No. S-1510120
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

APPLICATION RESPONSE

Application response of: New Walter Energy Canada Holdings Inc., New Walter Canadian Coal Corp., New Brule Coal Corp., New Willow Creek Coal Corp., New Wolverine Coal Corp. and Cambrian Energybuild Holdings ULC (the "**New Walter**")

THIS IS A RESPONSE TO the Notice of Application of Kevin James filed October 6, 2017.

Part 1: ORDERS CONSENTED TO

New Walter consents to the granting of the Orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: *None.*

Part 2: ORDERS OPPOSED

New Walter opposes the granting of the Orders set out in the following paragraphs of Part 1 of the Notice of Application: *Paragraphs 1, 2, 3, and 4.*

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

New Walter takes no position on the granting of the Orders set out in Part 1 of the Notice of Application: *None.*

Part 4: FACTUAL BASIS

Division 1: New Walter's Response to Alleged Facts

1. New Walter affirms the facts set out in the following paragraphs of Part 2 of the Notice of Application: *Paragraphs 1, 2, 3 (except that it has no knowledge in respect of Mr. Swanson), 4, 6, 7, 9-14, 18, 20 (1st and 2nd sentences), 28, 29, 31-39, 41-43.*

2. New Walter denies the facts set out in the following paragraphs of Part 2 of the Notice of Application: *Paragraphs 5, 8, 15-17, 19, 20 (3rd and 4th sentences), 21-27, 30, 40.*

3. New Walter has no knowledge of the facts set out in the following paragraphs of Part 2 of the Notice of Application: *None.*

Division 2: Additional Facts

4. Capitalized terms used but not defined herein have the meanings given in the Notice of Application ("NOA") or the RSA.

5. The RSA has been the subject of four previous decisions of British Columbia Courts:

   (a) 2006 BCSC 463, the "Corporate Formalities Decision" of Tysoe J (as he then was);

   (b) 2009 BCSC 446, the "Criminal Rate of Interest Decision" of Pearlman J;

   (c) 2010 BCCA 70, the "Criminal Rate of Interest Appeal" of Newbury JA; and

   (d) 2016 BCSC 1746, the "Sale Approval Decision" of Fitzpatrick J.

6. No one previously advanced the interpretation of the RSA that Mr. James is now advancing.

7. None of the previous decisions considered the interpretation of the RSA Mr. James is now advancing in this application.

8. Mr. James did not make the arguments advanced in the NOA at the hearing on the Sale Approval Decision.

9. Affidavit evidence has been filed with the British Columbia Courts in relation to the RSA in the prior proceedings.

10. New Walter has sought to obtain this evidence, some of which has been destroyed by the British Columbia Courts due to the passage of time.

11. New Walter has asked Mr. James to provide any such evidence in his or his former counsel's possession to New Walter and the Court.

12. The evidence filed in the prior proceedings contradicts the evidence filed by the Applicant in this application. For example, contrary to paragraphs 15, 21 and 22 of the NOA, Mr. Fawcett has previous sworn affidavits in connection with litigation on the RSA stating that he instructed Mr. Devlin to draft the RSA and related matters.

13. The prior decisions of this Court contradicts the evidence filed by the Applicant in this application. For example, contrary to paragraph 27 of the NOA, the Court did not find that Mr. Austin had sole responsibility for negotiating the terms of the RSA. At para 13 of the Corporate Formalities Decision, the Court notes that Mr. Fawcett instructed Mr. Devlin to prepare the RSA.

14. The evidence filed in the prior proceedings indicates that the directors of Western Canadian Coal Corp. ("WCC"), which included Mr. James, knew how to draft a royalty agreement incorporating an express consent right. The agreement granting a royalty and certain interests in property to Mr. Mark Gibson (the "Gibson Agreement") filed with this Court in connection with the Criminal Rate

of Interest Decision states that Mr. Gibson "may not sell his interest in the Property to any third party without the approval of Western [WCC]."

15. At paragraph 23 of the NOA, the Applicant relies on evidence that is solicitor-client privileged as between Walter Energy and its counsel. Walter Energy did not waive such privilege.

16. The RSA provides that Mr. James contributed value in the amount of $17,500 to WCC in consideration for the royalty.

17. Mr. James was repaid a significant proportion of this sum before the RSA was even executed. At para 48 of the Corporate Formalities Decision, the Court notes that Mr. James received a cash repayment of $12,000 of the $17,500 contribution he made to obtain the royalty prior to the execution of the RSA. He further received significant share compensation in consideration of his outstanding remainder prior to the execution of the RSA.

    Fawcett Affidavit at para 31

18. Mr. James was paid significant sums pursuant to the royalty granted to him under the RSA.

19. New Walter has asked Mr. James to provide details of all other payments received in respect of WCC and Walter.

20. The Wolverine mine was idled in April 2014. No royalties were payable under the RSA from the period following final shipment of coal in the idling of the mine until the disclaimer of the RSA.

21. No royalty payments were owed to Mr. James on the day that the RSA was disclaimed.

22. Mr. James has had the benefit of the royalty stream for the lifetime of WCC's and Walter Energy's property base in the mines and for the lifetime of WCC and Walter Energy as mining companies.

Part 5: LEGAL BASIS

Overview

1. Mr. James proposes five alternative grounds for his position that he has a provable claim against Walter Energy (and therefore New Walter). He alleges that:

    (a) the RSA requires Mr. James' consent to transfer the coal licences;

    (b) this Court should rectify the RSA to require Mr. James' consent to transfer the coal licences;

    (c) this Court should imply into the RSA a term requiring Mr. James' consent to transfer the coal licences;

    (d) the obligation to pay a royalty does not end upon the transfer of the coal licences; or

    (e) Walter Energy was unjustly enriched when it sold the coal licences without paying to Mr. James 0.219% of the proceeds of the sale.

    NOA Part 3: Legal Basis at paras 2-3, 15

2. The first three grounds rest on Mr. James's contention that the RSA, either on a "proper reading" or through rectification or an implied term, forbids the sale of the coal licenses without Mr. James's prior consent. Mr. James claims that he is owed damages because Walter Energy breached this term of the RSA when Walter Energy sold the mines and the coal licenses through a court-approved sale over Mr. James's objections.

3. None of these three grounds can succeed. It is *res judicata* that the RSA does not restrict Walter Energy's ability to sell the coal licenses. Moreover, the criteria for rectification or an implied contractual term are not met in this case.

4. The fourth ground cannot succeed because Mr. James's proposed interpretation of the RSA is inconsistent with its terms and is commercially absurd.

5. The fifth ground cannot succeed because the criteria for unjust enrichment are not met.

Ground 1: The RSA Does Not Restrict Walter Energy's Ability to Sell the Licenses

6. It is trite law that the most significant tool in contractual interpretation is the language of the agreement, which must be read against the background of the surrounding circumstances, or factual matrix, prevalent and known to the parties at the time the agreement was made. As the Court of Appeal has emphasized,"[t]he words of the contract must not be overwhelmed by a contextual analysis, otherwise there is little point in writing things down."

> Criminal Rate of Interest Decision, at para 61
> Criminal Rate of Interest Appeal at para 26
> *Black Swan Gold Mines Ltd v Goldbelt Resources Ltd*, 1996 CarswellBC 1445 (BCCA) at para 19

7. The RSA contains no express provision that prohibits WCC from selling the mines or the coal licenses, no requirement that WCC obtain the Investors' consent prior to any such sale and no obligation on WCC to cause any buyer to assume WCC's obligations under the RSA. Mr. James's claim would turn this silence into a specific requirement, giving each investor veto power over any prospective sale. This interpretation finds no support in the text of the RSA. As this Court has found, the RSA imposes no limits or restrictions on Walter Energy's ability as WCC's successor under the RSA to sell the coal licenses.

> Sale Approval Decision at paras 67(g), 69-70

8. Mr. James reads the representation given by WCC in the RSA (section 3.1(c), the "Ownership Representation") that WCC "is or will be the beneficial owner" of the Properties as a covenant given by Walter Energy to obtain the Investors' consent prior to selling the coal licenses.

9. The Ownership Representation is not a commitment by WCC to retain the coal licenses in perpetuity; instead, as is plain on the face of the RSA, WCC gave a representation about its future ownership of the Properties because WCC did not own all the coal licenses at the time the RSA was signed.

10. The Ownership Representation was given once, at closing. The RSA does not provide that the Ownership Representation is made anew at any future time.

11. Moreover, on its own terms, the Ownership Representation in section 3.1(c) indicates that Mr. James does not have a right to control how WCC will deal with the Properties in the future. Section

3.1(c) provides that WCC owns the Properties "free and clear of any claims or interests of others". A right to consent to any sale of the Properties is a claim or interest in the Properties. Under section 3.1(c), WCC has advised that neither James nor any other person has any claim or interest, including the interest now asserted by Mr. James.

12. In the Criminal Rate of Interest Decision, this Court concluded that Mr. James and the other Investors had relinquished any rights with respect to particular coal properties in exchange for their shared interest in the royalty payable under the RSA. This Court repeated that conclusion in the Sale Approval Decision.

   Criminal Rate of Interest Decision at para. 108,
   Criminal Rate of Interest Appeal at para 29,
   Sale Approval Decision at para 40

13. This is not a case in which the parties did not turn their minds to their rights in the future. The RSA indicates that the parties did consider what rights the Investors would have in relation to the coal licenses in the future. Section 4.3 of the RSA sets out the consequences of a forfeiture of the coal licenses. Section 8.1 of the RSA requires the Investors' consent before the RSA can be assigned. However, as this Court has found, the licenses have not been forfeited and the RSA has not been assigned, so these provisions are inapplicable to the sale.

   Sale Approval Decision at paras 66-67

14. The RSA contains an entire agreement clause at section 9.4, which provides the terms and provisions of the RSA constitute the entire agreement and supersede all previous oral or written communications. As this court noted in the Criminal Rate of Interest decision, "An entire agreement clause precludes a party to the contract from asserting that any promise or assurance made during the course of negotiations, which is not reflected in the contract, has binding force as a collateral warranty."

   Criminal Rate of Interest Decision at para 79

15. There is no ambiguity about the meaning of Section 3.1(c) – it is clearly a representation about the ownership of the Properties at a point in time. Mr. James's interpretation of Section 3.1(c) as giving him and the other Investors a right to consent to any sale of the Properties is not reasonable. Instead, he is asserting that such a consent right exists or should be read into the RSA as a result of the discussions and understanding of the parties prior to signing the RSA – essentially, arguing for a collateral warranty. The entire agreement clause precludes any such interpretation of the RSA or any reliance on the evidence put forward by Mr. James and Mr. Austin.

16. The evidence advanced by Mr. James regarding the parties' intentions and specific concerns at the time the RSA was executed and his subjective beliefs regarding the commitments made to him are irrelevant in light of the entire agreement clause in the contract Mr. James signed, inadmissible as subjective evidence, and lacking in credibility given the passage of time.

   Corporate Formalities Decision at paras 48, 50
   Criminal Rate of Interest Decision at para 46

17. Affidavit evidence sworn a decade ago in connection with the Criminal Rate of Interest Decision states that Mr. Devlin, WCC's solicitor, conceived of the protections from forfeiture set out in section 4.3 of the RSA. No mention is made of any protections for the Investors in the event of a sale of the mines, even though WCC had negotiated for protections on a sale of property interests

for itself as part of the Gibson Agreement. Mr. James was a director of WCC at the time the Gibson Agreement was negotiated.

> Affidavit of Kevin James, sworn January 25, 2017 ["James Affidavit"] at paras 50, 56, 57
> Affidavit of David Austin, sworn February 27, 2017 ["Austin Affidavit"] at paras 19, 21
> Affidavit of David Fawcett, sworn January 19, 2007 ["Fawcett Affidavit"] at para 31

18. Moreover, Mr. James' and Mr. Austin's evidence on these points is not admissible. As Pearlman J concluded in the Criminal Rate of Interest Decision, "evidence of the subjective intentions of the parties or of pre-contractual negotiations is not relevant or admissible on the construction of a contract."

> Criminal Rate of Interest Decision at para 62,
> Criminal Rate of Interest Appeal at para 25

19. At best, Mr. James's evidence regarding the Investors' desire to have entered into a contract that prohibits the sale of the coal licenses without their consent goes to the factual circumstances in which the RSA was signed. However, as Pearlman J concluded in the Criminal Rate of Interest Decision, "the words of the contract must not be overwhelmed by a contextual analysis."

> Criminal Rate of Interest Decision at para 65
> Criminal Rate of Interest Appeal at para 26

20. The factual matrix for the Ownership Representation and the RSA generally is adequately set out in the recitals to the RSA: WCC had made certain applications to acquire the West Brazion, Burnt River, Wolverine and Mount Spieker mines and related coal interests (recital A); Mr. James and the other Investors assisted WCC in acquiring those Properties (recital B); and were to be compensated with a royalty (recital C).

21. Mr. James is seeking to replace the words of the contract entirely with extraneous and questionable evidence disguised as alleged contextual factors. This is not permissible.

22. As a director of WCC, Mr. James had some control over WCC at the time the RSA was executed. It would have been a simple matter to have included clear language to grant the Investors the rights he now alleges they bargained for.

> Sale Approval Decision at para 67(d).

23. Mr. James had access to the Gibson Agreement and could have required that language similar to the consent rights granted to WCC thereunder be inserted into the RSA.

24. Mr. James's claim for "projected royalties" is similarly is not based on the terms of the RSA itself. Section 2.1 of the RSA specifies that Mr. James is owed a royalty of the "price (FOBT at Port)" for coal produced from the mines. The phrase "FOBT at Port" means that the royalty is calculated based on the price actually obtained for coal after it has been sold and shipped. The RSA does not contemplate "projected royalties" should the actual amount of coal produced be unknown. On its face, the RSA was not intended to encompass circumstances where the exact royalty could not be determined – for instance, where Walter Energy no longer operated the mines.

Ground 1 Continued: Mr. James's Claim Is Barred Due To Res Judicata

25. Mr. James is barred from claiming that Walter Energy breached the RSA by selling the coal licenses without Mr. James's consent because this question was addressed in the Sale Approval Decision, and is therefore *res judicata*. This Court has already determined that Mr. James's consent was not required by the RSA. Mr. James cannot now seek to reinterpret the RSA contrary to previous judgments of this Court in this proceeding.

26. The doctrine of *res judicata* bars parties from re-litigating issues and arguments that were disposed of in an earlier proceeding. *Res judicata* has two branches, each of which is sufficient to bar a party from raising an argument: issue estoppel and cause of action estoppel.

> *Fontaine v Canada (Attorney General)*, 2017 BCSC 418 ["*Fontaine*"]

27. Issue estoppel will bar a matter from being re-litigated when the same question has been decided, the judicial decision creating the estoppel was final, and the parties to the previous final judicial decision were the same as the parties in this proceeding.

> *Erschbamer v Wallster*, 2013 BCCA 76 ["*Erschbamer*"] at para 13

28. Cause of action estoppel will bar a cause of action from being raised when there is a final decision in a prior proceeding, the parties to the current proceeding were parties to the prior proceeding, the cause of action in the prior proceeding is not separate and distinct, and the basis of the current proceeding was or could have been argued in the prior proceeding if the parties had exercised reasonable diligence.

> *Erschbamer* at para 15

29. Both issue estoppel and cause of action estoppel are triggered here. This Court has already considered what rights the RSA granted to Mr. James respecting the coal licenses in the Sale Approval Decision. Mr. James appeared at the Sale Approval Hearing in 2016 and made representations objecting to Walter Energy's proposed sale of the coal licenses.

30. Mr. James's argument at the Sale Approval hearing rested on the assumption that royalty obligations under the RSA were tied to ownership of the coal licenses. At that time, Mr. James took the position that the RSA "ran with the land" such that any new owner of the coal licenses would take them subject to his royalty obligation. This is incompatible with Mr. James's current position that Walter Energy's obligation "does not end upon the transfer of the coal licences to another party".

> Sale Approval Decision at paras 24-25
> NOA at para 4

31. Mr. James did not advance his current argument that the RSA required his consent to transfer the coal licenses, though he had ample opportunity to do so.

32. This Court rejected Mr. James's submissions and approved the sale of the coal licenses. The Court held the RSA did not "grant, assign, transfer or convey any rights to Mr. James in relation to the coal licenses". While Mr. James could have "obtained the right to control any further disposition of the Properties by WCC", this Court held he did not do so. The Court concluded, "Importantly, the RSA does not restrict the ability of Walter Energy to sell the properties."

Sale Approval Decision at paras 67, 69, 70

33. Parties must put their best foot forward in litigation. After being unsuccessful once, they cannot later advance arguments that bear directly on matters already decided in earlier proceedings. Mr. James had the opportunity to advance his interpretation, rectification and implied term arguments at the Sale Approval Hearing last year. He failed to do so. He cannot now seek to undercut previous decisions by advancing claims inconsistent with this Court's findings about what rights he was granted under the RSA.

Fontaine at para 32

Ground 2: The RSA Cannot Be Rectified Because There Is No Prior Contract

34. Even if *res judicata* did not bar Mr. James from arguing that the RSA should be rectified, Mr. James's claim does not meet the preconditions for contractual rectification.

35. Rectification is a discretionary equitable remedy that must be used "with great caution". It is only available where there was a prior oral agreement between the parties, but a written instrument incorrectly or erroneously recorded that agreement. Rectification does not empower a court to alter the agreement between the parties; rather, the court's equitable jurisdiction is limited to ensuring that the written instrument accurately reflects the specific terms that parties had already agreed to.

Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd, 2002 SCC 19 ["*Sylvan*"] at para 41,
Canada (Attorney General) v Fairmont Hotels Inc, 2016 SCC 56 ["*Fairmont*"] at paras 12, 30

36. A party seeking rectification must overcome the following hurdles:

(a) Prove the existence and specific content of a prior oral contract between the parties;

(b) Prove that the written instrument is inconsistent with the prior oral contract, and that allowing one party to take advantage of the error would be "the equivalent of fraud";

(c) Establish the precise form in which the written instrument can be made to express the prior intention; and

(d) Demonstrate all of the foregoing with "convincing proof" above and beyond the ordinary civil standard.

Sylvan at paras 36-41,
Fairmont at para 32

37. Mr. James has provided no evidence that at the time of the RSA, the parties specifically agreed that Mr. James's consent would be required before WCC could sell the coal licenses.

38. The only evidence Mr. James has adduced about what the parties agreed regarding their rights in the event of a sale of the properties comes in the Austin Affidavit at paragraph 21. Mr Austin states (disclosing solicitor-client privileged information without authorization):

> I particularly spoke to counsel about what would occur if Western sold the properties. I was told the royalty agreement provided that the royalty would stay with the properties no matter who owned the licences.

39. Mr. Austin's statement does not support Mr. James's current allegation that the RSA should be rectified to include a consent right. Rather, Mr. Austin contradicts Mr. James's current allegation by stating effectively that the royalties are tied to the owner of the licenses. Mr. Austin contradicts Mr. James's theory that Walter Energy remains obliged to pay royalties even though it no longer owns the licences.

40. Mr. James's evidence is that it did not occur to him that WCC could transfer or sell the licenses at a later date other than to the Investors.

    James Affidavit at para 58

41. There is no evidence in the record that the parties specifically agreed that WCC would continue to be liable to Mr. James for royalties even if Walter Energy no longer owned the properties or that WCC had to seek the Investors' consent to any sale. Rather, as this Court found, the parties did consider Mr. James's rights with respect to the coal licenses – but only in the context of forfeiture.

    Sale Approval Decision at para 67(f)

42. Rectification cannot alter the terms of the agreement to achieve an outcome the parties now say they always intended. Mere intention cannot ground a rectification claim. Instead, rectification is strictly limited to cases where parties agreed to specific terms that were incorrectly recorded by mistake. Rectification cannot be used as Mr. James proposes: to radically reshape parties' rights and obligations under the agreement in order to generate an outcome Mr. James now says they always intended, on theories that are inconsistent with the evidence and Mr. James's earlier positions.

    Fairmont at paras 3, 12, and 29

43. A court may not give effect to parties' unexpressed intentions, or "impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not." To rectify the RSA Mr. James must prove that the parties specifically considered what would happen if the coal licences were sold and agreed a sale could not occur without Mr. James's consent, but this term was erroneously omitted from the written instrument. He has not discharged this evidentiary burden.

    Fairmont at para 13,
    Sylvan at para 40,
    Jacobsen v Bergman, 2002 BCCA 102 at para 6

Ground 3: There Is No Implied Term in the RSA

44. Mr. James's alleged implied term is inconsistent with the RSA. Clause 9.4 of the RSA states that the RSA "constitute[s] the entire agreement between the parties and will supersede all previous oral or written communications." At the time the RSA was signed, both parties agreed that the document as written encompassed all the terms of their agreement.

45. Even if the RSA did not contain an entire agreement clause, Mr. James's alleged implied term does not meet the standard for implied terms established by the Supreme Court of Canada. A court will ask whether the proposed implied term is "necessary to give business efficacy to a contract or as

otherwise meeting the 'officious bystander test' as the term the parties would say, if questioned, that they had obviously assumed."

> *Moulton Contracting Ltd v British Columbia*, 2015 BCCA 89 at para 53, *Canadian Pacific Hotels Ltd v Bank of Montrea*l, [1987] 1 SCR 711 at para 43

46. Implying a term that Mr. James's consent was required before Walter Energy could sell the coal licenses does not meet the "officious bystander" test. It is not "obvious" that Mr. James's consent was required before the coal licenses could be sold – in fact, this Court came to the opposite conclusion in the Sale Approval Decision.

> Sale Approval Decision at para 69

47. Mr. James' proposed implied term would not give business efficacy to the RSA. The RSA is a royalty-sharing agreement. There is nothing in the RSA to suggest it was intended to give each of the individual royalty beneficiaries, including Mr. James, veto power in perpetuity over the disposition of Walter Energy's assets.

Ground 4: Walter Energy is Only Liable to Pay Royalties on Coal that Walter Energy Sells

48. In the further alternative, Mr. James contends that he has a provable claim against Walter Energy because Walter Energy's "obligation to pay Mr. James his royalty amounts does not end upon the transfer of the coal licences to another party." Mr. James argues that by disclaiming the RSA, Walter Energy has become liable to Mr. James for "royalties, or the amount of the projected royalties" for coal that may or may not be produced from mines Walter Energy does not own. Such an interpretation is unsupported and commercially unreasonable.

> NOA at paras 4-5

49. Courts will interpret contracts in a commercially reasonable fashion, giving effect to what the parties "reasonably intended." The starting point is the plain language of the contract. Where a dispute arises about the meaning of plain language, courts will prefer an interpretation that "achieves a result consistent with commercial efficacy and good sense. Considerations of reasonableness and fairness inform this exercise."

> *Miller v Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 ["*Miller*"] at para 15

50. Interpreting the RSA to require Mr. James' consent to transfer the coal licenses, or to make Walter Energy liable for royalties on coal from mines Walter Energy no longer owns, is not "consistent with commercial efficacy and good sense". It is not commercially reasonable to suppose that a party would contract to pay royalties in perpetuity on coal it did not sell from mines it does not own.

51. Mr. James himself stated the RSA was drafted in contemplation of a mutual benefit of the Investors and WCC from the mines' operation. The royalty is a share in the cash flow received by WCC from the coal licences.

> James Affidavit at para 48

52. Mr. James's proposed valuation of his claim illustrates the commercial unreasonableness of this interpretation. Mr. James proposes that his claim should be valued today based on the projected amount of coal the mines will produce for a third party at a projected coal price and a projected foreign exchange rate. This valuation might be wholly at odds with the amount of coal actually produced by the third party operating the mine, and is certainly more than what Mr. James would receive had Walter Energy retained the mines in their idled state.

53. Furthermore, under the CCAA, a party to a disclaimed agreement has a provable claim if he or she "suffers a loss in relation to the disclaimer or resiliation". When a contract is disclaimed in the CCAA process, a party has a provable claim for what he or she would have received under the contract if it had not been disclaimed. However, Mr. James has not suffered a loss as a result of the disclaimer.

54. The RSA does not provide Mr. James with a guaranteed income stream: it contains no minimum payments and imposes no obligation on Walter Energy to produce coal.

James Affidavit at para 41

55. Walter Energy ceased coal production in 2014 and the mines subject to the RSA have not been operational in Walter Energy's hands since then. There is no dispute that Walter Energy was entitled to cease coal production at its discretion, nor has Mr. James claimed royalties for the period that the mines were idled.

56. To the extent that Mr. James had reasonable expectations, they have already been met. Mr. James acknowledges he understood the risk that he might receive no payments under the RSA at all. Moreover, Mr. James states he expected the productive life of the mines – and thus, the duration of his royalty period – to be 15-20 years. Mr. James has received royalties over the course of 14 years.

Sale Approval Decision at para 43,
James Affidavit at paras 51, 54

57. There is no realistic prospect, and Mr. James could not reasonably have expected, that Walter Energy could have retained the mines, avoided liquidation, emerged from CCAA protection recapitalized, and eventually resumed coal production. Neither the sale of the coal licenses nor the disclaimer of the RSA caused Mr. James to suffer a loss for which Walter Energy is liable to compensate him.

Ground 5: Walter Energy Was Not Unjustly Enriched

58. Walter Energy was not unjustly enriched by the sale of the coal licenses. This Court has held that the mining rights were not impressed with an obligation to pay Mr. James a royalty. Moreover, there was a juristic reason for both the sale of the coal licenses and the disclaimer: an order of this Court.

Sale Approval Decision at paras 66-67

59. Even if Walter Energy had been unjustly enriched, as Mr. James himself concedes, Mr. James would have a claim for only 0.219% of the proceeds Walter Energy received from the sale of the licenses. This would amount to US$7,150.35 – considerably less than the $7,150,000 that Mr. James currently claims.

NOA at paras 6, 7

Inflated Valuation of Mr. James' Claim

60. New Walter believes that the valuation of Mr. James' claim is inflated and will rely on expert evidence to be adduced on this point.

Part 6: MATERIAL TO BE RELIED ON

61. Affidavit #1 of Larry Evans, to be sworn

62. Affidavit #1 of an expert, to be sworn

63. Monitor's Report, to be filed

64. Materials previously filed with this Court in these CCAA proceedings

65. Materials previously filed with this Court and the British Columbia Court of Appeal in the following proceedings:

    (a) Vancouver Registry no. L050703;

    (b) Vancouver Registry no. S070436; and

    (c) Court of Appeal no. CA037084.

New Walter estimates that the Application will take 1 day for argument. New Walter estimates that an additional 1.5 days will be required if experts are cross-examined in Court. New Walter estimates that an additional 1.5 days will be required if the other fact witnesses are cross-examined in Court.

☒ New Walter has filed in this proceeding a document that contains the New Walter' address for service.

☐ New Walter has not filed in this proceeding a document that contains an address for service. The New Walter' ADDRESS FOR SERVICE is:

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Date: 03/11/2017

Signature of lawyer for New Walter

Mary Paterson

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NO. S-1510120
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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

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