LC facility, the term loan facility below that, and then the second lien PIK facility.

In that context, and given the performance of the business and the distress, the unfortunate distress facing coal companies for a number of reasons, it became clear to us that it was going to be difficult, if not impossible, to obtain a DIP loan that wasn't a priming DIP loan. It was pretty clear to me that nobody was going to loan us money below 800 million dollars in secure debt.

It also became clear that the type of DIP loan we were going to get here, if we could get one, was going to be what we call a defensive DIP loan and would likely come from the existing stakeholders in the case.

We turned immediately to both Barclays and Deutsche Bank. Deutsche Bank, Mr. Qusba mentioned, is the agent under the ABL facility. It's thirty seven million outstanding under the ABL today. Barclays, at that time, was the agent under the LC

facility and the term loan facility.

We turned to both of those parties. We had active negotiations and discussions about a DIP facility. Mr. Dombrowski provided a cash flow forecast, and after extensive discussions, both parties were unwilling to provide us any DIP financing for the Chapter 11.

Q. Okay. So I want to stop you right there, if I could.

Now, you were in the courtroom when Mr. Ziman asked Mr. Dombrowski if there'd ever been discussion with Barclays about providing financing; were you not?

A. I was.

MR. ZIMAN: Objection, Your Honor. That's not exactly what I asked. So I asked specific questions which Mr. Dombrowski answered. That's not the question I asked.

MR. HACKNEY: Well, I guess the record will speak for itself. I didn't think I misstated it but it was --

THE COURT: Why don't you ask him what he recollects being asked and what he --

MR. HACKNEY: Good idea, Your Honor.

Q. Do you remember what Mr. Dombrowski was asked on the subject of whether he had spoken to Barclays?

A. I do.

Q. What was it?

A. I think Mr. Ziman asked Mr. Dombrowski if Mr. Dombrowski ever asked Barclays whether they would provide financing for a

liquidation of the company or a wind down of the company.
Q. But I want to go back to your testimony which is did you talk to Barclays about providing financing to these debtors?
A. Absolutely. We did not ask Barclays to provide financing for a liquidation or a wind down of this business because we, the debtors and their professionals, don't believe a liquidation or a wind down of this business is the best way to maximize value for the debtors and their stakeholders.

We did ask Barclays and Deutsche Bank for a DIP financing to fund an operating Chapter 11 where the goal would be to negotiate a value-maximizing sale transaction and emerge from Chapter 11 as quickly as we could.
Q. And were either of them willing to do so?
A. No. Yes. No. Yes. No. No. I'm confused. Neither was willing to provide us DIP financing.
Q. Who else did you talk to to try to get a DIP loan?
A. So we turned quickly, really in parallel to the parties in our capital structure below the LC facility. That's the term loan lenders and the second lien lenders.

We have a group represented by Kramer Levin that represents a majority of both the term loan facility and the second lien PIK notes. We turned to that group very quickly and explained to them that absent financing -- we were running out of money -- absent financing, we wouldn't be able to prosecute a case; we wouldn't be able to continue negotiating

with Blackhawk and other bidders. And so we turned to them and sort of threw ourselves on them and negotiated a DIP facility with them.

Q. Did you talk to any third parties about providing a DIP?

A. We did. I did, personally, me and my team. We reached out to three financial institutions, three large banks that are active in providing DIP financing in cases big and small.

Q. And what came of that?

A. None of those parties were interested in providing us DIP financing in the facts and circumstances.

Q. Okay. So the DIP that you reference is the one that's presently before the Court on a final basis. Is that right?

A. Correct.

Q. And can you describe, at a high level, the terms of the DIP or the kind of key economic terms?

A. Sure. It's a hundred-million-dollar delayed draw DIP facility. The first thirty million was approved and drawn on the filing date. I think an incremental twenty million will be available upon approval of the final DIP -- an entry of a final DIP order.

From an economic perspective, the interest rate under the DIP facility is twelve percent. That interest rate is payable in kind, meaning it accretes. We don't have to pay cash interest, and then it rolls into the principal balance that needs to be addressed at the termination of the DIP facility.

The tenor of the DIP facility, the length, is approximately seven months, six-and-a-half or seven months.

There are fees associated with the DIP facility. There was a two percent fee paid up front, that's a two million dollar fee, and there's a three percent exit fee upon termination or refinancing of the DIP facility.

MR. HACKNEY: Your Honor, I hadn't intended to get into the milestones in any specificity, but I have an exhibit here that shows what the milestones are under the DIP as filed and how they've changed a bit to resolve some objections. And I just want to make you aware of that in case you have curiosity about it, but I don't intend to get into them anymore.

THE COURT: Well, that's up to you.

MR. HACKNEY: Okay.

THE COURT: I don't need to see it.

MR. HACKNEY: Okay. Thank you. I'm just going to move on, then.

Q. Based on your experience in the industry as an investment banker, were you surprised that you were unable to source a DIP on a nonpriming basis?

A. No.

Q. How does the current DIP facility, in terms of its economics, compare to other post-petition facilities entered into in other coal company bankruptcies?

A. The two most recent coal company bankruptcies are Xinergy and James River Coal. Xinergy filed earlier this year, I think, a month before we filed, and James River Coal filed in well over a year ago.

Both of those -- those companies obtained DIP financings of similar length to our DIP financing. And if you look at the overall yield, which accounts for both interest rate and fees, and then the length of the DIP facility, our DIP facility is a little bit more expensive than both of those DIP facilities but not meaningfully so.

Q. You understand that the DIP allows these debtors to continue to operate their businesses in the ordinary course. Is that right?

A. Yes.

Q. And it buys them time, so to speak. Is that right?

A. Yes.

Q. How much time does the current DIP secure the debtors?

A. I think the length of the DIP is approximately seven months, as I said. The cash flow forecast that's been prepared by the company at the direction of Mr. Dombrowski shows us coming up a little bit short. I think Ray and team have taken measures to try to maximize the cash available at the company. The goal is that we'll have enough liquidity to prosecute what's a fairly quick case but a seven-month -- six-to-seven month Chapter 11 case.

Q. Yes. And more specifically, what do the debtors intend to do with the time that the DIP buys them?
A. I think what we intend to do and what we started to do even before we filed and continued last night with the filing of the bid procedures motion and the LOI, is to run a sale process, a comprehensive sale process for the debtors' assets.

As Mr. Hessler mentioned, we would like to have Blackhawk be the stalking horse for substantially all the debtors' operating assets. We propose to run a separate process for the debtors' Federal mine complex; that's a thermal business located in northern Appalachia that's not part of the Blackhawk purchase.

We intend to shop these assets as best we can in the circumstances. And candidly, we are thankful we have Blackhawk to, at least, provide a foundation in what we think is significant value to our stakeholders to kick off that process.

Q. And just for the record, Black -- when you refer to Blackhawk, that's the counterparty to the term sheet that Mr. Hessler was referring to today that involves a purchase of some of the company's -- a majority of the company's operating assets. Is that correct?
A. Yes.

MR. HACKNEY: Your Honor, I'd like to hand up copies of that, if I could.

THE COURT: A term sheet for acquisition of certain assets of Patriot Coal is identified as Exhibit 3.

MR. HACKNEY: Yes. Thank you, Your Honor.

(Term sheet of acquisition of certain assets of Patriot Coal was hereby marked for identification as Debtor's Exhibit 3, as of this date.)

BY MR. HACKNEY:

Q. Is this a copy of the Blackhawk term sheet that you were just referencing?

A. Yes.

Q. And have you personally been involved in negotiating this document?

A. Yes.

MR. HACKNEY: Your Honor, we'd offer it.

THE COURT: Any objections?

MR. ZIMAN: No objection.

THE COURT: It's admitted.

(Term sheet of acquisition of certain assets of Patriot Coal was hereby received into evidence as Debtor's Exhibit 3, as of this date.)

BY MR. HACKNEY:

Q. So, Mr. Puntus, what was the status these discussions three weeks ago when we were here seeking approval of the DIP on an interim basis?

A. I think what we represented to the Court and what had

happened was we were able to negotiate between the debtors, Blackhawk, and a group of our term loan/second lien lenders, what we called a deal in principle, an economic deal in principle on the filing date, or maybe it happened the day after the filing date; I forget. We turned immediately after that to turning that economic deal in principle into what's in front of you, a letter of intent.

Q. And is this what you spent most of the last three weeks getting to?

A. Yes. Professionally.

Q. I'll resist the desire to ask a follow-up question on that.

THE COURT: Did you open the door to something?

MR. HACKNEY: Yes. I think it's going to be an interesting cross-examination.

Q. So where do the debtors plan to take this term sheet next?

A. I think we are going to turn immediately to turning this term sheet, which is nonbinding and has conditions, into a definitive purchase agreement that we will present to the Court. As part of that, as we said, the term loan lenders and second lien lenders have been active participants in this process, but we understand completely we will need to engage with the creditors' committee, the ABL lenders, as well as the LC lenders in order to bring this from a term sheet to a definitive purchase agreement; ultimately, to a confirmed

Chapter 11 plan.
Q. And what's your hope in terms of how long it will take to get to definitive documents from this term sheet?
A. I think we hope to get to definitive documents before we get to the next hearing on the bid procedures.
Q. Okay. So let's turn it around, now, and talk about what happens to this term sheet in that sale process if the DIP is denied and the company runs out of cash.
A. If the compan -- I think Mr. Dombrowski said it pretty eloquently, I think -- if the company runs out of cash, we can no longer operate as a going concern. If we can't operate as a going concern, we can't sell the business as a going concern. And this term sheet -- I think, really, any opportunity to sell the business on a going-concern basis for enterprise value will go away.
Q. And what is, at a general level, the impact on the value as a result? Is it positive or negative?
A. Negative.
Q. In your view, is the proposed DIP facility necessary for the continued operation of the debtors' businesses?
A. Yes.
Q. And was it negotiated at arm's length and in good faith?
A. Yes.
Q. And in your business judgment and based on your experience as a restructuring professional, does the proposed DIP

financing represent the best path forward to allow the debtors to maximize value for all of their stakeholders?
A. Yes.
Q. Do you believe it represents a sound exercise of business judgement?
A. I do.
Q. Now, are you aware that Black Diamond has submitted a nonbinding indication of interest to loan the company money on a post-petition basis?
A. Yes, I am.
Q. I'd like to hand that to you now, if I could.
THE COURT: A letter dated May 26th, 2015 marked as Exhibit 4.
(Letter dated May 26, 2015 was hereby marked for identification as Debtor's Exhibit 4, as of this date.)
BY MR. HACKNEY:
Q. Do you have Exhibit 4 in front of you, sir?
A. I do.
Q. I notice that you are a carbon copy recipient on this document. Have you seen it before?
A. Yes, I have.
Q. And is this the Black Diamond indication of interest to do a DIP loan?
A. Yes.
MR. HACKNEY: Your Honor, we'd offer this, Exhibit 4.

THE COURT: Any objection?
MR. ZIMAN: No objection.
THE COURT: It's admitted.
(Letter dated May 26, 2015 was hereby received into evidence as Debtor's Exhibit 4, as of this date.)
BY MR. HACKNEY:
Q. So are you familiar with the content of this document or do you need to review it?
A. No. I'm familiar with it.
Q. Let me ask you some questions about it. First of all, is this a firm commitment to lend?
A. No.
Q. Okay. And what conditions, if any, is it subject to?
A. I think the principal condition is diligence as well as the negotiation of definitive credit documents.
Q. Okay. So what assurances can you give the debtors or this Court that this document can be turned into a firm commitment to lend?
A. Well, I can give no assurances.
Q. Now, what are the general terms that Black Diamond's proposing here?
A. I think what Black Diamond has proposed is a -- an alteration of the current economic terms of the DIP as follows: a reduction of the interest rate under the DIP facility from twelve percent, which is the current interest

rate under the current DIP to ten percent; a reduction of both up-front and exit fees under their proposed DIP facility -- they're proposing a one percent up-front fee, a million dollars on a hundred million dollars -- a hundred million dollar DIP facility; and a two percent exit fee, so two million dollars additional on a hundred million dollar DIP facility.

Q. Now, you referenced the up-front fee of one percent. If you do the Black Di -- if you were able to take this proposal to a final DIP that was on substantially similar terms and you paid Black Diamond a one percent up-front fee, would you get the up-front fee that you paid the current DIP lenders back?

A. No.

Q. And this proposal anticipates an exit fee. If you pay this exit fee, do you get the exit fee that you'd owe them upon the refinance back?

A. No. Not according to the documents.

Q. Okay. So let me ask you, viewed from purely economic terms, will the debtors be in a better position financially if they were able to close a loan with Black Diamond on terms substantially similar to those contained in this nonbinding proposal?

A. No. They would be approximately two million dollars worse off.

Q. And have you prepared a demonstrative showing that?

A. I have.
Q. Okay.
MR. HACKNEY: Thank you, sir. One for each side. I know I'm making you go up and down today.
THE COURT: This document titled "Illustrative Black Diamond DIP Analysis" marked as Exhibit 5.
(Summary of the competing DIPs was hereby marked for identification as Debtor's Exhibit 5, as of this date.)
Q. Do you have Exhibit 5 in front of you?
A. I do.
Q. And is this the illustration of the economic impact of remaining with the current DIP versus switching to the indicative terms in the Black Diamond DIP?
A. Yes, it is.
Q. And was this prepared by you or someone acting at your direction?
A. Yes, it was.
Q. We're going to get into it in a moment.
MR. HACKNEY: Your Honor, I would offer this into evidence as -- I think it's fairly offered as a summary of what are otherwise complex financial documents. So I'd offer it as Rule 1006 summary of the competing DIPs.
THE COURT: Any objection?
MR. ZIMAN: No, Your Honor.
THE COURT: It's admitted.

(Summary of the competing DIPs was hereby received into evidence as Debtor's Exhibit 5, as of this date.)

Q. Okay. Can you explain to the Court what you're doing here? Walk us through the two columns.

A. Sure. So the column on the left is the current DIP facility. It's the fees and interest rate payments that remain under the DIP facility. There's a three million dollar exit fee associated with the current DIP facility. The current DIP facility had a twelve percent interest rate over a six-month period, which is assumed in here, would require the debtors to pay approximately 6.2 million dollars in interest. Those things added -- those two items added together would be a total remaining cost of 9.2 million dollars.

If the debtors were to choose to move to Black Diamond, refinance the current DIP, if you will, with Black Diamond, the three million dollar DIP fee, which is incurred under the existing DIP would still be payable by the debtors. The interest rate would be lower; at ten percent over six months, that would be 5.1 million dollars. And then we would have to pay Black Diamond's fees, both up-front and exit -- that's one million and two million -- for a total cost of 11.1 million dollars. So about 1.95 million dollars more, total, over the life of the DIP facility.

Q. Okay, so in your judgment, should the debtors give up the opportunity to get a final DIP and draw twenty million

dollars, in the interest of chasing a nonbinding proposal that is economically inferior to the present DIP?

A. No, they shouldn't.

Q. Let me ask you a follow-on question, which is, are there noneconomic differences -- I'm talking separate and apart from the illustrative terms -- but noneconomic differences between the lender groups here that are relevant to you as the investment banker to the company?

A. There are. I mean, first of all, as I mentioned earlier, we offered, in fact pleaded with Barclays and Deutsche Bank, as well as the LC lenders who Barclays represents, to provide us a DIP financing here that would -- they would prime themselves. We thought that would be the most efficient way to prosecute the case. They refused.

Having lenders in the term loan and the second lien lenders, so below the senior parts of our capital structure, we think is a good thing for the prosecution of the Chapter 11 cases. While we would like the DIP facility to be a little bigger, while we would like to have more flexibility, we think we negotiated the best DIP we have. But to the extent there is a hiccup, we have a covenant default, we need a little more liquidity, we miss a milestone, what makes me sleep better at night is that we have lenders at the bottom of our capital structure providing us that DIP facility. And they are protecting their interests at the bottom of their capital

structure. So I feel better that if we need a little more flexibility, we'll get it from those DIP lenders. And they won't be pushing for a wind-down or a liquidation.

Q. Is Black Diamond a hedge fund, in your understanding?

A. A hedge/private equity fund, yes.

Q. And based on your experience in the industry, does Black Diamond often pursue a loan-to-own strategy in the distressed context?

A. I think Black Diamond pursues loan to own strategies, as well as they have a distressed private equity business.

Q. And do you view that potential as relevant here in terms of understanding the noneconomic benefits of entering into the present DIP loan?

A. Look, I think so. Black Diamond is an institution that's responsible to its LPs, and they're responsible, and they're obligated to try to make money. To the extent they've purchased a position in the LC facility, presumably they purchased it at a discount. Providing a DIP facility would be for the purpose of making a return on the DIP facility, for maximizing the value of their interest in the LC facility. As well, Black Diamond has a private equity business. They reached out to us. They are interested in participating in the auction process and trying to buy assets here. So I think you need to view all of those things together. But I think their focus would be on maximizing value for them. Our focus

is on maximizing value for the estate, its stakeholders, and all of the creditors.

Q. You mentioned earlier that the -- one of the benefits of the existing DIP loan is that its lenders are willing to roll the loan into whatever transaction is ultimately achieved in this case, with Blackhawk or someone else. Is that correct?

A. That's correct. I think that's a critical component here.

Q. Yeah, my follow-up question was have you seen any similar indication of willingness to roll from Black Diamond?

A. I haven't.

Q. Now, there's been some complaints along the lines of access to information in this case, Mr. Puntus. And I just want to ask you about that term sheet that we referenced earlier. Have you been working on that term sheet fairly consistently since we were together last, at the first-day hearing?

A. Yes, we have.

Q. And did you provide it to the creditors as soon as you were able to strike it with Blackhawk?

A. We actually provided it to, I believe, the creditors' committee before we reached final agreement, like twenty-four hours before we reached final agreement with Blackhawk. And we have been providing constant updates as to the substance of the term sheet and the direction in the provisions.

Q. As the company's investment banker, someone who's charged

with helping maximize the value of this company, in your view, which is better for the company: to get a final DIP order and twenty million dollars in incremental liquidity today or rather hit the pause button and try to negotiate a better DIP loan with Black Diamond?

A. The former, approving a DIP facility today and obtaining access to the incremental liquidity.

Q. Why do you say that?

A. I think it's important to maintain momentum in these cases. I think the coal industry is at, you know, historical lows. The business is distressed. We don't generate meaningful cash flow. We've created a little bit of momentum in the case. We have a DIP facility; we have a stalking horse for substantially all of our operating assets. And should we not continue that momentum, I think the company's employees, the company's trade vendors, the company's customers, people who buy coal from the company -- I think all of those will become -- all of those constituents, as well as Blackhawk and other parties that may be interested here, will become more and more concerned about the viability of Patriot and its ability to continue as a going concern.

Q. Now, you heard Mr. Dombrowski testify today about the economic impacts of a so-called cold idle, did you not?

A. I did.

Q. And taking that testimony in account, based on your

judgment and experience, are the debtors' LC lenders, the objecting creditors, better or worse off if this DIP is approved?

A. I believe they're better off.

MR. HACKNEY: Your Honor, I'll pass the witness, subject to redirect.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. ZIMAN:

Q. Mr. Puntus, how are you?

A. Good, Mr. Ziman; how are you?

Q. Dandy, thank you. Regarding the indication of interest from Black Diamond, did you or someone on behalf of the company communicate to Black Diamond or its representatives that its proposal wasn't economic in your view?

A. I didn't, no. Those fees are pretty straightforward and set forth in the company's DIP filings.

Q. Are you aware whether Black Diamond -- is there still interest in engaging in discussion about DIP terms, recognizing they would have to improve -- assuming they would have to improve the economics?

A. I believe the sequence of events was we sent them -- or Kirkland sent then an NDA. And I believe we were unable to negotiate an appropriate NDA with Black Diamond. I don't know whether they continue to be interested in providing us a DIP.

I suppose --
Q. If I told you that --
A. -- you could tell me.
Q. Well, if I told you that the NDA issues were resolved -- and assume that for a second. Are you aware whether Black Diamond remains interested in pursuing discussions around an alternative DIP, recognizing that they may have to improve their economics to make it at least economically worthwhile?
A. Really, all I'm personally aware of is what's contained in this letter.
Q. Mr. Hackney didn't go into the milestones, but are you familiar, generally with the milestones under the DIP financing?
A. Generally.
MR. ZIMAN: May I have your exhibit?
MR. HACKNEY: Yeah.
MR. ZIMAN: Just to refresh. I'm not even going to admit it.
(Pause)
THE COURT: This is not marked as an exhibit. It'll be -- milestones will be marked as Exhibit 6.
(Milestones was hereby marked for identification as Debtors' Exhibit 6, as of this date.)
MR. ZIMAN: That can be 6; that's fine.

It really is -- I mean, it's really for the witness to refresh his recollection as to what the milestones in the DIP -- proposed amended milestones. So I think there's three pages here, I believe. The first page is, I believe where the milestones are as negotiated with some modifications to accommodate concerns of the creditors' committee, and through that back and forth. The underlying page, which I don't really need to refer to, is the original milestones.

BY MR. ZIMAN:

Q. But do you agree that this chart basically sets forth a date for a milestone, what the milestone is, and then what funding's available?

A. I do.

Q. Okay. And it shows, as you -- I believe, or Mr. Dombrowski -- testified, that entry of a final order, on or before June 19th, will result in an incremental twenty million dollars of availability; correct?

A. Correct.

Q. The next milestone is June 30th?

A. Correct.

Q. And it's tied to a binding stalking horse?

A. Correct.

Q. Is there anybody else in discussions for a binding stalking horse, other than Blackhawk?

A. Nobody in active discussions.

Q. Because it has to be for four mines and related assets, correct? So no one fits that description, other than Blackhawk?
A. Nobody we're currently negotiating with.
Q. And then the next milestone thereafter, end of July, is to approve bid procedures, except over the required numbers, whatever those may be. Correct?
A. That's what it says, yeah.
Q. Okay. Let's -- we can move on from there.
So earlier, when Mr. Hackney asked you a question about the Black Diamond letter, he asked you, I believe, whether you could -- you had -- what assurances you had or whether you could guarantee that that deal could be executed on. Do you remember that?
A. I do.
Q. And you said no assurances, I believe was your response. Is that correct?
A. Sounds right.
Q. Okay. So the Blackhawk transaction, how -- you describe that as firm or conditional?
A. I believe we've negotiated a pretty extensive and detailed LOI. But there's certainly some conditions attached to it, and we have some work to do.
Q. Okay, so is there a diligence condition in favor --
A. There is a diligence condition, but candidly, that's

something I'm far less concerned about. Blackhawk has done extensive due diligence, here.

Q. That was a yes or not question, but is it -- yeah. I appreciate the color.

A. Yeah.

Q. Okay, do you have that document -- I believe it's Exhibit 3 -- in front of you?

A. Yes.

Q. You turn to page 6? And just initially, if you look on pages 6 and 7 and carry over to the very top of page 8, there's a subject number 7 on the bottom of page 6. It starts off with what's the type of conditions; correct?

A. That's correct.

Q. All right. And then -- let's see can I count these -- I count nine romanettes; do you agree there are nine specified conditions?

A. I'm going to trust you. Yes, I do; I believe there are nine.

Q. And within those nine, I count any number of sub parts. So there's -- we can agree that there's at least nine types of conditions to the Blackhawk?

A. Yes.

Q. Okay. And then the lead-in -- can you just read the sentence that ends with the word "following" in number 7?

A. "Key conditions include, but are not limited to, the

following."
Q. Right, so there are others; we just don't know what they may be?
A. This is an LOI. Yes.
Q. Right.
A. There are conditions.
Q. So what assurances can you give that this deal's going to pan out?
A. Far greater assurances than I could give that a Black Diamond deal --
Q. That's not the test here --
A. -- would be approved.
Q. -- is it?
A. Ken -- excuse me, Mr. Ziman -- this is -- we spent a lot of time negotiating what we think is a very good LOI. We have a lot more work to do to turn this into a definitive purchase agreement in very difficult circumstances. We have a lot more work to do to address concerns with the creditors' committee of the ABL lenders, as well as the LC lenders. And nobody said this would be easy. We intend to work as hard as we can to try to turn this into a definitive agreement and to use that as the predicate to run a comprehensive process to maximize value.
Q. Right, so the answer would be none, but you're optimistic?
A. What was the question?

Q. I forgot, too.
A. Okay, yeah.
MR. ZIMAN: I'll withdraw that, Your Honor. I'm done, thank you.
THE COURT: Any redirect?
MR. HACKNEY: No, sir.
THE COURT: Thank you, sir. You may step down.
THE WITNESS: Thank you, Your Honor.
THE COURT: Any further witnesses?
MR. HACKNEY: No, Your Honor. Those are it.
THE COURT: Any witnesses?
MR. ZIMAN: No, Your Honor.
MR. KWASTENIET: Your Honor, if I could beg your indulgence for, like, a five-minute break before we start argument; that okay?
THE COURT: That would be fine.
MR. KWASTENIET: Maybe we could just --
THE COURT: We'll take a brief recess.
MR. KWASTENIET: Until 3:30, Your Honor?
THE COURT: Until 3:30.
MR. KWASTENIET: Thank you.
THE CLERK: All rise.
(Recess from 3:20 p.m. until 3:41 p.m.)
THE CLERK: The court is now in session. Please be seated and come to order.

MR. KWASTENIET: Good afternoon, Your Honor. Ross Kwasteniet again, from Kirkland & Ellis, on behalf of the debtors.

Your Honor, having moved through the evidentiary portion of the presentation of the final DIP order, I thought we'd maybe move to the legal arguments in support of the DIP and yield the podium to Mr. Ziman in opposition.

Your Honor, when we talk about adequate protection, and we look into it, there isn't a lot of case law in the Fourth Circuit. I mean, adequate protection issues don't often get litigated. But the case law that is out there in this jurisdiction and in others is instructive.

Your Honor, the case law is pretty clear that adequate protection means just what it says; it means adequate protection, and it does not mean absolute protection. So absolute protection in any and all circumstances is not what's required, and we don't have to show that. Your Honor, the purpose of adequate protection is to protect the creditor from diminution or loss of the value of its collateral during the Chapter 11 case and to demonstrate that by a preponderance of the evidence.

Your Honor, I also think it's instructive to look at eh case cited in the Barclays objection. In paragraph 7 of the Barclays objection, Your Honor, they note that financing should only be -- the bankruptcy court should only approve DIP

financing, and the proposed nonconsensual priming liens, if the LC secured parties receive the same level of protection they would have had if there had not been post-petition superpriority financing.

Your Honor, we have put on evidence today about what would happen if there wasn't post-petition superpriority financing. Your Honor, we don't have other financing available today; this DIP facility is the only facility available to us. And absent this facility, we'd be looking at an imminent shut-down of our facilities, potential loss of significant collateral value, all to the detriment of creditors in this case, including, we believe, the LC lenders.

Your Honor, on the next page, later in paragraph 7, they say that the purpose of adequate protection is to guard the secured creditors' interest from a decline in the value of the collateralized property. Well here, for the LC lenders, the collateralized property is largely the mines and the equipment. There may be a few other categories of equipment, but for a mining -- or of collateral, but for a mining company, that's essentially what you're talking about. The bulk of their collateral package is mines, reserves, and equipment. And Mr. Dombrowski testified at length, uncontroverted, about the potential implications to the mines and to equipment if the financing was not approved and if we had to shut down and suspend operations.

Your Honor, Barclays also says in its objection that we should be required to show a clear path to exit at the outset of the case. But that, Your Honor, is not the standard, and they haven't cited any case law for that being the standard. And I submit that if that was the standard, if every debtor who came in on a DIP financing motion early in a case had to demonstrate a clear and definitive path to exit, that DIP financing proposals would be routinely shot down and that many Chapter 11 cases would die before they ever even got out of the gates because, like here, it's perfectly typical that debtors don't know exactly where they're going.

But here we've got a pretty good-faith expectation as to next steps. We've got a good game plan for next steps. We've negotiated a stalking horse proposal. We proposed bidding procedures. Parties are going to have a chance to weigh in on that. And we're proposing a rational process to make sure that we're maximizing the value of our assets, not just for the LC lenders but for all other creditors. And the fact that we don't have a clear, definitive, no-risk solution here, no-risk path out of Chapter 11 is just not relevant to the adequate protection analysis because, again, we're not required to demonstrate absolute protection in all circumstances, Your Honor.

We do propose, in the final DIP order -- and again, the final DIP order has been negotiated, so there really isn't

an issue about what is the adequate protection that we're proposing to give to the LC lenders or any other lenders in the final DIP order. That final DIP order has been negotiated. The only question today is should it be entered today.

We're proposing to give a combination of new liens on previously unencumbered assets. The debtors did have material coal reserves that were previously not subject to liens. We're proposing to offer that. We are offering those assets as replacement liens. We're offering superpriority claims. We're offering agreed-upon limitations on the right to use proceeds of the sale of the pre-petition lenders' collateral. We're offering accrual of interest and fees during the case. We're offering reporting obligations. And we're offering payment of fees and expenses to advisors, Your Honor.

Your Honor, the testimony from today from Mr. Puntus demonstrated that there was really no meaningful benefit to the estate, or for parties-in-interest, in delaying the case, delaying the hearing. First, the alternative proposal that was described in the Barclays objection is simply more expensive than the current proposal the debtors have in hand. Your Honor, the current DIP lenders' interests are fundamentally more aligned with the best interests of the estate. They're a more appropriate DIP lender in these cases.

Your Honor, the currently DIP lenders are amenable to

rolling their debt into the Blackhawk transaction. That is a very significant concession. And Your Honor, I don't believe that the debtors second lien lenders or junior lenders or term loan lenders, would consent to being primed by a lender like Black Diamond. So that's a further question mark as to even the viability, assuming we were able to negotiate a deal with Black Diamond, whether that would be acceptable to our secured lenders, of whom there are many, whether we can get a consensual approval of a deal like that.

Your Honor, more importantly, we've also heard testimony today about the very real risks of delay. Mr. Dombrowski took the stand, and he testified that the debtors need access to more cash. But we're limited to thirty million dollars in funding under the interim DIP order. We need the final DIP order, and we need the extra twenty million dollars that we will only get upon entry of that final order.

We cannot force the DIP lenders to lend more money to us in an interim basis, which is effectively what Mr. Ziman is proposing. He is proposing, why don't we just continue the interim order and set the final hearing for a later day? Well, the big problem with that is we don't get access to that twenty million dollars that Mr. Dombrowski testified he needs to responsibly run this business and hold things together.

Your Honor, part of the reason Mr. Dombrowski says he needs that money is because there's a real impact on

customers, venders, and employee morale if we adjourn. He's concerned about being able to hold this business together. He's concerned about the inquiries we're getting from customers and vendors, people who are paying attention to the milestone dates and whether our case is progressing and whether we're getting access to the liquidity that we've been telling people we're going to get access to.

Your Honor, Mr. Dombrowski also testified that if the DIP financing was denied, which Mr. Ziman said was his alternate proposal in the event that the financing order wasn't adjourned, that there's simply no replacement financing available to us; that we would be facing imminent employee layoffs; that we would be forced to idle mines, potentially with the significant loss of equipment value; and that we would face devastating value destruction. This would hurt all of our creditors-in-interest and would definitely hurt, we think, the LC lenders. Your Honor, the mines and our equipment are the LC lenders' collateral.

Your Honor, adequate protection is designed to prevent the loss of value. But the debtors would suffer significant value destruction if the DIP was not approved today. We've got an immediate need for liquidity. We have no ability to compel the lenders to loan more on an interim basis, no other financing available, and there'd be an immediate and negative consequences if the DIP wasn't

approved.

So Your Honor, based on that, we think that adequate protection could be demonstrated if the debtor shows that it is maximizing and improving the value of its estate for the benefit of its creditors. Again, this doesn't have to be an absolute showing. But the uncontroverted evidence is that the pursuit of a stalking horse proposal and the related bidding procedures is designed to preserve and maximize value and that we're going to be subjecting the stalking horse proposal -- we understand, people have questions about it. It may not be entirely optimal. And it's definitely not fully negotiated at this point.

But we think it provides a baseline bid and a basis on which we can conduct further negotiations with a stalking-horse bidder and upon which we can run a competitive auction process, all of which is designed to maximize value. And when we compare that with the likely alternative, which is a devastating loss of value, loss of jobs, idling of operations, we don't think that there's any way to conclude that the term loan -- or that LC lenders are adequately protected or are not adequately protected today. We think they, unequivocally, are adequately protected.

We think that the process we're running, we think that the money that has been provided by our junior lenders to help fund the case, to help keep the equipment and the mines

that are the LC lenders' collateral operational and in a position to be sold, and for us to maximize the value of that collateral, means that the LC lenders are adequately protected, and we respectfully request entry of the final DIP order today.

THE COURT: Thank you.

MR. ZIMAN: So Your Honor, I think we should start with the standards. Let's just start with what the law is, and then we can come back to all the straw men that have been set up around here. But we've got two statutes that we're working with. 363(e) says you could prohibit or condition the use of cash collateral as necessary to provide adequate protection. There's that phrase "adequate protection". 363(p) says it's the debtor's burden to show adequate protection. 364(d)(1), priming, can't prime without providing adequate protection to the pre-petition secured lender. And (d)(2), again, imposes that burden on the debtor, nobody else but the debtor.

Adequate protection is not defined in the Code. All right? That's -- you know, there's -- 361 offers some alternatives, talks about cash payments, talks about other property. I think, when you look at the case law, I disagree with Mr. Kwasteniet; I don't think it says what he says it says. I think it makes clear that, one, it's determined on a case-by-case basis, but the concept and goal is

something -- something, whatever it is -- something that, nearly as possible, provides the creditor with the value of his bargained-for rights.

Okay? That's right from the Swedeland case; I actually quoted that. That's 16 F.3d, 552, 564. That's citing two other circuit court cases, In re: Martin, from the Eighth Circuit, and In re: American Mariner Industries from the Ninth Circuit.

I think it's important to go back and look at Swedeland, because I've been doing this for a while now; it's one of the seminal cases in this area, because I think Mr. Kwasteniet is right, there's not a lot of law on adequate protection and priming and when you can and can't prime a secured creditor.

But in Swedeland, the Third Circuit ultimately held that the priming that had been authorized by the lower courts was inappropriate. And that fact pattern turned on that there was no property or new protections provided to offset the priming, and further turned on that a secured lender couldn't be adequately protected only by the prospects of a reorganization going forward.

And that case was different than this case, no doubt about it, but the quote's worthwhile. This is: "Congress did not contemplate that a creditor could find its priority position eroded, and as compensation for the erosion, be

offered an opportunity to recoup, depending upon the success of the business, with inherently risky prospects."

All we heard about today is the inherently risky prospects that this business is confronted by, unfortunately. All we heard about today is there is no assurance that the Blackhawk deal could get done. Everyone's optimistic on that; they feel optimistic that it's something that can be advanced or an alternative that arises out of it could get consummated. We have no assurance what the treatment of creditors will be under that deal that has no assurances behind it. So there's no doubt that they are trying to adequately protect secured lenders by the inherently risky prospects of the business that we've all invested monies in.

I think you look at the James River case, the James River Associates case -- it goes back to 1992, I think; that's an Eastern District of Virginia case. It's 148 B.R. 790. It sort of says the same thing, slightly different context. But that case involved a bankrupt hotel where the secured lender moved for relief from stay. And the predicate was, was the secured lenders' interest adequately protected under the, I guess, 362(d)(1) prong, and the Court said no. And it said no because there was no proof of an equity cushion, there were no payments being made on the secured debt, the secured debt obligations were accruing, and there was no apparent means to repay the proposed DIP financing from the cash flows of the

business. Essentially, all that was offered there, again, like here, was the prospect the debtor would be successful if it were allowed to incur the priming financing.

So I think the bit of a straw man that we're dealing with here is, you know, we're not saying that we need -- that they need a clear path to an exit to prime. We're saying that because they can't establish adequate protection, which is their burden, we don't want to be primed until we can see a clear path.

And so all we're saying, right, we're saying is that you can't prime us today, so don't. Kick this for a week, kick this for ten days, kick this till -- if the DIP lenders were amenable to providing more capital, kick it till the period of time when we consider the transaction itself, and we'll all work together, and hopefully we, and our constituent, will get comfortable that it is the right path to go forward on, and we'll get comfortable with what's being proposed.

If today was about the company having zero financing and zero money, they clearly met their burden of showing a parade of horribles would ensue. I'm somewhat surprised we didn't hear about the canaries dying from the methane gas, but that was just something they didn't seem to find necessary to cover. If this were about their business judgment, and wanting to take the financing they have or making a decision

as between the proposed or the indication of interest for an alternative and what they have, I'd say they've met their burden. But that's not the burden they have to meet when it comes to me. The burden they have to meet, when it comes to me, is to adequately protect me, and that burden, I don't think they've met, based on the evidence they've put in.

Just a moment on the parade of horribles, though, there's a bit of a disconnect. I mean, at some point, the company, arguably, would run out of money. But could they live for a week or ten days or two weeks? I mean, I think -- you know, Mr. Dombrowski testified they would bring fifty-seven million in bank cash, which is, in any way, shape or form higher than the forty million he'd be at, right, without having ten million more. So there's some disconnect there that I can't explain.

His own projection period has him managing the company with ending cash balances, towards the week of August 7, August 14th, of fifteen to thirteen to seventeen million dollars. So it's not an ideal position; I'm not saying it is. But it's possible. And he clearly has to do it at the end of this projection period, unless something changes.

Mr. Kwasteniet walked through the different kinds of adequate protection being provided in the order. I would say that's all great, but when you look at it, they don't actually add up to anything we're not otherwise entitled to, for the

most part. First, there is no additional lien on coal -- new coal reserves. There are coal reserves that are unencumbered. They're unencumbered because the under -- the leased coal reserves and the underlying leases didn't allow for a pledge of the coal. There are some rights being provided that might give priority access to that value, should there be a diminution of value and we add an adequate protection claim, of course junior to any DIP claim. But that's not the same as getting a lien. It's getting something; we're not really sure how you value it. We're not getting cash payments. There are, granted, payments that cover professional fees. Those professional fees are part of the claim. They are a secured part of the claim anyway, so I'm not sure that that's an additive. There's no definitive agreement here to monetize assets; we know that. Mr. Puntus testified clearly that, you know, he can give no assurance that it will get done. He's optimistic, as we said, and I give him his optimism, and I'm happy he's optimistic, but that's not a deal to get these assets monetized in a way that would adequately protect us.

And there's no doubt -- and I want to make sure, there's no doubt they've worked hard at getting to where they've gotten to, both on the operational side and on the banking and legal side. That's not -- they're not -- no one's to be criticized here. It's just we are where we are, and there's a difference of opinion as to how to go from where we

are today to, kind of, the next step.

The milestones they've set up make clear that this is all tied together. It comes back to my point earlier, Your Honor, that the financing really is inseparable from the sale transaction. So to that extent, why aren't we concerned with the other? I mean, I'm still not fully understanding, other than because, I think, at the end of the day, the DIP lender doesn't want to. But that's the only thing I can interpret from all the argument around here.

And this whole argument that it would be worse for us if they don't prime us, that's not actually the standard. I think that's just a variant of the standard we talked about in Swedeland, and James River talks about. I think that it's -- there is no discussion of that scenario, right, that Mr. Dombrowski and Mr. Puntus both made clear they weren't aware that there was ever a discussion about what would happen if that was the alternative. If we really got to that point where you said, no, you can't have your DIP, and boom, the company had to go into liquidation, I would think economically rational actors would act rational, and there would be a solution for that. So I think that is just, literally, a straw man, as I said, that's put up to scare a result out of Your Honor that's not actually consistent with the facts and the law that are before you.

So I think the better course of action, and the one

which I would say does the least violence, to both the Code and the Constitution, relative to the property rights of the LC lenders in their collateral, is to push this out, preferably with the support of the DIP lenders, and whatever modest incremental financing the company might need, if they were to need it over the period. But in any case, to push it out, and let's all come back when we can talk about everything that needs to happen in the case on a go-forward basis.

Thank you, Your Honor.

MR. KWASTENIET: Ross Kwasteniet again for the Kirkland, on behalf of the debtors, just briefly in response.

The Swedeland case didn't involve provision of new value. We are proposing new value in terms of priority access to previously unencumbered coal reserves.

Your Honor, we do have a conundrum here today in that the value of the LC lenders' collateral hinges on the assets continuing as a going concern. Mr. Ziman says there's no evidence. Who knows? Maybe, I would think, that the debtors would be able to get a DIP loan to provide for more of an orderly liquidation transition, responsible wind-down of the company.

Your Honor, those facts are not in evidence today. The facts that are in evidence today is that the debtors and their advisors shopped high and low, including from Mr. Ziman's clients, seeking DIP proposals. Barclays initially

indicated that they were willing to make one, and at a meeting, about a week before the filing, they reneged on that prior indication that they'd provide a DIP loan.

So the only evidence today is that this is the only financing available to us. There is no evidence, there is no reason to think, there's no evidence in the record to suggest that if this gets denied we'd have some sort of reasonable or responsible fallback financing, simply no evidence of that, Your Honor. And frankly, what Mr. Ziman thinks we might be able to do isn't evidence and isn't anything that this Court or the debtors can take any comfort in.

Your Honor, we think that the LC lenders' position that they would come out whole in a liquidation, that's also not supported by any evidence, and in fact, is contradicted by the evidence from Mr. Dombrowski, who walked through the real operational consequences of a denial of the DIP financing and of a shutdown of business operations. We believe that there is a substantial risk of impairment.

And again, to get back, this is -- I'm reading from Barclays' brief: "The purpose of adequate protection" -- is to guard against -- "is to guard the secured creditors' interests from a decline in the value of the collateral as property."

We heard about potential loss of mining equipment worth in the hundreds of millions of dollars, in an

irresponsible wind-down scenario. And we simply have no evidence today that we'd have any other alternative, other than an irresponsible forced wind-down scenario, if the DIP financing was denied.

And in terms of whether the DIP financing should be adjourned, you also heard evidence, and it's uncontroverted, that the debtors have access to the need for incremental financing between now and our next hearing. So what Mr. Ziman's essentially asking you to do is to call the DIP lenders' bluff. The DIP lenders, the deal we negotiated with them is that they are obligated to provide, which they have provided, thirty million dollars, on entry of the interim DIP order. That interim DIP order was entered several weeks ago. That's been funded. And with access to that money, we've been able to stabilize our operations. There have -- there have been a few bumps along the way, but overall, we've responsibly transitioned very responsibly into Chapter 11. We've had as soft a landing as we could have hoped for.

Your Honor, that continued soft landing, that continued ability to keep the business together --

(Beeping sound)

MR. KWASTENIET: I don't know if that means I'm running out of time or if this is a --

THE COURT: I think they're getting tired of listening, but go ahead.

MR. KWASTENIET: Okay. The beepings -- it's getting faster paced, so I'll speed it up.

Your Honor, the -- he's testified that it's important to him, it's important to the business that we get access to the next installment of financing. Our creditors are sophisticated, our customers are sophisticated; they know that the financing is being made available to us in chunks, based on the satisfaction of milestones.

And if we have to come back, in a week or ten days, Mr. Ziman may say that that's no big deal, but he gets to go back to his office in New York and do other things for those next ten days. Mr. Dombrowski and the management team go back to West Virginia and explain to customers why they don't have access to that twenty million dollars that they'd previously told people we were going to get access to, the twenty million dollars that gives our customers comfort in buying from us, that gives our vendors confidence in shipping to us.

So Your Honor, there are real-world significant business implications. We wouldn't be here having a drag-out hearing over access to financing today if it really was no big deal to just put this off a few weeks. But the fact is, the deal that we cut with our DIP lenders is that they'd loan thirty million on an interim order and not more than that. They're not willing to lend more than that. So if we continue, if we push this off, that means we're not getting

any more access to financing until the next time we're back before Your Honor.

And again, we don't see any real reason to delay. There's no benefit to the estate in delaying, certainly not in pursuing the Black Diamond proposal, Your Honor. We think that is a worse alternative. We think that, compared to our current DIP lenders, they're a worse DIP provider, for a lot of reasons. The terms of their DIP are worse, their interests are not aligned with those of our other creditors and of the estate. That is not a credible reason. There is no evidence to suggest it is, for adjourning the hearing today.

And the other reason put forward is that Mr. Ziman will have a little more time to review the proposed transaction. Well, we're a very long way before coming before Your Honor and asking that that transaction be approved. We're even weeks away from coming before Your Honor on bidding procedures. People have that time. People have that time, but what Mr. Ziman wants is he wants additional leverage when we come back before Your Honor on bidding procedures. He wants to be able to threaten that if he doesn't get X, Y, or Z modifications to the bidding procedures or the stalking horse agreement, that he's going to threaten to blow up the DIP financing.

I can understand and appreciate why he wants that; I don't think that's appropriate. He will be able to come to

Your Honor and make whatever arguments he wants to make about the bidding procedures, about the proposed stalking horse deal. But even beyond that, Your Honor, we're proposing, in the bidding procedures, to run a full-blown marketing process. We've got miles to go in this sale process. And because he, today, has questions and concerns around what that ultimate transaction looks like is not a basis to cut off the life blood of this case, which is the access to the DIP financing. This is what keeps the business going. This is what keeps the miners mining. This is what keeps our customers buying. This is what keeps our vendors shipping. And without this, Your Honor, we run the risk, and it's a serious risk, that we're over before we started.

And we've made too much progress, at this point, and good-faith progress towards a real transaction that gives us a real chance of maximizing value for everybody, including the LC lenders. They can't tell you what's going to happen to this company if the DIP's denied or we don't get access to the financing or we have to start to shut down mines that are their collateral, idle equipment that are their collateral.

They're hoping that Your Honor just gives them a little more leverage going into the next hearing, and we don't think -- we think that's an inappropriate game of chicken, Your Honor. We think that we've satisfied our burden. We are much further along today than we were at the interim DIP

hearing. The interim DIP hearing, Your Honor found everybody adequately protected based on where we were at the time. We are now substantially further along in the discussions with our stalking-horse bidder, and we think that we've more than satisfied the burden of demonstrating that the LC lenders are adequately protected, and again, we request that you enter the order approving a DIP financing.

THE COURT: Thank you. More?

MR. ZIMAN: I think just two points, Your Honor, very quickly. I apologize. I mean, if we were going to argue about whether we're protected by an equity cushion, they should have put on evidence of value. They didn't put on any evidence of value. So the fact that I don't have a liquidation analysis to say the opposite, that's not my burden; it's theirs.

And I think we keep coming around and around here as to who bears the burden. And I think we can decide for ourselves whether our interests are advanced or not advanced, sophisticated lenders, by what we're proposing before the Court. I don't think we need the debtors to look out for us in that regard.

I think the key issue is when you go back and you look at what's been put into evidence, there's no doubt that they -- for today's purposes since they haven't engaged with others yet, and maybe they won't, but they got a DIP, they

like their DIP, it provides them what they want. So they put on testimony that, in their business judgment, it's the only DIP they got, it's the DIP they want to do. That makes perfect sense; if I were them I'd say the same thing. It doesn't equate to adequate protection, it just simply doesn't. It's not what the law says. And the law asks for more than what's been offered here. The law asks for concrete new value when you prime somebody.

And priming is very different than use of cash collateral, and it's very different than the notion that -- it's our interest in the property that's entitled to be protected. That's the rank in the property too. I mean, certainly if the new money were coming in junior we'd have nothing to say. But that's not where we are, and I think they haven't met the burden, Your Honor. Thank you.

THE COURT: All right, thank you.

The Court has before it the debtors' motion on for final order authorizing the debtor to obtain post-petition financing, use of cash collateral, granting liens and superpriority claims, granting adequate protection to pre-petition secured parties.

There were various objections and responses to the motion, all of which, but one, have been resolved, apparently by consent. And I note that the substantial objection filed by the creditors' committee apparently has also been resolved

by consent. And the remaining objection was a limited objection of Barclay Bank. Barclays Bank on behalf of the LC lenders.

The objection, when it was filed, questioned whether there was alternative debtor-in-possession financing on better terms that might be available and sought, in the objection, delay or that the approval of the proposed DIP financing be put off until a later date.

It is true that the burden rests with the debtors to demonstrate that the terms of the proposed financing were fair and reasonable and in the best interest of the estates and their creditors, that they have chosen the DIP facility on the exercise of their sound and reasonable business judgment, that the terms of the transaction, once again, are fair, reasonable and adequate. Under Sections 363, 364 the debtor bears the burden of establishing that secured lenders are adequately protected.

In this case, the only evidence before the Court is the testimony of Mr. Dombrowski and Mr. Puntus. And that's the evidence that the Court will consider in determining whether to approve this agreement at this time.

The alternative to not approving the proposed DIP financing appears to be dire consequences for the debtor. If the debtor were to shut down, as described by Mr. Dombrowski, there would be a substantial loss, not only to the value of

the going concern of the debtor, but to the collateral of all the secured creditors, including the LC lenders. And it would appear to me that that based on the evidence, that the value -- that the financial detriment would exceed by a great extent the proposed additional financing.

I think in this case that the preservation of the going concern adequately protects the LC lenders' interests. I think also that in this case while the debtor appears to be tying all of its hopes to the sale that is proposed in connection with the proposed bidding procedures and the commitment letter, or the notice of intent that it's received from its proposed buyer, I think it has explored all of its alternatives, that it appears to be doing what is in the best interest of the debtor at this point and what is available to the debtor in terms of whatever alternatives it might have available. I think that the debtor has endeavored to provide as much information as possible to all the creditors in the case and, in fact, was able to file the proposed bidding procedures motion prior to today's hearing.

I realize that creditors have not really had a chance in this case to assess all of the alternatives, what might be best in terms of going forward, whether there's other alternatives, not only potentially with other possible financing, but other possible alternatives in terms of whether there's other potential purchasers, other potential

opportunities. Those have been expressed by the creditors' committee and others, yet the creditors' committee remains apparently in support of this proposed DIP financing.

I don't really see where a delay in entering an order approving the financing would be of any real benefit. I don't know that anything will change between now and two, three weeks from now. And I do see where delaying it, based on the testimony of the witnesses, would appear to be detrimental to the debtor.

So at this point, the Court is going to approve the proposed DIP financing as described, and with the alternatives, or the amendments that have been described by counsel for the debtor.

And the Court will look for entry of that order -- for the submission of that order. I would like for the order to include a reference to Barclays' objection, and I think that it would be sufficient to say for the reasons stated in court, that objection is overruled.

MR. KWASTENIET: Thank you, Your Honor. Ross Kwasteniet from Kirkland.

We're certainly happy to add that additional language.

Your Honor, we do have a redline of the order. We're happy to do this any number of ways. We're happy to submit it to your chambers and field any questions you have. I'm also

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

In re:	)	Chapter 11
	)	
Walter Energy, Inc., et al., [1]	)	Case No. 15-02741-TOM11
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	

DECLARATION OF EDWIN N. ORDWAY, JR. 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, Edwin N. Ordway, Jr., declare under penalty of perjury:

1. I am a Managing Director and a member[2] of Berkeley Research Group, LLC (d/b/a BRG/Capstone) ("BRG"), a professional services firm with offices located at 104 West 40th Street, 16th Floor, New York, NY 10018, among other locations. The Official Committee of Unsecured Creditors (the "Committee") of the debtors and debtors in possession in the above-

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Walter Energy, Inc. (9953); Atlantic Development and Capital, LLC (8121); Atlantic Leaseco, LLC (5308); Blue Creek Coal Sales, Inc. (6986); Blue Creek Energy, Inc. (0986); J.W. Walter, Inc. (0648); Jefferson Warrior Railroad Company, Inc. (3200); Jim Walter Homes, LLC (4589); Jim Walter Resources, Inc. (1186); Maple Coal Co., LLC (6791); Sloss-Sheffield Steel & Iron Company (4884); SP Machine, Inc. (9945); Taft Coal Sales & Associates, Inc. (8731); Tuscaloosa Resources, Inc. (4869); V Manufacturing Company (9790); Walter Black Warrior Basin LLC (5973); Walter Coke, Inc. (9791); Walter Energy Holdings, LLC (1596); Walter Exploration & Production LLC (5786); Walter Home Improvement, Inc. (1633); Walter Land Company (7709); Walter Minerals, Inc. (9714); and Walter Natural Gas, LLC (1198). The location of the Debtors' corporate headquarters is 3000 Riverchase Galleria, Suite 1700, Birmingham, Alabama 35244-2359

[2] Equity owners of limited liability companies are referred to as "Members" and such term is used herein.

captioned cases (the "Debtors") has selected BRG as its financial advisor, and I am authorized to make this declaration on behalf of the Committee in support of the Committee's objections (the "Objections")[3] 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 "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.[4]

QUALIFICATIONS

2. BRG has acted as financial advisor, crisis manager, and corporate officer in middle market to large multinational restructurings across a wide array of industries. BRG has experience in restructuring, transaction advisory, litigation support, solvency and valuation matters and provided a focus on viable solutions that maximize value for companies and creditors. BRG's services include forensic analysis, plan development and implementation, and advice on sale/merger transactions. Moreover, the professionals at BRG have assisted and advised debtors, creditors, creditors' committees, bondholders, investors, and others in numerous bankruptcy cases, including Quicksilver Resources, Inc., Reichhold Holdings US, Inc., Brookstone Holding Corp., MF Global Holdings, Ltd., Refco, Inc., Chrysler (k/n/a Old Carco LLC), Tropicana Entertainment, LLC, Spiegel Inc., W.R. Grace & Co., Kmart Corp., Mirant

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the applicable Objection.

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

Corp., Adelphia Communications Corp., Owens Corning, Polaroid Corp., Sunbeam Corp., U.S. Office Products, Penson Worldwide Inc., Collins & Aikman Corp., Federal-Mogul Corp., U.S. Industries, SemGroup, L.P., Nortel Networks Corp., and Calpine Corp.[5]

3. Based on my many years of restructuring experience, education and professional credentials, I am qualified to submit this declaration. I am a Certified Public Accountant and a Certified Insolvency and Restructuring Advisor. I specialize in providing financial restructuring advisory and investigative services to companies, creditors, equity holders, and third-party purchasers in the workout and financial restructuring communities. I have also served as a court appointed examiner, as a trustee, and have provided expert testimony principally concerning bankruptcy matters. Before joining BRG, I was an Executive Director with Capstone Advisory Group, LLC, specializing in Restructuring Advisory Services.

4. I have prepared analyses for and/or testified in numerous bankruptcy matters on subjects including fraudulent conveyance issues (W.R. Grace & Co.), substantive consolidation (Kmart Corp. and United Companies); illegal dividends and debt re-characterization allegations (TW, Inc. (aka "The Wiz")), reasonableness of business plans, plan of reorganization feasibility with an emphasis on appropriate debt terms, liquidation issues, appropriateness of litigation settlements, accounting irregularities, asset sale transactions, appropriateness of interest charges, and management compensation issues.

5. A select listing of testifying experience includes *PCS Nitrogen, Inc. v. Ross Development Corporation* (valuation, fraudulent conveyance, appropriateness of shareholder distributions, and financial reporting matters); *Simply Wheelz LLC /Advantage Rent-A-Car* (appropriateness of a 363 sale process); *Almatis BV* (expert regarding the reasonableness of the Company's business plan, including key economic assumptions in a contested plan adversary

[5] The professionals were employed in these engagements prior to joining BRG.

proceeding). Additional details regarding my professional experience are described in the curriculum vitae, attached hereto as Exhibit A.

ANALYSIS

I. The Proposed Adequate Protection Payments Are Excessive

6. Since the Committee's selection of BRG as its financial advisor, BRG has actively engaged with the Debtors' advisors to analyze and investigate, among other issues, the reasonableness and appropriateness of the adequate protection that the Debtors propose to provide the Prepetition Secured Parties pursuant to the Cash Collateral Motion. Through communications with the Debtors' professionals, I have learned that although the Interim Order requires the Debtors to provide updated Budgets to the First Lien Secured Parties every ten weeks to be approved by the First Lien Secured Parties and used for the measurement of permitted variances for covenant testing purposes, the Debtors also update and extend the budget weekly to more effectively manage liquidity. BRG has now been provided with updated budgets for the weekly periods since the Committee's selection of BRG as its financial advisor.

7. Attached hereto as Exhibit B is the Debtors' cash flow budget, updated as of August 20, 2015 (the "Updated Budget"), which reflects budgeted cash flows for the Debtors' domestic operations through November 14, 2015. As such, the Updated Budget in Exhibit B provides the most current view of the Debtors' thirteen-week cash flow and liquidity that has been received by BRG.

8. According to the Updated Budget, the Debtors forecast a net use of cash of approximately [redacted] during the applicable thirteen-week period. Of this total amount, in excess of [redacted] is to be paid to the Prepetition Secured Parties as adequate protection payments, solely on account of 80% of their post-petition accrued interest. That amount represents approximately [redacted]% of the Debtors' total forecasted cash use (i.e., operating and non-

operating cash flow for the Debtors' domestic operations). Even more telling, the net domestic operating cash use for the Debtors during this same period (cash used to simply operating their domestic businesses) is approximately $[redacted].[6] In other words, the Debtors are proposing to pay as adequate protection during the applicable thirteen-week period an amount ($[redacted]) that is roughly equal to [redacted]% of the total cash that they are forecasted to use by operating their domestic assets.

9. When one adds to these adequate protection payments the professional fees to be paid to the advisors for the Prepetition Secured Parties—projected to be approximately $[redacted] under the Updated Budget—the total payments proposed to be made to the Prepetition Secured Parties[7] on account of their undersecured facilities is approximately $[redacted]. That means that the cash being consumed on account of the Debtors' agreed-upon payments to the Prepetition Secured Parties is approximately equal to [redacted]% of the total domestic operational cash use.

10. Staggeringly, these adequate protection payments do not even take into account the Debtors' proposal to pay 100% of the First Lien Secured Parties' pre-petition accrued and unpaid interest on [redacted]. According to several inconsistent documents produced by the Debtors, the accrued pre-petition interest that the Debtors propose to pay to the First Lien Secured Parties will be somewhere between $[redacted] and $[redacted]. While I have been unable to confirm which of these conflicting amounts is correct, even a $[redacted] payment on

[6] Operating cash flow figures exclude, among other things, adequate protection payments, restructuring related advisory fees and expenses, and certain deposits.

[7] The Debtors' Updated Budget includes [redacted].

account of accrued pre-petition interest would be catastrophic to the Debtors and would likely render them administratively insolvent by [redacted].

11. As the Debtors' cash flow budgets demonstrate, despite the 20% discount to the First Lien Secured Parties' prepetition contractual interest rate (and a fixed LIBOR component to the interest rate calculation), the magnitude of the proposed adequate protection interest payments to, and professional fee payments on behalf of, the Prepetition Secured Parties is a major contributor to the Debtors' forecasted diminishing liquidity. In fact, the Debtors' domestic cash position is estimated to decrease from approximately $[redacted] as of August 15, 2015, to approximately $[redacted] as of November 14, 2015, due in significant part to the $[redacted] in post-petition interest payments and the additional professional fees of $[redacted] with respect to the Prepetition Secured Parties. Furthermore, proposed adequate protection payments through the contemplated emergence in January 2016 would consume more than $[redacted] which, if not required to be paid, could potentially provide the Debtors with up to an additional six months of operating liquidity.[8]

II. The Debtors' Continued Operations Will Benefit the Prepetition Secured Parties

12. The Debtors' continued use of their significant cash reserves is critical to preserving the value of the Prepetition Collateral. The Debtors must utilize their cash reserves in order to continue operating their businesses and avoid either a reduction in the level of their mining activities or a sudden and unexpected complete shut-down of their mining operations. Either of these outcomes would negatively impact the value of the Prepetition Collateral.

13. Large coal operations generally benefit from economies of scale that result in decreases in the marginal cash cost of coal production as production levels increase. Thus,

[8] Even accounting for increased costs of, for example, $300,000-$500,000 associated with a contested cash collateral hearing, the Debtors would likely still be able to maintain liquidity for up to an additional six months beyond current projections if they were not required to make monthly adequate protection interest payments.

although the Debtors' current cash cost of sales exceeds the market price for metallurgical coal, a reduction in the level of the Debtors' mining operations could result in further unfavorable movements in the Debtors' cost structure, thereby diminishing the value of the Prepetition Collateral on a discounted cash flow basis.

14. Moreover, a sudden and unexpected shut-down of the Debtors' mining operations resulting from their inability to access Cash Collateral (assuming that the Debtors' cash is Prepetition Collateral) could be catastrophic to their businesses. Properly idling coal mining operations is a costly process. Particularly for longwall mining, the timing of ceasing production could have a significant impact on remaining reserve values. If a longwall face is only partially mined when operations cease, the remaining reserves along that face may be unminable when operations resume in the future. Proper planning requires that operations ceases only when a face has been sufficiently mined.

15. The mine idling process is also subject to federal and state environmental oversight, as well as contractual obligations in the respective labor agreements. As a result, failure to properly idle mines can also result in further expense and liabilities (including environmental and reclamation liabilities), and can unnecessarily increase the costs associated with restarting mining operations at the particular location in the future. For example, the equipment supporting the mines requires preparation before the mines are shuttered to ensure that the equipment is maintained while idle and to eliminate any risks of pollutant discharges. In addition, idling mines without properly preparing for the treatment of effluents or the disposition of gasses that commonly accumulate and could create a significant environmental liability.

16. Without access to Cash Collateral, the Debtors would not be able to continue to fund mine idling costs. Any resulting increase in the costs of restarting mining operations and any increases in environmental liabilities would have a direct, negative impact on the

profitability of the associated mine and, consequently, the value of the Prepetition Collateral as a whole. In order to ensure a safe and value protecting process, it typically takes thirty to ninety days or more to complete these tasks and prepare a mine for idling.

17. In sum, the Debtors' continued operations of their businesses preserves far more value for the Prepetition Collateral than would be the case if the Debtors did not use Cash Collateral and suddenly ceased operations.

III. The Budget Covenants Contained in the Proposed Order May Result in an Unnecessary Default

18. The budget covenants contained in the Interim Order (the "Budget Covenants") are also constructed in a way that provides insufficient cushion to navigate a dynamic marketplace. As currently constructed, and based on the Updated Budget, these covenants are likely to cause an unnecessary default and an inability by the Debtors to continue to use Cash Collateral or pursue a consensual plan of reorganization. These restrictions serve no purpose other than to benefit the First Lien Secured Parties.

19. The Debtors' Updated Budget proves the point. As illustrated in Exhibit C, the permitted variance figures calculated using disbursements from the Updated Budget (as measured against disbursements included in the Initial Budget figures) now show that the Debtors are precariously close to a default of the Cumulative Disbursements Covenant for the test periods ending [redacted] and [redacted].

20. Based upon historical week-to-week variances in disbursements, the Debtors require sufficient cushion to ensure that relatively minor timing discrepancies relative to their Initial Budget do not result in an unnecessary crisis and breach of the Budget Covenants. A more appropriate Cumulative Disbursements Covenant test would utilize 10% to 15% of budgeted cumulative disbursements on which to calculate the permitted variance.

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

/s/ Edwin N. Ordway, Jr.
Edwin N. Ordway, Jr.
Managing Director

EXHIBIT A

Edwin N. Ordway, Jr., CPA, CIRA

Managing Director – Manager and Member of the Firm
New York

Contact

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M 201 960 1510
eordway@thinkbrg.com

Industry Experience

Automobiles and Components
Consumer Products and Apparel
Entertainment and Media
Financial Services
Infrastructure and Energy
Manufacturing, Metals and Mining
Real Estate and Construction
Retail and Wholesale Distribution
Transportation

Selected Public Cases

Aleris International – Advisor to the Lenders

Almatis BV – Advisor to the Lenders

APS Auto Parts – Advisor to the Lenders

Atlas Air Worldwide Holdings – Advisor to the Lenders

Citation – Advisor to the Lenders

Cooper Standard Automotive Inc. – Advisor to the Lenders

Kmart Corp. – Advisor to the UCC

Loews Cineplex Entertainment Corp. – Advisor to the Lenders

Metaldyne Corp. – Advisor to the Lenders

National Energy Group – Advisor to the Lenders

Polaroid – Advisor to the Lenders

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Experience

Mr. Ordway is the Manager of the Firm, Executive Director and co-founder of BRG Capstone Advisory Group, LLC ("BRG Capstone" or the "Firm"). He is a Certified Public Accountant and a Certified Insolvency and Restructuring Advisor. Mr. Ordway specializes in providing financial restructuring advisory and investigative services to companies, creditors, equity holders, and third-party purchasers in the workout and financial communities. Mr. Ordway has also served as a court appointed examiner, as a trustee, and has provided expert testimony principally concerning bankruptcy matters.

Prior to co-founding BRG Capstone, Mr. Ordway was a Senior Managing Director at the Policano & Manzo legacy practice at FTI Consulting for fourteen years, most recently as co-leader of FTI's national restructuring practice. Previously, he spent five years as Chief Operating Officer of Knickerbocker Associates, a real estate development and investment company with projects valued in excess of $100 million. He was also with a major auditing firm for eight years.

Representative Experience in Selected Matters

- Mr. Ordway has prepared reports and/or analysis regarding a variety of bankruptcy legal matters, including:
- Fraudulent conveyance issues, such as in the W.R. Grace and KB Toys bankruptcies
- Substantive consolidation, such as in Kmart and United Companies bankruptcies
- In support of illegal dividends and debt re-characterization allegations, such as in the TW, Inc. (aka "The Wiz") bankruptcy
- Mr. Ordway has provided expert testimony in various jurisdictions on matters involving:
- Reasonableness of business plans, including key economic assumptions
- Plan of reorganization feasibility with an emphasis on appropriate debt terms
- Liquidation issues
- Appropriateness of litigation settlements
- Accounting irregularities
- Asset sale transactions

Edwin N. Ordway, Jr., CPA, CIRA (cont'd)

Managing Director – Manager and Member of the Firm
New York

Selected Public Cases (cont'd)

Progressive Moulded Products – Advisor to the Lenders

Purina Mills – Advisor to the Lenders

Simply Wheelz LLC (Advantage Rent-A-Car) – Advisor to the Debtor

Smurfit-Stone Container Corporation – Advisor to the Lenders

Spheris Inc. – Advisor to the Debtor

Sunbeam Products, Inc. – Advisor to the Lenders

The Wiz (TW, Inc.) – Advisor to the Lenders

Tropicana Entertainment, LLC – Advisor to the UCC

United Companies – Advisor to the Lenders

U.S. Industries – Advisor to the Lenders

U.S. Office Products – Advisor to the Lenders

WCI Communities – Advisor to the Lenders

W.R. Grace – Advisor to the UCC

Representative Experience in Selected Matters (cont'd)

- Appropriateness of interest charges
- Management compensation issues

Expert Testimony Experience

Mr. Ordway's depositions and testimonies include:

- 2014: PCS Nitrogen, Inc. v. Ross Development Corporation et al – testified in Federal Court in Charleston, South Carolina in a jury trial regarding valuation, fraudulent conveyance, appropriateness of shareholder distributions, and financial reporting matters
- 2013: Simply Wheelz LLC (Advantage Rent-A-Car) bankruptcy – testified in Bankruptcy Court regarding the appropriateness of a 363 sale process, including defending against an objection
- 2011: Confidential litigation – deposed as an Expert in litigation related to a breach of a purchase and sale agreement based on a material adverse effect claim
- 2010: Almatis BV bankruptcy – deposed as an Expert to the reasonableness of the Company's business plan including key economic assumptions in a contested plan adversary proceeding
- 2009: CABI Downtown LLC bankruptcy – testified as a plan Feasibility Expert in the contested plan adversary proceeding with emphasis on appropriateness of proposed debt terms
- 2008: Tropicana Entertainment bankruptcy – deposed on appropriateness of an asset sale transaction
- 2007-2008: Rockaway Bedding, Inc. bankruptcy – numerous appearances in Bankruptcy Court regarding plan feasibility and disputes with the Committee on liquidation issues
- 2007: W.R. Grace bankruptcy – deposed on plan feasibility issues – appropriateness of interest charges
- 2005: Jazz Photo Corp. bankruptcy – testified as a court appointed Examiner regarding the appropriateness of a proposed litigation settlement
- 2002: American Classic Voyages bankruptcy – testified as an Expert regarding management compensation issues

Edwin N. Ordway, Jr., CPA, CIRA (cont'd)

Managing Director – Manager and Member of the Firm
New York

Expert Testimony Experience (cont'd)

- 1999: Louise Potato Chips, Inc. bankruptcy – deposed as an Expert regarding accounting irregularities
- 1993: InterUrban Communications, Inc. bankruptcy – testified as a plan Feasibility Expert in the contested plan adversary proceeding

Professional Experience

- January 2004 – Present: BRG Capstone Advisory Group, LLC – Manager of the Firm
- 1991 – January 2004: FTI Consulting, Inc. (and predecessor firm Policano & Manzo, LLC, which was acquired by FTI Consulting, Inc.) – Co-leader of National Restructuring Practice
- 1985 – 1991: Knickerbocker Associates – Chief Operating Officer
  - Responsible for all aspects of business, including Land acquisition activities, Land planning and approval processes, Contracting, Financing, Marketing and selling, Accounting and Supervision of professionals: engineers, architects, lawyers
  - Projects included: single-family home subdivisions, condominiums, office space, flex space facilities and retail strip centers
- 1978 – 1985: Arthur Andersen LLP – starting as entry level staff, rose to manager level in New York-New Jersey audit practice

Education and Affiliations

Mr. Ordway holds a BA in Economics and Accounting from Rutgers University. He is a Certified Public Accountant and a Certified Insolvency and Restructuring Advisor (CIRA) and whose professional memberships include the Association of Insolvency and Restructuring Advisors (AIRA), the New Jersey State Society of CPAs, and the American Institute of CPAs. Mr. Ordway is a member of the Board of Directors of the AIRA.

Speaking Engagements

Mr. Ordway has spoken at professional forums and to institutional lenders on topics ranging from DIP financing, Valuation, Exit Financing Strategies, Residential Real Estate Issues, and Co-Sponsored Commercial Lending Conference. Most recent speaking engagements include:

- March 12, 2013: AIRA's Webinar: A Look at Creditor Fraudulent Transfer Challenges Post-TOUSA

Edwin N. Ordway, Jr., CPA, CIRA (cont'd)

Managing Director – Manager and Member of the Firm
New York

Speaking Engagements (cont'd)

- February 22, 2013: ABI's VALCON 2013 Conference, Panel discussion: Implications of Valuations from the Board of Directors' Perspective
- January 9, 2013: AIRA's Webinar: Fiduciary Duties of Directors and Officers of Distressed Companies
- June 6, 2012: AIRA's 28th Annual Bankruptcy & Restructuring Conference, Panel discussion: Duties of Directors When Facing Financial Difficulty
- June 10, 2011: AIRA's 27th Annual Bankruptcy & Restructuring Conference, Panel discussion: Credit Markets – The Availability of Financing in Support of Restructuring Activities
- October 4, 2010: International Bar Association Annual Conference, Panel discussion: Demystifying Financial Products

In the Summer 2010, Mr. Ordway co-authored a chapter on Evaluating the Balance Sheet in Distressed Environment in the book titled *Navigating Today's Environment: The Directors' and Officers' Guide to Restructuring*

EXHIBIT B

Domestic Subsidiaries (JWR, Walter Coke, Inc., West Virginia Operations, Walter Black Warrior Basin, Walter Minerals, Corporate, Blue Creek Energy)														Date of Update:	8/20/2015
Weekly Cash Forecast & Analysis														Currency:	USD
13 Week Cash Flow Forecast - Condensed															
(Amounts in USD)		Current 13-Week Forecast													
		1	2	3	4	5	6	7	8	9	10	11	12	13	Total
Actual / Forecast	Actual	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	for
Week Ending															13 Weeks
OPERATING CASH FLOW															
Total Operating Cash Receipts															
Total Operating Disbursements															
Net Operating Cash Flow															
Non-Operating Disbursements															
Debt Service															
Restructuring Advisor Fees															
Deposits															
Restricted Cash															
Funds (to)/from UK															
Funds (to)/from Canada															
Other/Misc															
Bank Fees															
Adequate Protection															
Total Non-Operating Disbursements															
TOTAL NET CASH FLOW															
BEGINNING CASH - BOOK (FX Effected)															
Net Cash Flow															
ENDING CASH (FX Effected)															
Change in Float															
ENDING CASH - BANK (FX Effected)	[1]														

[1] Cash balances for latest actual period exclude Restricted Cash balance amount of [redacted].

ny-1201062

EXHIBIT C

(Amounts in Thousands USD)	1	2	3	4	5	6	7	8	9	10	11	12
Actual / Forecast	Actual	Actual	Actual	Actual	Actual	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast
Week Ending	7/18/15	7/25/15	8/1/15	8/8/15	8/15/15	8/22/15	8/29/15	9/5/15	9/12/15	9/19/15	9/26/15	10/3/15
Cumulative Totals		Testing Wk		Testing Wk		Testing Wk		Testing Wk		Testing Wk		Testing Wk
Total D/B - CCO Budget [1]	($14,504)	($37,012)	($64,613)	($85,423)	($103,157)	($112,901)	($127,106)	($140,110)	($152,771)	($168,895)	($182,174)	($201,337)
Total D/B - Actuals/Forecast [2]	[redacted]											
Positive / (Negative) Variance												
Greater of Cap or 5% CCO Budget D/B												
Cushion												
Total NCF - CCO Budget[2]	[redacted]											
Total NCF - Actuals/Forecast[2]	[redacted]											
Positive / (Negative) Variance												
Variance Cap												
Cushion	[redacted]											

Notes:

(1) - Balances from court filed 12 week Cash Collateral Budget

(2) - Balances incorporate actual results through WE 8-15-15 and the updated Cash Collateral Budget dated 8-20-15

(3) - NCF excludes adequate protection payments, $[redacted] of cash to be used to collateralize workers compensation obligations for the state of Alabama and $[redacted] to be used to collateralize surety obligations

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