Court of Appeal File No. CA44448

COURT OF APPEAL

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 A 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

PETITIONERS
(RESPONDENTS)

AND

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

REPLY BOOK OF THE RESPONDENTS

United Mine Workers of America
1974 Pension Plan and Trust

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TAB 1

This is the 1st Affidavit of
William G. Harvey in this case and
was made on December 4, 2015

NO.
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 A PLAN OF COMPROMISE OR ARRANGEMENT OF
WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER
PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

AFFIDAVIT

I, **WILLIAM G. HARVEY**, Chartered Financial Analyst, of the City of Birmingham, in the State of Alabama, United States of America, MAKE OATH AND SAY AS FOLLOWS:

I. INTRODUCTION

1. I am the Executive Vice President and Chief Financial Officer of Walter Energy Canada Holdings, Inc. and the Chief Financial Officer and Executive Vice President of Walter Energy, Inc. and as such have personal knowledge of the facts hereinafter deposed to, except where such facts are stated to be based upon information and belief and where so stated I do verily believe the same to be true.

2. This affidavit is made in support of a petition by Walter Energy Canada Holdings, Inc. and its direct and indirect subsidiaries and affiliates listed on **Exhibit "A"** to this affidavit under the heading "Petitioners" (collectively, the "**Canadian Petitioners**") for relief under the *Companies' Creditors Arrangement Act*, 1985, c. C-36, as amended (the "**CCAA**") and for the extension of such relief to the partnerships listed on **Exhibit "A"** to this Affidavit under the heading "Partnerships" (such partnerships, collectively with the Canadian Petitioners the "**Walter Canada Group**").

3. I have spoken with certain officers, directors, employees and advisors of the Walter Canada Group and the U.S. Petitioners (defined below), and where I have relied on information from such

discussions, I believe such information to be true. All amounts are in Canadian dollars unless otherwise indicated.

4. This affidavit contains information under the following headings:

II. OVERVIEW

5. The Walter Canada Group consists of producers and exporters of metallurgical coal for the global steel industry. The coal industry has experienced a significant and prolonged downturn. As a result, and as more fully described herein, the operations of the Walter Canada Group were idled, their mines were placed in care and maintenance and efforts were made to contain costs in hopes that the price of coal would rebound. In addition, efforts have been made to find an out-of-court resolution of the Walter Canada Group's financial difficulties. The Walter Canada Group has exhausted its efforts to reach an out-of-court solution to its financial difficulties and faces a looming liquidity crisis.

6. Walter Energy Canada is a wholly owned subsidiary of Walter Energy U.S. Walter Energy U.S. and a number of its U.S. subsidiaries filed voluntary petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "**Chapter 11 Cases**") with the United States Bankruptcy Court in Birmingham, Alabama (the "**U.S. Court**") on July 15, 2015 (the "**U.S. Petition Date**"). As discussed in more detail below, developments in the Chapter 11 Cases have resulted in the approval of bid procedures and the approval of a stalking horse asset purchase agreement that will (if it is the successful bid) see the majority of the assets of Walter Energy U.S. and the assets of certain of its U.S. subsidiaries sold to a new company pursuant to a credit bid in favour of certain lenders to the Walter U.S. Group. The equity interests in the members of the Walter Canada Group and the assets held by the members of the Walter Canada Group are not part of the purchased assets under the credit bid. As a result of the developments in the Chapter 11 Cases and the looming liquidity crisis faced by the Walter Canada Group, it has become necessary for the Petitioners to seek relief pursuant to the CCAA for all of the members of the Walter Canada Group so that they can develop and implement an independent sales process to maximize value for their stakeholders in consultation with various governmental authorities.

7. The Walter Canada Group is facing the following challenges:

(a) costs in excess of $16 million per year associated with maintaining the Walter Canada Group's mining operations in an idled state, with limited offsetting revenue;

(b) aggregate long-term liabilities in respect of the Canada Revolver (defined below) associated with undrawn letters of credit of approximately of $22.6 million with associated annual fees and interest expenses;

(c) claims of employees and other creditors that have or will crystallize in the near term if certain members of the Walter Canada Group do not recommence mining operations, including an employee claim estimated at approximately $11.3 million that will allegedly become due if unionized employees at the Wolverine Mine do not return to work before April 2016;

(d) due and accruing due B.C. mineral tax liabilities, including liabilities in respect of a payment plan entered into by Walter Energy Canada and the B.C. Ministry of Finance and potential additional liabilities relating to years that have not yet been assessed;

(e) loss of the financial support normally provided by Walter Energy U.S. as a consequence of developments in the Chapter 11 Cases; and

(f) pending loss of essential managerial and back office support that will occur upon the consummation of a sale of a significant portion of the assets of Walter Energy U.S. and certain of its U.S. subsidiaries.

8. The Walter Canada Group has a finite amount of liquidity available to address the foregoing challenges and, as discussed in more detail below, limited access to further sources of funding in the near term. These challenges, when combined with the projected liquidity shortfall and the current market environment for metallurgical coal and steel, make it necessary for the Walter Canada Group to take immediate steps to attempt to stabilize their affairs and seek a going concern outcome in consultation with the applicable governmental authorities while the members of the Walter Canada Group still have sufficient resources available. If a going concern solution cannot be found, the Walter Canada Group will need to implement a prudent and responsible wind down of its remaining operations.

9. I made a declaration dated July 15, 2015 in support of the first day motions in the Chapter 11 Cases, which is attached as **Exhibit "B"** to this affidavit (my "**First Day Declaration**"). My First Day Declaration provides a comprehensive overview of the Walter Group's background, its business and the events leading up to the commencement of the Chapter 11 Cases. In this affidavit, I provide a high-level overview of the Walter Group's background and relevant details regarding the Chapter 11 Cases, focusing on the operations of the Walter Canada Group.

(A) Defined Terms

10. This affidavit will use the following defined terms, which are consistent with my First Day Declaration. For the sake of clarity, if a defined term uses the word **"Energy"**, it is a discrete corporate entity. If a defined term uses the word **"Group"**, it represents a collection of corporate entities:

(a) ***"Walter Energy U.S."*** is Walter Energy, Inc., a company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama, and the parent company of all the other members of the Walter Group. Walter Energy U.S. directly or indirectly has an interest in all of the members of the Walter Group.

(b) ***"Walter Group"*** includes all companies, partnerships or other corporate structures directly or indirectly affiliated with Walter Energy U.S.

(c) ***"Walter U.S. Group"*** and ***"Walter Non-U.S. Group"***: The Walter Group operates its business in two distinct segments: (i) U.S. Operations (the "**Walter U.S. Group**"), and (ii) Canadian and U.K. Operations (the "**Walter Non-U.S. Group**"). As discussed in more detail below, Walter Energy U.S., a public company, reports its financial results by segment and does not provide financial reporting for the Walter Canada Group or the Walter U.K. Group independently.

(d) ***"Walter Canada Group"*** and ***"Walter U.K. Group"***: The Walter Non-U.S. Group can be further broken down into Canadian and U.K. operations (the "**Walter Canada Group**" and "**Walter U.K. Group**", respectively). The Walter Canada Group consists of all the entities listed in Exhibit "A", including under the headings "Petitioners" and "Partnerships". The members of the Walter U.K. Group are indirect subsidiaries of Walter Energy Canada.

(e) ***"Walter Energy Canada"*** is Walter Energy Canada Holdings, Inc., a company incorporated under the laws of B.C. Walter Energy Canada is the parent company for the Walter Non-U.S. Group. Walter Energy Canada is wholly owned by Walter Energy U.S.

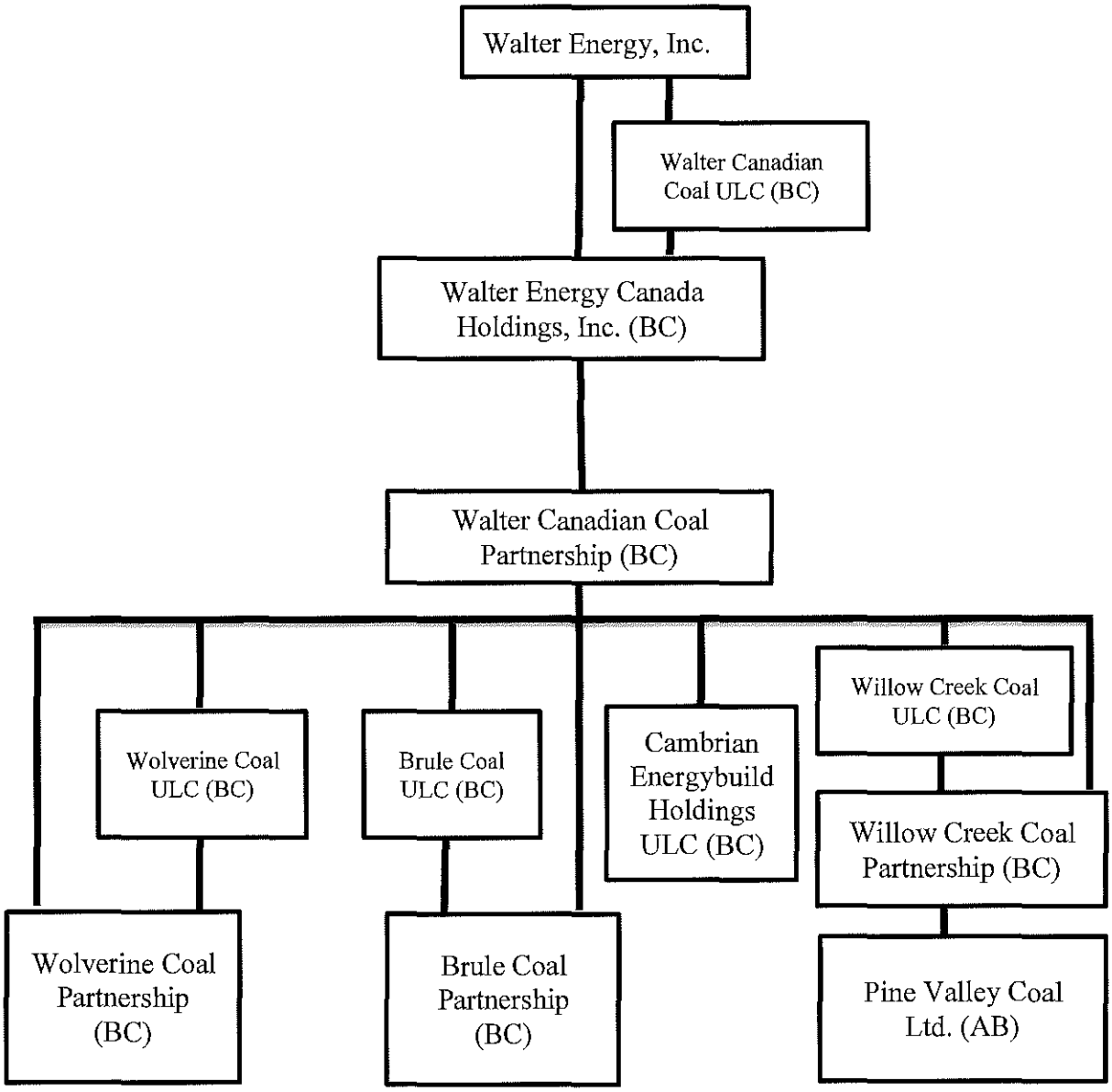
(f) ***"U.S. Petitioners"*** includes substantially all members of the Walter U.S. Group. Attached hereto as **Exhibit "C"** is a list of the members of the Walter U.S. Group that filed for and were granted Chapter 11 protection.

(B) The Walter Canada Group

11. Walter Energy Canada is a holding company and the general partner of Walter Canadian Coal Partnership. It was incorporated on March 9, 2011. All of the issued and outstanding shares of Walter Energy Canada are held by Walter Energy U.S. Walter Energy U.S. formerly traded on the NYSE under the symbol "WLT", but was delisted due to failure to meet certain continued listing conditions.

12. The principal operating entity of the Walter Canada Group is Walter Canadian Coal Partnership, a B.C. general partnership. Its partners are Walter Energy Canada and Walter Canadian Coal ULC, a B.C. unlimited liability company formed on June 28, 2012. All of the issued and outstanding shares of Walter Canadian Coal ULC are held by Walter Energy Canada.

13. The principal assets of the Walter Canada Group are the Brule, Willow Creek and Wolverine Mines, located in northeast B.C., and the Walter Energy Canada Group's 50% interest in the Belcourt Saxon Coal Limited Partnership. As the organizational chart attached hereto as **Exhibit "D"** indicates, Walter Canadian Coal Partnership is a partner of each of the three B.C. partnerships that operate the Canadian mines: Wolverine Coal Partnership, Brule Coal Partnership and Willow Creek Coal Partnership. Each of the partnerships has a separate B.C. unlimited liability company as its other partner. The mines will be discussed in more detail below. The following is a simplified version of the organizational chart at Exhibit "D":



15. British Columbia is the Walter Canada Group's chief place of business.

(C) The Walter U.K. Group

16. The Walter Group also has U.K. assets, which are held through a B.C. unlimited liability corporation, Cambrian Energybuild Holdings ULC ("**Energybuild ULC**"). The Walter U.K. Group's operations consist of an underground development mine located in South Wales that produces anthracite coal.

17. Energybuild ULC is wholly owned by Walter Canadian Coal Partnership, and is a holding company that holds shares of a U.K. holding company that, in turn, owns shares of the U.K. companies that operate the mine in South Wales and perform other related activities.

18. The Walter U.K. Group's primary activity has been the development and expansion of the Aberpergym underground coal mine located at Glynneath in the Neath Valley. In the fall of 2011, the Walter U.K. Group stopped continuous mine development operations to focus on completing a new drift opening. The Walter U.K. Group completed the upper section of the drift during 2012, but due to challenges related to an oversupply of coal and decreased demand, the Walter U.K. Group took steps to reduce development spending in this U.K. mine until market conditions improve. This has slowed the development of the drift opening.

19. The Walter U.K. Group idled the U.K. mines in 2015 to further manage its liquidity. Towards that end, on or about June 5, 2015, the Walter U.K. Group commenced a 30-day consultation period with the National Union of Mineworkers South Wales in connection with the Walter U.K. Group's plans to idle the U.K. mines. On or about July 4, 2015, the majority of the Walter U.K. Group's employees were rendered redundant, and the mines now retain only those employees necessary to keep the premises in safe, idling condition. Before July 4, 2015, the Walter U.K. Group employed approximately 70 full-time employees, including management and personnel engaged in underground mining activities. Approximately 10 employees were retained to sell remaining coal inventory and to manage security and environmental matters. Development of the U.K. mine can begin relatively quickly if market conditions improve.

20. Prior to the commencement of the Chapter 11 Cases, the Walter U.K. Group generally funded its operations through sales of coal and intercompany loans received from Walter Energy U.S. The Walter U.K. Group owes approximately £4 million to the Walter U.S. Group in respect of borrowings made between April 2011 and March 2015. In June 2015, the Walter Canada Group advanced an additional US$3 million to the Walter U.K. Group to address its funding needs. It is anticipated that the Walter U.K. Group will not need any additional funding in 2015 and is projected to have sufficient funding to operate in its current idled state until the end of the third quarter of 2016.

21. At this time, it is not anticipated that the members of the Walter U.K. Group will be petitioners in these CCAA proceedings. The members of the Walter U.K. Group are not debtors in the Chapter 11 Cases.

(D) The Walter U.S. Group

22. As discussed in more detail in my First Day Declaration, the Walter U.S. Group has operations in Alabama and West Virginia. As of the U.S. Petition Date, the U.S. Petitioners had the following obligations (excluding accrued and unpaid interest):

Facility	Outstanding Indebtedness
2011 Credit Agreement	Term B Loan: $978.2 million US Revolver: $ 76.9 million[1]
9.50% Senior Secured First Lien Notes due October 15, 2019 ("**First Lien Notes**")	US$970.0 million
11.0% / 12% Senior Secured Second Lien PIK Toggle Notes due 2020	US$360.5 million
9.875% Senior Notes due 2020	US$388.0 million
8.50% Senior Notes due 2021	US$383.0 million
Total Funded Debt:	**US$3.146 billion**

23. The Walter U.S. Group has also guaranteed the US$150 million multi-currency revolving credit facility available to Walter Energy Canada under the 2011 Credit Agreement (the "**Canadian Revolver**"). No amounts are drawn on the Canadian Revolver, but the Walter U.S. Group has guaranteed Walter Energy Canada's obligations in respect of approximately $22.6 million of undrawn letters of credit issued under the 2011 Credit Agreement that are discussed in more detail below.

24. The Walter Canada Group does not have any obligations in respect of the US$3.146 billion of outstanding indebtedness described above. The Walter Canada Group only has limited obligations in relation to certain letters of credit issued for the benefit of the Walter Canada Group under the 2011 Credit Agreement. These obligations are described in more detail below.

25. Prior to the commencement of the Chapter 11 Cases, the Walter Group engaged in extensive negotiations with a committee of lenders under the 2011 Credit Agreement and holders of the First Lien Notes (the "**Steering Committee**") and their advisors to address the challenges faced by the Walter Group, including those faced by the Walter Canada Group. As a result, the U.S. Petitioners entered into a Restructuring Support Agreement ("**RSA**") with the Steering Committee. The RSA contemplated a consensual debt-to-equity conversion of Walter Energy U.S.'s prepetition first lien secured debt for substantially all of the reorganized Walter Group's common stock. As a result of developments in the Chapter 11 Cases, however, the RSA was terminated.

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[1] The US Revolver is undrawn but a number of outstanding letters of credit have been issued.

26. The Steering Committee and the U.S. Petitioners then engaged in further negotiations which resulted in the granting of the amended final order (A) authorizing postpetition use of cash collateral, (B) granting adequate protection to the prepetition secured parties and (C) granting related relief in the Chapter 11 Cases on September 28, 2015 (the "**Cash Collateral Order**"). A copy of the Cash Collateral Order is attached as **Exhibit "E"** to this affidavit. The Cash Collateral Order required the U.S. Petitioners to commence a sales process for certain assets held by the U.S. Petitioners and has certain more direct consequences for the Walter Canada Group, discussed below.

27. In accordance with the Cash Collateral Order, the U.S. Petitioners have begun to implement a sales process in the Chapter 11 Cases. On November 5, 2015 Walter Energy U.S. announced that it had entered into a stalking horse asset purchase agreement (the "**U.S. APA**") with a newly formed entity capitalized and owned by the First Lien Lenders ("**Coal Acquisition LLC**"), pursuant to which Coal Acquisition LLC became the stalking horse bidder in a bid to acquire substantially all of the Walter U.S. Group's Alabama assets. On November 25, 2015, the U.S. APA and related bid procedures were approved by the U.S. Court.

28. Pursuant to the bid procedures, a court-supervised auction process under section 363 of the U.S. Bankruptcy Code is scheduled to be held on January 5, 2016. Accordingly, the U.S. APA is subject to higher or otherwise better offers, among other conditions. If the U.S. APA is the successful bid pursuant to the sales process, it is anticipated that the transaction will close in mid to late February.

29. The APA does not include all the assets held by the Walter U.S. Group, such as the shares of Walter Energy Canada, nor does it include the assets held by members of the Walter Non-U.S. Group. PJT Partners Inc. has been canvasing the market in an attempt to find a purchaser for the assets of the Walter Canada Group. Following discussions with applicable government authorities, the Walter Canada Group anticipates that it will seek this Court's approval for further marketing efforts to be undertaken for the assets of the Walter Canada Group in these CCAA proceedings.

30. Once the sale contemplated by the U.S. APA is complete, the Walter U.S. Group will no longer be in a position to support the Walter Non-U.S. Group financially and it will no longer provide essential management services, unless other arrangements are made. These essential management services include accounting, procurement, environmental management, tax support, treasury functions, and legal advice. Currently, the Walter Canada Group pays approximately $1 million per month to the Walter U.S. Group for these essential management services, based on a historical overhead allocation methodology. Negotiations among the Walter Canada Group and the Walter U.S. Group are underway to address the provision of these services and the pricing of such services until the consummation of the transaction contemplated by the U.S. APA (assuming the U.S. APA is the successful bid).

(E) The Western Acquisition

31. On April 1, 2011, Walter Energy U.S. acquired Western Coal Corp. ("**Western**") and its subsidiaries. Walter Energy Canada was formed for the purpose of acquiring Western. Walter Energy Canada acquired all outstanding common shares of Western for US$3.3 billion[2] under an arrangement agreement approved by the B.C. Supreme Court pursuant to the B.C. *Business Corporations Act* (the "**Western Acquisition**"). Certain transactions in connection with the Western Acquisition, including share purchases, were completed and consideration was paid prior to April 2011. If these transactions are included, the total consideration paid in respect of the Western Acquisition was approximately US$3.7 billion. Before 2011, the Walter Group did not have any operations in Canada or the U.K. When the Western Acquisition closed, Walter Energy Canada acquired all direct and indirect subsidiaries of Western and their assets, including mines and mineral reserves in Canada, West Virginia and the U.K.

32. Concurrently, and in connection with entering into the arrangement agreement with Western, Walter Energy U.S., Western and Walter Energy Canada entered into a credit facility with Morgan Stanley Senior Funding, Inc., the Bank of Nova Scotia ("**BNS**") and the other lenders thereunder (the "**Bank Lenders**") pursuant to which, subject to the conditions set forth therein, the Bank Lenders committed to providing Walter Energy U.S. (the "**U.S. Borrower**"), Western and Walter Energy Canada (the "**Canadian Borrowers**" and, collectively with the U.S. Borrower, the "**Borrowers**") with US$2.725 billion of senior secured credit facilities, the proceeds of which were used to (i) fund the cash consideration for the Western Acquisition, (ii) pay certain fees and expenses in connection with the Western Acquisition, (iii) refinance all existing indebtedness of Walter Energy U.S. and Western and their respective subsidiaries, and (iv) provide ongoing working capital to Walter Energy U.S. and its subsidiaries (the "**2011 Credit Agreement**"). Due to its size, the 2011 Credit Agreement and the subsequent amendments are not attached to this Affidavit, but will be made available upon request.

33. As discussed in more detail below in the section titled "The Financial Position of the Walter Group", the Canadian Borrowers only have limited obligations in respect of the 2011 Credit Agreement. As discussed below, the majority of the funding Walter Energy Canada paid for the Western Acquisition was obtained under a hybrid debt transaction.

34. The Western Acquisition closed on April 1, 2011 with the following final consideration:

(a) payment of US$2,107,018,736.90, representing 67% of the total consideration for the transaction; and

(b) 8,951,558 shares of Walter Energy U.S., valued at approximately US$1,224,125,538, representing 33% of the total consideration for the transaction.

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[2] At the time of the Western Acquisition, the Canadian and U.S. dollars were trading near parity.

35. The Western Acquisition was a strategic initiative by Walter Energy U.S. to increase reserves available for future production and create a diverse geographical footprint with strategic access to high-growth steel-producing countries in both the Atlantic and Pacific basins.

36. After the completion of the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and to organize the Walter Group into geographical business segments, the Walter U.S. Group, the Walter Canada Group and the Walter U.K. Group.

III. THE WALTER GROUP'S BUSINESS – THE COAL INDUSTRY

37. The Walter Group is a leading producer and exporter of metallurgical coal for the global steel industry, with mines, mineral reserves and operations in the U.S., Canada and the U.K. There are three types of metallurgical coal: (i) hard coking coal, (ii) semi-soft coking coal, and (iii) pulverized coal injection ("**PCI**") coal. The Walter Canada Group's mines produce hard coking coal and PCI coal.

38. In recent years, the global market for metallurgical coal has sharply contracted. Metallurgical coal markets are influenced by the level of crude steel production, which in turn depends on global economic conditions. Recessionary forces in the global economy reduced global demand for metallurgical coal and resulted in a precipitous decline in its price.

39. The *British Columbia Coal Industry Overviews* for the years 2011 to 2014 (attached hereto as **Exhibit "F"**) explain that, following a historic peak in 2011, prices of hard coking and PCI coal decreased as global inventories increased. The sharp decrease in price from 2011 to 2014 is demonstrated by the table below:

	2011	**2012**	**2013**	**2014**
BC premium hard coking coal	US$220 per tonne	US$175 per tonne	US$155 per tonne	US$121 per tonne
PCI coal	US$144 -180 per tonne	US$144 -180 per tonne	US$125 - $144 per tonne	US$107 per tonne

(All prices estimated West Coast Port Price.)

40. The benchmark price metallurgical coal has dropped dramatically from US$330 per tonne in the second quarter of 2011 to US$89 per tonne in the fourth quarter of 2015.

41. According to Wood Mackenzie's *Global Metallurgical Coal Short-term Outlook* released in September 2015, attached as **Exhibit "G"** to this affidavit, metallurgical coal prices are expected to remain depressed throughout 2015, with a modest recovery expected in early 2016.

42. At current prices, even with the modest recovery Wood Mackenzie predicts in early 2016, the Walter Canada Group anticipates that metallurgical coal production will remain uneconomic for the immediately foreseeable future.

43. Over the last two years, the high cost of coal extraction in northeastern B.C., combined with low metallurgical coal prices and the near-term market outlook caused the Walter Group, including the Walter Canada Group, to focus on containing costs to preserve enterprise value and mitigate the impact of poor market conditions. This strategy included planned reductions in capital spending.

44. In B.C., reductions in capital spending have been achieved by way of idling mines or otherwise curtailing operations. Mining operations at the Walter Canada Group's three mines (Brule, Willow Creek and Wolverine) were curtailed or idled between April 2013 and June 2014 and placed in care and maintenance, all in an effort to reduce costs and minimize losses while the metallurgical coal market remained depressed. Steps have been taken to ensure that the mines can return to production quickly if market conditions warrant. Copies of the press releases announcing the idling of the mines are attached as **Exhibit "H"** to this Affidavit.

45. Idling of the mines has resulted in significant savings for the Walter Non-U.S. Group. Walter Energy U.S. reported a Walter Non-U.S. Group operating loss of US$183.2 million for the year ended December 31, 2014. For the three months ended September 30, 2015, Walter Energy U.S. reported a Walter Non-U.S. Group operating loss of US$2.974 billion. The operating results for the Walter Non-U.S. Group for the nine months ended September 30, 2015 include asset impairment charges of US$2.9 billion to write-down the carrying values of the Canadian and U.K. operations segment to fair value. In the absence of this write-down, the operating loss would have been approximately US$74 million, a significant improvement over the 2014 year that resulted from the idling of the Canadian and U.K. mining operations.

46. The suspension of mining operations was intended to be temporary, and the Walter Canada Group intended to resume operations once existing inventories had been depleted and metallurgical coal prices had recovered. However, the idling of the mines has been prolonged because metallurgical coal prices continue to worsen and there is significant global overcapacity. The Walter Canada Group continues to monitor developments such as the weakening Canadian dollar and declining diesel fuel prices to assess whether and when to resume mining operations. However, these developments are not sufficient at present to warrant a restarting of the Canadian mines. Given the recent developments in the Chapter 11 Cases, the Walter Canada Group does not have sufficient resources to wait and see whether the market for Canadian coal will improve.

47. To successfully restructure, the Walter Canada Group needs to survive the prolonged depressed coal prices with sufficient capital to restart operations. The most viable restructuring option available to the Walter Canada Group at the time of this Affidavit is a sale of the assets pursuant to the CCAA.

IV. THE WALTER CANADA GROUP – MANAGEMENT AND MINES

48. The Walter Group's financial statements report the Walter Non-U.S. Group on a consolidated basis; however, the Walter Canada Group and the Walter U.K. Group are operated separately and there is little overlap between the two corporate groups, other than the fact that the President of Walter Energy Canada is also the President of Energybuild Group Limited, the parent company of all of the U.K. members of the Walter Group.

49. The Canadian mining operations consist of three surface metallurgical coal mines in Northeast B.C.'s coalfields: (i) the Brule Mine, (ii) the Willow Creek Mine, and (iii) the Wolverine Mine, sometimes referred to as the Perry Creek Mine. The Brule and Willow Creek Mines are near Chetwynd, B.C.; the Wolverine Mine is near Tumbler Ridge, B.C.

50. As of December 31, 2014, the Walter Canada Group was estimated to have approximately 133.4 million metric tonnes of recoverable metallurgical coal reserves including 91.3 million metric tonnes at potential future mine sites (including the Walter Canada Group's share of Belcourt Saxon's reserves). As discussed, all the Walter Canada Group mines were idled prior to December 31, 2014, so these estimates are generally unchanged.

51. The Canadian mines are located near existing infrastructure established for the Northeast B.C. coalfields, including rail and road networks that are available year round. Coal produced from the mines is shipped by rail to the Ridley Terminals in Prince Rupert. Active mineral extraction at each of the three mines has been suspended but existing coal inventory was being shipped to Prince Rupert in the third quarter of 2015. For the nine months ended September 30, 2015, a total of 634,000 metric tonnes of coal was sold by the Walter Non-U.S. Group. Only 100,000 metric tonnes was produced. Instead, existing inventory at the Brule and Willow Mine was shipped.

52. A more detailed description of the Canadian operations at each of the mines is set out below.

(A) Brule Mine

53. Brule Coal Partnership ("**Brule Partnership**") operates the Brule Mine, which is located 28 miles south of Chetwynd, B.C. The Brule Mine is an open pit metallurgical coal mine that produces pulverized coal injection coal. PCI coal is generally sold at 15-20% discount to the price of hard coking coal. As of December 31, 2014, the Brule Mine had approximately 16.6 million metric tonnes of recoverable coal reserves. The Brule Mine is expected to have a life of at least 8 years (assuming the applicable permits are renewed or extended), which could be extended depending on how the mine is operated.

54. The Brule Mine does not have a processing plant or a rail load-out facility. Instead, coal from the Brule Mine is transported by truck to the Willow Creek Mine for processing and loading onto rail cars for shipment to Prince Rupert.

55. The dramatic drop in coal prices led the Walter Canada Group to idle the Brule Mine in June 2014. Since that time, the only operations at the Brule Mine were loading the remaining coal and hauling it to the Willow Creek Mine, maintaining the mine and mining equipment, and complying with environmental and other laws and regulations. The final haul of coal from the Brule Mine to Willow Creek occurred on or about April 28, 2015.

56. Idling costs for both the Brule Mine and Willow Creek Mines are estimated to be in excess of $652,000 per month, with some seasonal variation. Idling costs consist of property taxes, expenses related to water and air sampling, reporting to the Ministry of Environment, surveying, geotechnical support, reclamation matters, other environmental monitoring, expenses related to the maintenance of the bioreactor (discussed below), maintenance of the mining machinery and equipment, loss control expenses and labour costs associated with the foregoing. Employment matters at the Brule Mine are described in greater detail below.

57. The Walter Canada Group has experienced some issues meeting the revised provincial water quality guidelines relating to selenium, nitrate and sulphate levels at the Brule Mine. Like many coal mines, the Brule Mine operations have resulted in increased levels of selenium (a natural occurring element) being released into the environment, largely as a result of rain falling on rock exposed through the mining process.

58. The selenium issues at the Brule Mine are more significant than at the Wolverine and Willow Creek Mines, in part because of differences in the local environment and dilution rates of the neighbouring creeks and rivers. The Walter Canada Group is working with the British Columbia Ministry of Environment to address selenium issues at Brule and various selenium management approaches have been considered. This includes, but is not limited to, a biochemical reactor which has been permitted and constructed, and is presently being tested (for the first time in a Northern Canadian mine).

59. The Walter Canada Group estimates that the cost of maintaining the bioreactor through to the end of the first quarter of 2016 will be less than US$150,000. If the bioreactor is successful in meeting its objectives, it is anticipated that two more bioreactors will be established and a third may be constructed. The cost to build each bioreactor is estimated at approximately US$1.0 million. Given the nature of the technology and the local environmental conditions, the Walter Canada Group will not know until August 2016 whether or to what extent the bioreactor assists in achieving the selenium management objectives. If the bioreactor, along with other selenium management steps, is unsuccessful in sufficiently meeting objectives, active treatment of the effluent may be required at some point. Active treatment would be considerably more expensive than the selenium management measures used to date.

(B) Willow Creek Mine

60. Willow Creek Coal Partnership operates the Willow Creek Mine, located 28 miles west of Chetwynd, B.C. It is an open pit metallurgical coal mine with a coal processing plant and a rail load-out facility. The Willow Creek Mine produces metallurgical coal comprised of an estimated one-third hard coking coal and two-thirds low-volatile PCI coal. As of December 31, 2014, the Willow Creek Mine had approximately 16.6 million metric tonnes of recoverable coal reserves. The Willow Creek Mine is currently expected to have an operating life of at least 10 years if running at full production.

61. In April 2013, the decision was made to curtail mining production at the Willow Creek Mine in response to declining coal prices and the excess inventory of PCI coal that had developed at the Brule Mine. The mining footprint was reduced from 110 thousand tonnes per month to 20-30 thousand tonnes per month.

62. Coal prices continued to decline and Willow Creek mining activity was idled in May 2014. The coal processing plant remained in operation until late summer 2015. During this period, the Willow Creek plant was tasked with processing coal from the Brule Mine as well as processing a stockpile of mid-volatile PCI coal that had accumulated at Willow Creek Mine. Processing at the Willow Creek plant includes crushing, sizing and washing coal to remove impurities.

63. Willow Creek completed its processing of the Brule coal and mid-volatile PCI coal in August 2015. At that time, the processing plant was idled and all employees engaged at the processing plant received notice of termination. The rail load-out facility remained in operation until the final shipment of coal from Willow Creek to Ridley Terminals occurred in October 2015. Willow Creek Mine is now fully idled. The only remaining activities at the Willow Creek Mine relate to security, environmental testing and maintenance of on-site facilities.

64. As mentioned above, idling costs for both the Willow Creek Mine and the Brule Mine are estimated to be in excess of $652,000 per month, with some seasonal variation. Idling costs consist of property taxes, expenses related to water and air sampling, reporting to the Ministry of Environment, surveying, geotechnical support, reclamation matters, other environmental monitoring, maintenance of the mining machinery and equipment, loss control expenses and labour costs associated with the foregoing. Employment matters at the Willow Creek Mine are described in greater detail below.

(C) Wolverine (Perry Creek) Mine

65. Wolverine Coal Partnership operates the Wolverine Mine, which is approximately 15 miles south of Tumbler Ridge, B.C. The Wolverine Mine is an open pit metallurgical coal mine with a coal processing plant and a rail load-out facility. The mine produces premium hard coking coal. As of December 31, 2014, the Wolverine Mine had approximately 8.8 million metric tonnes of recoverable coal reserves. It is estimated that the current reserves at the Wolverine Mine have a life of 4 years; however, the Walter

Canada Group has permits for a number of future mine sites near the Wolverine Mine. If these sites are developed, they are expected to have a life of approximately 10 years.

66. Production at Wolverine was idled in May 2014 in response to low coal prices. The only remaining activities at the Wolverine Mine relate to security, environmental testing and maintenance of on-site facilities, including a tailings pond. In the aftermath of the Mount Polley tailings pond failure, tailings ponds are under heightened scrutiny in B.C. The Walter Canada Group has installed a number of additional monitoring sensors and is watching the tailings pond closely. At this time, additional work on the tailings pond is not necessary because the Wolverine Mine is idle; however, further work on the tailings pond is likely necessary before mining at the Wolverine Mine can be restarted.

67. Idling costs for the Wolverine Mine are estimated to be in excess of $515,000 per month, with some seasonal variation. Idling costs consist of property taxes, expenses related to water and air sampling, reporting to the Ministry of Environment, surveying, geotechnical support and reclamation matters, other environmental monitoring, maintenance of the mining machinery and equipment, maintaining the tailings pond, loss control expenses and labour costs associated with the foregoing. Employment matters at the Wolverine Mine are described in greater detail below.

(D) Additional Mine Sites

68. In addition to the three idled mines, the Walter Canada Group owns the right to mine at the following sites in B.C.: Hermann, Mount Spieker, EB, Mink Creek, Hudette, West Brazion, Willow West, Falling Creek, Mink Creek and certain other sites (collectively, the "**Potential Future Sites**"). At present the only activity in relation to the Potential Future Sites relates to maintaining the company's coal licenses for the Potential Future Sites. Some of the coal resources at the Potential Future Sites are not included in the Walter Canada Group's estimated reserves.

(E) Belcourt Saxon Coal Limited Partnership

69. In connection with the Western Acquisition, Walter Energy acquired a 50% interest in the Belcourt Saxon Coal Limited Partnership ("**Belcourt Saxon**"). Belcourt Saxon owns two multi-deposit coal properties located approximately 40 to 80 miles south of the Wolverine Mine in northeast B.C. The other 50% interest in Belcourt Saxon is owned by Peace River Coal Limited Partnership. The Peace River Coal Limited Partnership is a third party not affiliated with the Walter Group. It is affiliated with Anglo American Exploration (Canada) Ltd.

70. The Walter Canada Group's share of the reserves on these properties comprises approximately 28.5 million metric tonnes of recoverable coal. The joint venture was formed for the future exploration and development of surface coal mines. Costs associated with the joint venture were insignificant for the last four years. No field work has been conducted on the Belcourt Saxon properties recently, other than maintenance of environmental monitoring stations and activities relating to maintaining of Belcourt

Saxon's coal licenses. If coal prices rebound, the Belcourt Saxon properties may significantly increase in value.

V. THE WALTER CANADA GROUP – EMPLOYEES

71. There are currently 19 active employees employed by the Walter Canada Group and certain other part time employees are engaged on an as needed basis. These employees include the general mine manager, environmental monitoring staff, engineers, geologists, human resources staff and loss control staff. There are 4 loss control staff assigned to each mine site and the remaining staff support all three mines. None of these staff members are covered by a collective agreement.

72. The Walter Canada Group currently cumulatively employs a total of approximately 315 active and inactive employees in Canada, including approximately 280 inactive, unionized employees employed at the Wolverine Mine and certain employees on disability leave. The inactive Wolverine Mine employees currently on temporary layoff pursuant to the terms of a collective agreement, as further explained below.

(A) Brule Employees

73. No positions at the Brule Mine are covered by a collective agreement.

74. The Brule Mine was idled in June 2014. At the time of idling, there were approximately 200 active employees at Brule. Approximately 150 employees were terminated when the Brule Mine was idled and some additional employees have departed since idling began. There were approximately 40 remaining employees at the Brule Mine who were involved in loading coal onto trucks and certain other maintenance and related work. The majority of the remaining employees were given notice during the week of April 6, 2015, and were terminated on or about May 26, 2015, after all inventory was moved and the necessary steps to idle the remaining equipment were completed. As of the date hereof, these employees have received notice of termination pursuant to the B.C. *Employment Standards Act* (the "**ESA**") and, if applicable, additional severance amounts in respect of common law notice entitlements.

75. The only remaining activities at the Brule Mine relate to security services and ongoing environmental testing and monitoring.

(B) Willow Creek Employees

76. Some employees at the Willow Creek Mine are represented by a union, namely the Christian Labour Association of Canada ("**CLAC**"). The CLAC collective agreement expired November 30, 2014, but its terms continue in effect pursuant to the B.C. *Labour Relations Code*. Key features of the expired CLAC collective agreement include:

(a) a deemed termination and extinguishment of recall rights after 12 months on layoff; and

(b) employee severance of 1 week per completed year of service to a maximum of 10 weeks.

77. In April 2013, the decision was made to curtail mining production at the Willow Creek Mine in response to declining coal prices. Approximately 250 employees were laid off when mining was curtailed. In respect of these employees:

(a) All unionized employees who were laid off received notice of termination and severance pay required under the CLAC collective agreement; and

(b) All non-unionized employees who were terminated received notice of termination pursuant to the ESA and, if applicable, additional severance amounts in respect of common law notice entitlements.

78. The reduced operation at the Willow Creek Mine employed approximately 100 employees in both the mine and the processing plant. The Willow Creek Mine was idled in May 2014, although the coal processing plant continued to operate until August and the load-out facility continued to operate until October. Approximately 70 employees were laid off when the mine was idled and the majority of the remaining employees were laid off when the processing plant and load-out facility were idled in August and October of 2015. In respect of these employees:

(a) All unionized employees who were laid off received notice of termination and severance pay required under the CLAC collective agreement; and

(b) All non-unionized employees who were terminated received notice of termination pursuant to the ESA and, if applicable, additional severance amounts in respect of common law notice entitlements.

79. All processing at the Willow Creek Mine was completed in August and all coal loading was completed in early October 2015. Since that time the plant has been idled. The only remaining activities at the Willow Creek relate to security, environmental testing and maintenance of on-site facilities.

(C) Wolverine Employees

80. Certain positions at the Wolverine Mine are covered by a collective bargaining agreement with the United Steelworkers, Local 1-424 (the "**Steelworkers**"), which expired July 31, 2015. Key features of the Steelworkers collective agreement include:

(a) a deemed termination and extinguishment of recall rights after 24 months on layoff; and

(b) employee severance pay of 2 weeks per completed year of service to a maximum of 10 weeks.

81. The terms continued in effect pursuant to the BC *Labour Relations Code* after July 31, 2015.

82. Mining production at the Wolverine Mine was idled in April 2014 in response to low coal prices. Approximately 425 employees were laid off when the mine was idled; 300 of those employees were unionized. In respect of these employees:

(a) All non-unionized employees who were terminated received notice of termination pursuant to the ESA and, if applicable, additional severance amounts in respect of common law notice entitlements; and

(b) Any unionized employees who have not been recalled retain recall rights until April 2016 when the temporary layoff automatically becomes a termination of employment pursuant to the terms of the Steelworkers collective agreement outlined above.

83. The only remaining activities at the Wolverine Mine relate to security, environmental testing and maintenance of on-site facilities, including a tailings pond.

(D) Existing and Potential Employee and Union Matters

84. The Walter Canada Group is aware of certain current and potential employee and union related matters. The most significant of these relate to the Wolverine Mine. In particular, there is a potential liability that could be as high as $11.3 million relating to unionized employee severance costs that may allegedly arise if the unionized employees at the Wolverine Mine are not recalled to work prior to April 2016, on the date that their employment is deemed to be terminated under the Steelworkers collective agreement. There are a number of other claims that have been raised in respect of the Wolverine Mine employees, including certain claims relating to the Northern Living Allowance and certain claims related to the notice provisions under s. 54 of the B.C. *Labour Relations Code* that are currently subject to an application for judicial review.

VI. THE REAL PROPERTY AND ENVIRONMENTAL AND REGULATORY MATTERS

85. The Walter Canada Group's operations are subject to environmental assessment under the B.C. *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act.* Each mine was issued an environmental assessment certificate that sets out the criteria for designing and constructing the project, along with a schedule of commitments the Walter Canada Group has made to address concerns raised through the environmental assessment process. If, for any reason, the Walter Canada Group's operations are not conducted in accordance with the environmental assessment certificate, the Walter Canada Group's operations may be temporarily suspended until such time as its operations are brought back into compliance.

86. Any significant changes to the Walter Canada Group's current operations or further development of its properties in B.C. may trigger a federal or provincial environmental assessment or both.

87. Each of the Walter Canada Group's mining sites were inspected by the British Columbia Ministry of Energy and Mines in September 2014. The Ministry was satisfied with the conditions at the mines.

88. Pursuant to the *Mines Act*, 1996, c. 293 (the "***Mines Act***"), the Walter Canada Group's operations require permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine. The Chief Inspector of Mines may issue a permit with conditions, including requiring that the owner, agent, manager or permittee give security in an amount and form specified by the Chief Inspector for mine reclamation and to provide for the protection of watercourses and cultural heritage resources affected by the mine. The reclamation security may be applied towards mine closure or reclamation costs and other miscellaneous obligations if permit conditions are not met. Detailed reclamation and closure requirements are contained in the *Health, Safety and Reclamation Code* for Mines in British Columbia (the "***Mine Code***") established under *Mines Act*.

89. Under the *Mines Act* and the *Mine Code*, the Walter Canada Group has filed mine plans and reclamation programs for each of its operations. The Walter Canada Group accrues for reclamation costs to be incurred related to the operation and eventual closure of its mines once they have reached the end of their life. Additionally, under the terms of each mine permit, the Walter Canada Group is required to submit an updated mine plan every five years. The Walter Canada Group submitted updated five-year mine plans for Wolverine Mine and Brule Mine in 2013.

90. Estimates of the Walter Canada Group's total reclamation liabilities are based on permit requirements and its experience with similar activities. As of October 31, 2015, the Walter Canada Group accrued US$57.4 million in respect of its asset retirement obligations for all of the Walter Canada Group's mining operations until the end of the lives of each mine using a net present value calculation. The calculation incorporated estimates of all reclamation costs on the basis that the mines would be in continuous operation until the end of the life of each mine. A separate reclamation estimate was prepared by a third party environmental consultant for the Brule and Wolverine Mines, as a component of the five-year mine plans, on the assumption that the reclamation of the now idled mine sites would occur in the near term (rather than at the end of the life of each mine). On this basis, the environmental consultant has estimated reclamation obligations at approximately $12-14 million per mine. Assuming that Willow Creek reclamation costs are in the same range as the other mines, the total reclamation costs are estimated to be $36-42 million. These reclamation obligation estimates are based upon the five year mine plans that have not yet been approved by the Ministry of Energy and Mines.

91. As of October 2015, the Walter Canada Group had posted letters of credit for post-mining reclamation, as required by its *Mines Act* permits, totaling approximately $22.6 million, consisting principally of:

(a) $3.35 million, pursuant to Mining Permit C-221, in relation to the Brule Mine;

(b) $6 million, pursuant to Mining Permit C-153, as amended on June 9, 2011, in relation to the Willow Creek Mine; and

(c) $11.5 million, pursuant Mining Permit C-223, as amended on April 23, 2012 in relation to the Wolverine Mine (collectively, the "**Mining Permits**").

92. The Mining Permits are non-assignable and non-transferrable unless amended, pursuant to s. 11.1 of the *British Columbia Mines Act*, by way of application to the Chief Inspector or its delegate. The Mining Permits also require the permittee to notify the Chief Inspector of Mines of any intention to depart from either the work plan or reclamation program "to any substantial degree", and to not proceed without written authorization.

93. In addition to the Mining Permits, each of the mining sites has obtained the following types of permits/licenses to operate:

- Environmental Assessment Certificates ("**EACs**");
- Coal leases or licences;
- Various environmental permits including (i) air contaminant discharge permits (due to the dust or fine particulate matter created during the operations), (ii) water permits (due to the need to use or divert water existing on the site for the operations) and (iii) waste / effluent discharge permits (together, "**Environmental Permits**");
- licenses to cut and remove timber and permits to use forestry service roads issued under the *Forestry Act*;
- Explosive storage and handling permits issued under the *Mines Act*; and
- Other land tenures such as statutory right of ways and licenses of occupation.

94. It is imperative that the Walter Canada Group retain all of their EACs, coal leases and licenses, Environmental Permits and other rights throughout the restructuring proceedings to ensure that they can continue to operate and, should conditions prove favourable, ramp up mining at one or more of the Canadian mines. Without the EACs, coal leases and licences, Environmental Permits and other rights described above, the Walter Canada Group is prohibited from undertaking any activity on the site,

including ongoing maintenance and remediation. These rights are also necessary to preserve enterprise value.

95. As of today's date there are no orders outstanding or charges issues for any environmental non-compliance.

VII. THE WALTER CANADA GROUP – OTHER KEY CONTRACTS

Supplier and other contracts

96. The Walter Canada Group also has a number of critical contracts with equipment lessors, mechanics, parts suppliers, road maintenance companies, warehouses, offsite equipment storage and repair and environmental consultants. Each of the partnerships have entered into separate contracts with the applicable suppliers. Because Walter Canada Group's mines are located in an area of British Columbia that is far from a major urban centre, many of the Walter Canada Group's contracts are with the only available supplier of products and services in the area. Continued supply from these vendors will be essential for any proposed restructuring of the Walter Canada Group. For this reason, it is anticipated that certain pre-filing payments will be made to suppliers in accordance with the cash flows that have been reviewed by KPMG Inc. as proposed Monitor ("**KPMG**" or the "**Proposed Monitor**"), which I understand will be attached to the Proposed Monitor's pre-filing report.

Sale of certain equipment to Walter Energy U.S.

97. The Willow Creek Coal Partnership and Brule Coal Partnership (the "**Vendors**") plan to enter into an agreement with Jim Walter Resources, Inc. (a subsidiary of Walter Energy U.S.) (the "**Purchaser**") whereby the Purchaser has agreed to buy three bulldozers from the Vendors for a purchase price of approximately US$1,200,000, plus applicable taxes, and subject to adjustment as described below (the "**Surplus Equipment Transaction**"). The bill of sale for the Surplus Equipment Transaction will be executed in substantially the form attached as **Exhibit "I"** to this Affidavit.

98. The Walter Group, including the Walter Canada Group, has been attempting to sell various pieces of equipment for over a year, including by delivering lists of all of available equipment to selected potential purchasers, such as other mine operators and equipment sales brokers, and posting information regarding the equipment on equipment auctioneer websites.

99. The purchase price contemplated for the Surplus Equipment Transaction is equal to the appraised value of the bulldozers plus the applicable transaction costs. In addition, no commission will be paid out of the purchase price. As such, the net proceeds of the Surplus Equipment Transaction is likely to be higher than the amount realized on a sale to an arm's length party.

100. After the Initial Order is issued, the Proposed Monitor intends to expand upon the marketing process undertaken to date by the Walter Canada Group to sell the bulldozers. If a higher or better offer is not obtained by mid to late December, or, if a higher or better offer is obtained by mid to late December but the Purchaser agrees to match such higher or better offer, then it is proposed that the Proposed Monitor will deliver to the Purchaser a first certificate of the Proposed Monitor stating that the conditions to the sale have been met (the "**First Certificate**"). Among other things, this approach will avoid the need for the Walter Canada Group to schedule a further Court appearance with associated costs.

101. The Surplus Equipment Transaction will provide the Walter Canada Group with some additional funds during the CCAA proceedings. The Proposed Monitor has been consulted regarding the Surplus Equipment Transaction and agrees that it is a fair and reasonable transaction in the circumstances, subject to the efforts described above to be undertaken subsequently to see if a higher or better offer can be obtained.

102. This transaction will provide the Purchaser with assets necessary to the operation of its businesses and it will allow the Vendors to sell assets that are not presently needed, due to the idling of their operations. In addition, the transaction may be beneficial for U.S. federal income taxes for Walter Energy U.S., the parent of the Purchaser, and potentially, for the acquiror of substantially all of the Purchaser's assets (which assets may include those sold by the Vendors) through a sale in the Chapter 11 Cases.

103. It is contemplated that the purchase price will be paid within 60 days of the date of bill of sale. The payment terms are intended to reflect standard commercial practice in the industry and are necessary given the present constraints on the Purchaser's liquidity resulting from the Chapter 11 Cases. The payment terms have been agreed to by both parties and the Vendors are taking steps to ensure the purchase price is paid, including through protections proposed in the Initial Order

104. The Walter Canada Group will be seeking a provision in the Initial Order approving the Surplus Equipment Transaction and vesting title to the equipment in the Purchaser upon delivery of the First Certificate free and clear of any liens or encumbrances on such equipment except for the Equipment Charge (defined below). Any such liens are proposed to attach to the proceeds of the sale in the same manner and with the same priority as such liens had with respect to the equipment to be sold. In addition, the Walter Canada Group has taken a security interest in the equipment sold and will remain in possession of the equipment until the purchase price is paid in full.

105. To further secure the Purchaser's payment of the purchase price to the Vendors, the Walter Canada Group is also seeking a Court-ordered first-ranking charge on the equipment sold (the "**Equipment Charge**") so that the Walter Canada Group will be paid in priority to any creditor of the Purchaser. Once the purchase price is paid, it is proposed that the Equipment Charge will be extinguished automatically upon delivery of a second certificate of the Proposed Monitor certifying that

payment has been made. The Vendors are also seeking an order that ownership of the equipment will revert to the Vendors if the purchase price is not paid within 90 days of the date of the Initial Order.

VIII. THE FINANCIAL POSITION OF THE WALTER GROUP

106. As a publicly traded company, Walter Energy U.S. files consolidated financial statements with the Securities and Exchange Commission in the United States reflecting the financial position of the Walter Group. These financial statements include the consolidated results of U.S., U.K. and Canadian operations. A copy of the audited consolidated financial statements for the Walter Group for the fiscal year-ended December 31, 2014 is attached as **Exhibit "J"** to this Affidavit. A copy of each of the Walter Group's interim financial statements for the first, second and third quarters of 2015 are attached as **Exhibit "K"** to this Affidavit. These include the Walter Group's most recently filed interim financial statements from the third quarter of 2015, published on November 5, 2015. The Walter Group does not prepare stand-alone financial statements for the Canadian operations, but does provide details for its operating segments, the Walter U.S. Group and the Walter Non-U.S. Group .

(A) Financial Position of the Walter Non-U.S. Group

107. The financial statements show that revenue for the Walter Non-U.S. Group has declined in every year since 2011. The 2011 revenue figure was US$698 million; it decreased to US$668 million in 2012, US$527 million in 2013 and US$237 million in 2014. The Walter Non-U.S. Group's declining revenue is a result of the declining price of coal and the idling of the mines.

108. The financial statements also show declining sales of coal by the members of the Walter Non-U.S. Group. These declining sales are consistent with the idled state of all of the mines of the Walter Non-U.S. Group.

(B) Summary of Walter Canada Assets, Liabilities and Revenue

109. The Walter Canada Group prepares segment-specific balance sheets. Comprehensive details of the financial position of the Walter Canada Group are available in its balance sheets of December 2014, March 2015, September 2015 and October 2015 (the "**Balance Sheets**"), attached as **Exhibit "L"** to this affidavit.

110. The Balance Sheets show that in October 2015, the Walter Canada Group had assets totalling $379 million, a decrease from the December 2014 figure of $3.368 billion. The significant reduction in the value of the Walter Canada Group's assets is a result of the write-down taken earlier in 2015 and more fully described in paragraph 45. The value of the Walter Canada Group's assets as set out in the October 2015 balance sheet is comprised of the following:

(a) *Current Assets*: US$66 million, of which US$26.9 million is in cash or cash equivalents, US$8 million is coal inventory attributable to the Walter Canada Group's stockpiled coal inventory at all three mines, and US$20.8 million in supplies inventory; and

(b) *Long Term Assets:* US$312.9 million, of which US$75.4 million is in property, plant and equipment.

111. The Balance Sheets show that in October 2015, the Walter Canada Group had liabilities totalling US$68.2 million, a decrease from the December 2014 figure of $752 million, primarily due to a reduction in deferred tax liabilities. These amounts do not include the Walter Canada Group's liabilities in relation to undrawn letters of credit, but do include the following:

(a) *Current Liabilities*: US$19.5 million; and

(b) *Long Term Liabilities:* US$48.7 million.

112. The balance sheets also indicate a receivable of approximately $16 million in respect of coal sold by the Brule Coal Partnership. This receivable has been paid and Brule Coal Partnership is holding the funds received.

113. The net cash position of the principal members of the Walter Canada Group as of December 1, 2015 was as follows: (i) Walter Energy Canada held approximately $1.1 million, (ii) Brule Coal Partnership held approximately US$29.4 million, (iii) Willow Creek Coal Partnership held approximately US$3 million, (iv) Wolverine Coal Partnership held approximately US$5 million, and (v) Walter Canadian Coal Partnership held approximately $3.2 million. All of the accounts, other than the Walter Energy Canada account, are held in the name of Walter Canadian Coal Partnership for the other partnerships and are subject to the Cash Management System defined and described below.

114. The unlimited liability companies that are members of the Walter Canada Group are fully liable for the debts of the respective partnerships, hold a .01% interest in such respective partnership and have very limited cash. In addition, Pine Valley Coal Ltd. and 0541237 B.C. Ltd. have legal rights to certain mineral licenses, but have no other assets. They require funding from the other members of the Walter Canada Group to maintain the mineral licenses in good standing. I do verily believe that these entities are therefore insolvent.

(C) Cash Management System

115. The Walter Canada Group uses an account network at BNS. Each of Walter Canadian Coal Partnership, Brule Partnership, Willow Creek Partnership and Wolverine Partnership maintains a Canadian dollar and a U.S. dollar account with BNS. Certain customary pooling arrangements have been established with respect to all of these accounts. Under these pooling arrangements, BNS permits certain

of the accounts to have a negative dollar balance without applying its overdraft policy so long as the balance in all of the accounts, on a net basis, is positive. The accounts of the different partnerships are not consolidated. Funds are transferred from one partnership account to another quarterly and on certain other occasions to establish a positive balance in each account. Certain intercompany receivables are booked in relation to these transfers and these receivables are generally capitalized at year end such that the transfers are ultimately treated as partnership distributions made by certain partnerships to Walter Canadian Coal Partnership and as capital contributions made by Walter Canadian Coal Partnership to other partnerships. In addition, payments are made to the Walter Canadian Coal Partnership account in respect of each partnerships' share of certain shared services, royalty agreements and other transactions in the ordinary course of business. This system is referred to as the "**Cash Management System**". All bank accounts are located in Canada, but are generally managed by Walter Energy U.S., including by officers of Walter Energy Canada who are also employees of Walter Energy U.S. Walter Energy U.S. is responsible for the receipt and management of the vast majority of accounts receivable and for the disbursement of the vast majority of accounts payable incurred by the Walter Canada Group.

116. The Walter Canada Group is seeking certain enhanced powers of the Proposed Monitor in connection with the Cash Management System as more fully set out below.

(D) Secured Debt & Credit Facility

117. As described above, on April 1, 2011, Walter Energy U.S., Western Coal Corp. and Walter Energy Canada entered into the 2011 Credit Agreement to partially fund the acquisition of Western and to pay off all outstanding loans. The lenders consisted of various financial institutions who comprise the Bank Lenders. Morgan Stanley Senior Funding, Inc. acts as administrative agent and collateral agent.

118. The 2011 Credit Agreement includes the US$150 million multi-currency Canadian Revolver available to Walter Energy Canada. The Canadian Revolver provides for operational needs and letters of credit.

119. Amounts outstanding on the Canadian Revolver consist primarily of obligations in respect of issued but undrawn letters of credit. The Walter Canada Group is liable for approximately $22.6 million of undrawn letters of credit issued by BNS pursuant to the 2011 Credit Agreement.

120. The members of the Walter Non-U.S. Group, including Walter Energy Canada, are not liable for and have not guaranteed Walter Energy U.S.' obligations under the 2011 Credit Agreement or any of its other major financial obligations. Walter Energy Canada and the other members of the Walter Canada Group only have obligations to the Bank Lenders in respect of the obligations of Walter Energy Canada and Western Coal Corp. under the Canadian Revolver, namely the letters of credit.

121. With respect to the obligations of Walter Energy Canada under the Canadian Revolver, such obligations are secured by a first priority lien and security interest in all of the following, whether owned on the closing date or thereafter acquired:

(a) All equity interests of (or other ownership interests in), and intercompany debt of, the entities owned by Walter Energy Canada;

(b) All present and future tangible and intangible assets of Walter Energy Canada, including but not limited to, machinery and equipment, inventory and other goods, accounts receivable, owned and leased real property, leases on mines, fixtures, deposit accounts, general intangibles, intercompany debt, license rights, intellectual property, chattel paper, insurance policies, contract rights, hedge agreements, documents, instruments, indemnification rights, mineral rights, tax refunds, investment property and cash, wherever located, subject to exceptions and thresholds to be agreed; and

(c) All proceeds and products of the property and assets described in clauses (a) and (b) above.

122. Walter Energy Canada's obligations under the 2011 Credit Agreement are guaranteed by each of the members of the Walter Canada Group other than Belcourt Saxon Coal Ltd. and Belcourt Saxon Limited Partnership. These guarantees are secured by a security interest in all of the present and after-acquired property of the members of the Walter Canada Group who are guarantors.

123. On April 1, 2011, Walter Energy Canada and Walter Canadian Coal Partnership and certain other Canadian subsidiaries of Walter Energy U.S. (the "**Canadian Guarantors**") and the Collateral Agent entered into the Canadian Guaranty and Collateral Agreement, which was amended and restated in its entirety on July 31, 2012 (such amended and restated agreement and additional documents and ancillary agreements, as amended and supplemented from time to time, the "**Canadian Guaranty and Collateral Agreement**"). A copy of the Canadian Guaranty and Collateral Agreement is attached as **Exhibit "M"** to this Affidavit. A list of the Canadian Guarantors is attached as **Exhibit "N"**.

124. The security interests granted to the Collateral Agent pursuant to the Canadian Guaranty and Collateral Agreement are perfected by registrations made in the B.C. Personal Property Registry. Attached hereto as **Exhibit "O"** is a true copy of the search results from the B.C. Personal Property Registry with respect to the Walter Canada Group dated October 21, 2015.

125. Pursuant to the Canadian Guaranty and Collateral Agreement, each of Walter Energy Canada and Western Coal Corp. and the Canadian Guarantors jointly and severally, unconditionally and irrevocably, guaranteed to the Collateral Agent, for the benefit of the Bank Lenders, the prompt and complete payment and performance when due of all of the obligations of each of the Canadian Borrowers

and Canadian Guarantors, which comprise the Canadian Revolver and related obligations (the "**Canadian Obligations**").

126. The 2011 Credit Agreement contains customary events of default and covenants, including among other things, covenants that restrict Walter Energy U.S. and its subsidiaries' ability to incur certain additional indebtedness, create or permit liens on assets, pay dividends and repurchase stock, engage in mergers or acquisitions, and make investments and loans. The 2011 Credit Agreement also includes certain financial covenants that must be maintained. Walter Energy U.S. is in default of its obligations under the 2011 Credit Agreement, including due to the commencement of the Chapter 11 Cases. The Bank Lenders may have a right to declare that Walter Energy Canada is in default of the 2011 Credit Agreement as well.

127. In addition, Walter Energy U.S. and the U.S. Guarantors have guaranteed, on a secured basis, the Canadian Obligations pursuant to the U.S. Guaranty and Collateral Agreement between the members of the Walter U.S. Group more fully described therein and Morgan Stanley Senior Funding, Inc., as Collateral Agent.

128. The B.C. Personal Property Registry search results also indicate that certain other creditors have perfected security interests against members of the Walter Canada Group, generally in respect of purchase money security interests in certain equipment. However, at this time there are no further amounts owing to these former creditors in respect of any of the equipment other than in relation to one vehicle.

(E) The Hybrid Debt Structure

129. In connection with the Western Acquisition, Walter Energy Canada borrowed approximately US$2 billion from Walter Energy U.S. and issued a promissory note (the "**Note**") to Walter Energy U.S. in respect of such indebtedness and pledged the Subscription Agreement (defined below) to secure repayment of the Note. The funds advanced were used to acquire Western. Interest on the Note is payable in cash or in common shares of Walter Energy Canada.

130. The Note was issued as part of a series of transactions entered into by Walter Energy U.S., Walter Energy Canada and Walter Energy Holdings, LLC ("**LLC**"), a wholly owned subsidiary of Walter Energy U.S., to maximize tax efficiencies. In addition to the Note, LLC entered into a subscription agreement with Walter Energy Canada (the "**Subscription Agreement**"), pursuant to which LLC agreed to subscribe for new common shares of Walter Energy Canada on the maturity of the Note for cash equal to the aggregate principal amount of the Note. Walter Energy U.S. also entered into a capital support agreement with LLC (the "**Capital Support Agreement**") in which Walter Energy U.S. agreed to purchase shares of LLC with cash or by contribution of the Note to assist LLC to meet LLC's obligations under the Subscription Agreement. Walter Energy U.S. also gave Walter Energy Canada a guarantee of LLC's

obligations under the Subscription Agreement (the "**Guarantee**"). The Subscription Agreement, the Capital Support Agreement and the Guarantee are described collectively as the "**Hybrid Debt Structure**".

IX. IMPACT OF THE CHAPTER 11 CASES ON THE WALTER CANADA GROUP

131. As discussed above, the U.S. Petitioners are subject to the Cash Collateral Order. The Cash Collateral Order imposes certain restrictions on the activities of the U.S. Petitioners and their affiliates that apply so long as the U.S. Petitioners need to make use of the cash collateral. Although the Walter Canada Group is not subject to the Cash Collateral Order, it nevertheless imposes certain restrictions on the Walter Canada Group.

132. In addition, the Cash Collateral Order requires the Walter Canada Group to obtain the consent of the Steering Committee before:

(a) commencing a sale process or disposing of any material assets;

(b) commencing any insolvency proceedings;

(c) or incurring any new secured or unsecured debt outside the ordinary course of business, unless such debt (i) was to a member of the Walter U.S. Group, (ii) was guaranteed by all members of the Walter Canada Group, and (iii) such loans and guarantees were secured by liens on all present and future property of the Walter Canada Group pursuant to loan documents and security agreements in form and substance satisfactory to the Majority Lenders and assigned to the Majority Lenders.

133. The Steering Committee has been consulted and have not objected to this petition seeking relief under the CCAA.

134. In addition, PJT Partners Inc. has been canvasing the market in an attempt to find a purchaser for the assets of the Walter Canada Group. PJT Partners Inc., formerly a part of Blackstone Advisory Partners L.P., has been engaged by counsel to Walter Energy U.S. as its financial advisor to assist the Walter Group with its restructuring. It is anticipated that, after appropriate consultation with governmental authorities, the Canadian Petitioners will seek approval of a sales process in these CCAA proceedings to be run by PJT Partners Inc. At the time such approval is sought, it is anticipated that the Canadian Petitioners will also seek the approval of an engagement letter to be entered into by certain of the Walter Canada Group and PJT Partners Inc.

X. THE NEED FOR RELIEF UNDER THE CCAA AND RELIEF SOUGHT

135. As discussed above, the Walter Canada Group has idled its three mines and has sold all of its remaining saleable coal inventory stockpiled at those mines. As a result, the Walter Canada Group is not

producing coal and is not generating revenue. The Walter Canada's Group's survival depends on having sufficient capital to maintain and then restart the mines when coal prices improve.

136. The Walter Canada Group has a finite amount of funding. The annual costs associated with idling the Canadian mines are in excess of $16 million. In addition, significant working capital investments would be required before any of the Canadian mining operations can be restarted and the Walter Canada Group faces a number of claims that may deplete its remaining funds.

137. The Walter Canada Group also has aggregate, long-term secured liabilities under the 2011 Credit Agreement in excess of $22.6 million with the associated annual fees and interest expenses, primarily in connection with the issuance of letters of credit to secure the Walter Canada Group's environmental and other obligations.

138. Furthermore, in March 2015, the B.C. Ministry of Finance issued notices of assessment in relation to the Brule Mine. The Walter Canada Group is obligated to pay the B.C. Ministry of Finance $6,373,623, an amount owing in relation to a BC Mineral Tax audit for the 2005-2008 tax periods. The Walter Canada Group has negotiated a payment plan with the B.C. Ministry of Finance. There is approximately $1 million outstanding in respect of this payment plan. In addition, the years of 2010 and 2011 are currently being assessed and the result of the assessment could give rise to an additional mineral tax liability for the Walter Canada Group.

139. Based on known obligations and not considering contingent or potential claims, the Walter Canada Group does not have sufficient funding to restart the mines. The Walter Canada Group intended to rely on financial support from Walter Energy U.S. to restart the Canadian mines when warranted by market conditions. In light of the status of the Chapter 11 Cases, including the U.S. APA and bid procedures approved in the Chapter 11 Cases, the Walter Canada Group has been advised that it will not be able to rely on Walter Energy U.S. for financial support going forward or for essential management services after the sale contemplated by the U.S. APA is complete. If the Walter Canada Group cannot rely on its parent for financial support or for essential management services, it will not be able to restart the Canadian mines without additional financing.

140. At this time, the available liquid assets of the Walter Canada Group plus the aggregate, realizable value of the Walter Canada Group's other assets, property and undertaking, if sold in an expedited fashion in current market conditions, is not sufficient to enable the members of the Walter Canada Group to pay their obligations that are due or will become due during the period necessary for the Walter Canada Group to determine its path forward and to put that plan into effect unless the Walter Canada Group has the benefit of the relief sought under the CCAA, including a stay of proceedings. It certainly is not sufficient to restart the mines from care and maintenance to permit the Walter Canada Group to begin generating revenue. Accordingly, the Walter Canada Group faces a looming liquidity crisis and, absent protection under the CCAA, will exhaust its remaining cash within six months.

141. Accordingly, it is essential that the Canadian Petitioners are granted CCAA protection forthwith and have the relief extended to the other members of the Walter Canada Group in order to stabilize their affairs, commence discussions with stakeholders and seek a going concern outcome while they still have sufficient liquidity available.

142. If the Walter Canada Group is to restructure, among other things, the Walter Canada Group must de-integrate its management and operations from the Walter U.S. Group and work with applicable governmental authorities to establish an independent sales process to maximize value for the stakeholders of the Walter Canada Group before it is too late to do so. If no buyer can be found within a relatively short time frame, it will be necessary for the Walter Canada Group to permanently cease operations.

143. The members of the Walter Canada Group and their boards of directors have considered the circumstances and the alternatives available to the Walter Canada Group. In exercise of their business judgement, they have determined that the filing by the Walter Canada Group for protection under the CCAA is necessary at this time and the pursuit of the restructuring is in the best interests of the Walter Canada Group.

(A) Stay of Proceedings and Partnerships

144. The Walter Canada Group is concerned that, in light of declining revenues and the current liquidity challenges at the Canadian entity level, an uncontrolled material adverse change to the Walter Canada Group's business would precipitate a quick and significant erosion in enterprise value to the detriment of all stakeholders. The Walter Canada Group therefore requires a stay of proceedings and the "breathing space" created by a stay of proceedings to restructure their affairs.

145. In particular, the Walter Canada Group requires a stay of proceedings to manage the impact of the known potential claims, including employee claims at the Wolverine Mine, the possible assessment of mineral taxes for the 2010 and 2011 taxation year and the potential need for further security requested in respect of environmental claims. The effect of such claims, if not carefully managed, would likely result in the abrupt cessation of operations for the Walter Canada and would make it impossible to re-start the mines at any time in the future. The Walter Canada Group is requesting an initial stay of proceedings for the 30 days following the filing date to allow the Walter Canada Group sufficient time to engage with its stakeholders and in particular with applicable government authorities to determine whether there is a path forward to a going concern sale.

146. The Petitioners also seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extended to the Walter Canadian Coal Partnership, the Brule Coal Partnership, the Willow Creek Partnership and the Wolverine Coal Partnership. As discussed above, the partnerships

carry on operations integral to the business of the Walter Canada Group and are the principal vehicles through which the mines are operated.

147. In addition, the Petitioners seek to have a stay of proceedings extended to Belcourt Saxon Coal Ltd. for the limited purpose of preventing any action that may be taken under the Belcourt Saxon Coal Limited Partnership Agreement of March 2, 2005 to remove it as general partner of Belcourt Saxon Coal Limited Partnership or to force a sale to any particular person of the Walter Canada Group's interest in Belcourt Saxon Coal Limited Partnership, including as a result of any of the Charges being sought by the Walter Canada Group, any offers received during the CCAA proceedings or any other matters that may arise as a result of the insolvency of the Walter Canada Group.

(B) Payments During this CCAA Proceeding in Respect of Pre-Filing Obligations

148. During the course of these CCAA proceedings, the Walter Canada Group intends to make payments for goods and services supplied post-filing in the ordinary course and to make a limited number of pre-filing payments to suppliers that are critical , as set out in the cash flow projections prepared by the Walter Canada Group and reviewed by the Proposed Monitor and as permitted in the Initial Order.

(C) Management Services Provided by Walter Energy U.S.

149. Walter Energy U.S. and its subsidiaries provide a variety of shared services to the Walter Canada Group, including services pursuant to certain management agreements and other intercompany agreements (collectively, the "**Shared Services**"). Given the importance of these Shared Services to the Walter Canada Group's operations, the expertise and experience of Walter U.S. Group and the significant extent to which the Walter Canada Group relies on the Walter U.S. Group to provide these essential services, the Walter Canada Group will continue paying the Walter U.S. Group during the CCAA proceeding on a basis consistent with current payment terms and business practices but subject to certain changes to reflect the present set of services needed by the Walter Canada Group. The Walter U.S. Group has confirmed that it intends to continue providing Shared Services until the closing of the transaction contemplated by the U.S. APA or another sale under section 363 of the U.S. Bankruptcy Code to be completed in the Chapter 11 Cases. The Walter Canada Group will immediately commence steps to reduce and eliminate the need for the full slate of Shared Services, with the goal of ensuring that the Walter Canada Group can be fully independent of Walter Energy U.S. and the other members of the Walter U.S. Group before the U.S. APA or another sale closes.

(D) Proposed Monitor

150. The Walter Canada Group is seeking the appointment of KPMG as the Monitor in these proceedings. KPMG is a qualified financial restructuring firm and has consented to act as the Monitor. A copy of its consent is attached at **Exhibit "P"**. As discussed in paragraph 151, certain enhanced powers are requested for the Proposed Monitor.

151. The proposed Initial Order contemplates an enhanced role for the Proposed Monitor, including overseeing the Cash Management System and all receipts and disbursements in relation to the Walter Canada Group's accounts, assisting the Walter Canada Group in the preparation of cash flow statements, participating in any discussions or consultations with the Walter Canada Group's stakeholders, including unions and governmental authorities. In addition, due to the Walter Canada Group's intention to de-integrate from the Walter U.S. Group, the Proposed Monitor should be authorized to the review and monitor the provision of and payment for all Shared Services, assist the Walter Canada Group in negotiations with Walter Energy, Inc. and its affiliates regarding changes to existing Shared Services arrangements and assist the Walter Canada Group in developing alternatives to the Shared Services, including with respect to sourcing new service providers with respect to any or all services that are currently Shared Services, in each case in such manner as the Proposed Monitor, in consultation with the Walter Canada Group, consider appropriate and the proposed sale process to be commenced in respect of the Walter Canada Group if such consultation is successful. It is also contemplated that the Proposed Monitor have the ability to cause the members of the Walter Canada Group to initiate bankruptcy proceedings in circumstances where they are unable to do so on their own behalf.

(E) Charges and other Protections

Administration Charge

152. It is proposed that the Proposed Monitor, its counsel and the Petitioners' counsel be granted a court-ordered charge on the assets of the Walter Canada Group as security for their fees and disbursements relating to services rendered in respect of the Walter Canada Group (collectively, the "**Administration Charge**"). The Administration Charge is not to exceed an aggregate of $2.5 million. The Administration Charge would have first priority over all other charges.

153. All of the beneficiaries of the Administration Charge have contributed, and continue to contribute, to the restructuring of the Walter Canada Group. The Walter Canada Group has sought to ensure that there is no unwarranted duplication of roles so as to minimize the professional fees associated with the restructuring.

Directors' and Officers' Charge

154. A successful restructuring of the Walter Canada Group will only be possible with the continued participation in the near term of the Walter Canada Group's directors and officers. These personnel are essential to the viability of the Walter Canada Group's continuing business.

155. I am advised by legal counsel for the Walter Canada Group, and do verily believe that, in certain circumstances, directors and officers can be held liable for certain obligations of a company owing to employees and government entities. The Walter Canada Group estimates, with the assistance of the Proposed Monitor, that the obligations in respect of unpaid accrued wages, unremitted source reductions,

unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million.

156. The Walter U.S. Group maintains a directors' and officers' insurance policy that also provides coverage to the directors and officers of the Walter Canada Group. The primary limit of this insurance is $10 million, the excess limits total $90 million, and there is an additional $50 million of coverage for certain specified liabilities. The directors' and officers' insurance policy is scheduled to expire on July 1, 2016. The Walter U.S. Group has purchased run off coverage for a period of 6 years after the expiration of the directors' and officers' insurance policy. In addition, the Walter U.S. Group maintains certain other insurance policies for the benefit of the directors and officers of the Walter Group.

157. The remaining directors and officers have indicated that, in light of the uncertainty surrounding limits and exclusions in directors' and officers' insurance, their continued service and involvement in this restructuring is conditional upon the granting of an Order under the CCAA which grants a charge in favour of the directors and officers of the Walter Group in the amount of $2.5 million on the property of the Walter Canada Group (the "**Directors' Charge**"). The Directors' Charge will be subordinate to the proposed Administration Charge. The Directors' Charge would act as security for indemnification obligations for the Walter Group Directors' potential liabilities as set out above.

158. The Directors' Charge is necessary so that the Walter Canada Group may benefit from its directors' and officers' experience with the business and the metallurgical coal mining industry and so that its directors and officers can guide the Company's restructuring efforts.

159. In addition, it is proposed that the directors and officers receive the benefit of a stay of proceedings and that this Court order that the directors and officers not be liable for any losses, claims or damages of any nature or kind except to the extent that such losses, claims or damages result from gross negligence or wilful misconduct on the part of such director or officer.

(F) Cash Flow Forecast

160. I am advised by the Proposed Monitor that cash flow projections demonstrate that the Walter Canada Group can continue going concern operations during the proposed stay period. A copy of the 13-week cash flow projections, as prepared by the Walter Group with the assistance of its financial advisors and the Proposed Monitor, is attached to the Proposed Monitor's pre-filing report.

XI. CONCLUSION

161. The Walter Canada Group, like many other North American coal producers, is facing financial difficulties due to the prolonged depression in coal prices. The Walter Canada Group managed its business with due diligence by idling its mines and seeking to position itself to have sufficient capital to restart its mines when coal prices rebound. The developments in Chapter 11 Cases, and specifically the

U.S. APA which would eliminate the Walter Canada Group's access to the funding necessary to restart the Mines, have necessitated this petition for relief under the CCAA. The Walter Canada Group seeks the protection of the stay of proceedings under the CCAA to develop a path to a going concern outcome that will protect the Walter Canada Group's stakeholders, creditors, employees, suppliers and the environment. If a going concern outcome is not possible, then the Walter Canada Group will be forced to wind down operations and seeks the breathing space in which to do so.

SWORN BEFORE ME at Birmingham, Alabama, United States, on December 4th, 2015.

Kathy C. Lott

A Notary Public in the State of Alabama

W S Harvey

WILLIAM G. HARVEY

This is Exhibit **"A"** referred to in Affidavit #1 of **William G. Harvey** sworn December 4, 2015 at Birmingham, Alabama, United States.

Kathy C. Lott

A Notary Public in the State of Alabama

KATHY C. LOTT
MY COMMISSION EXPIRES
October 24, 2018
NOTARY PUBLIC
STATE OF ALABAMA

PETITIONERS

1. Walter Energy Canada Holdings, Inc.
2. Walter Canadian Coal ULC
3. Wolverine Coal ULC
4. Brule Coal ULC
5. Cambrian Energybuild Holdings ULC
6. Willow Creek Coal ULC
7. Pine Valley Coal, Ltd.
8. 0541237 BC, Ltd.

PARTNERSHIPS

1. Willow Creek Coal Partnership
2. Walter Canadian Coal Partnership
3. Wolverine Coal Partnership
4. Brule Coal Partnership

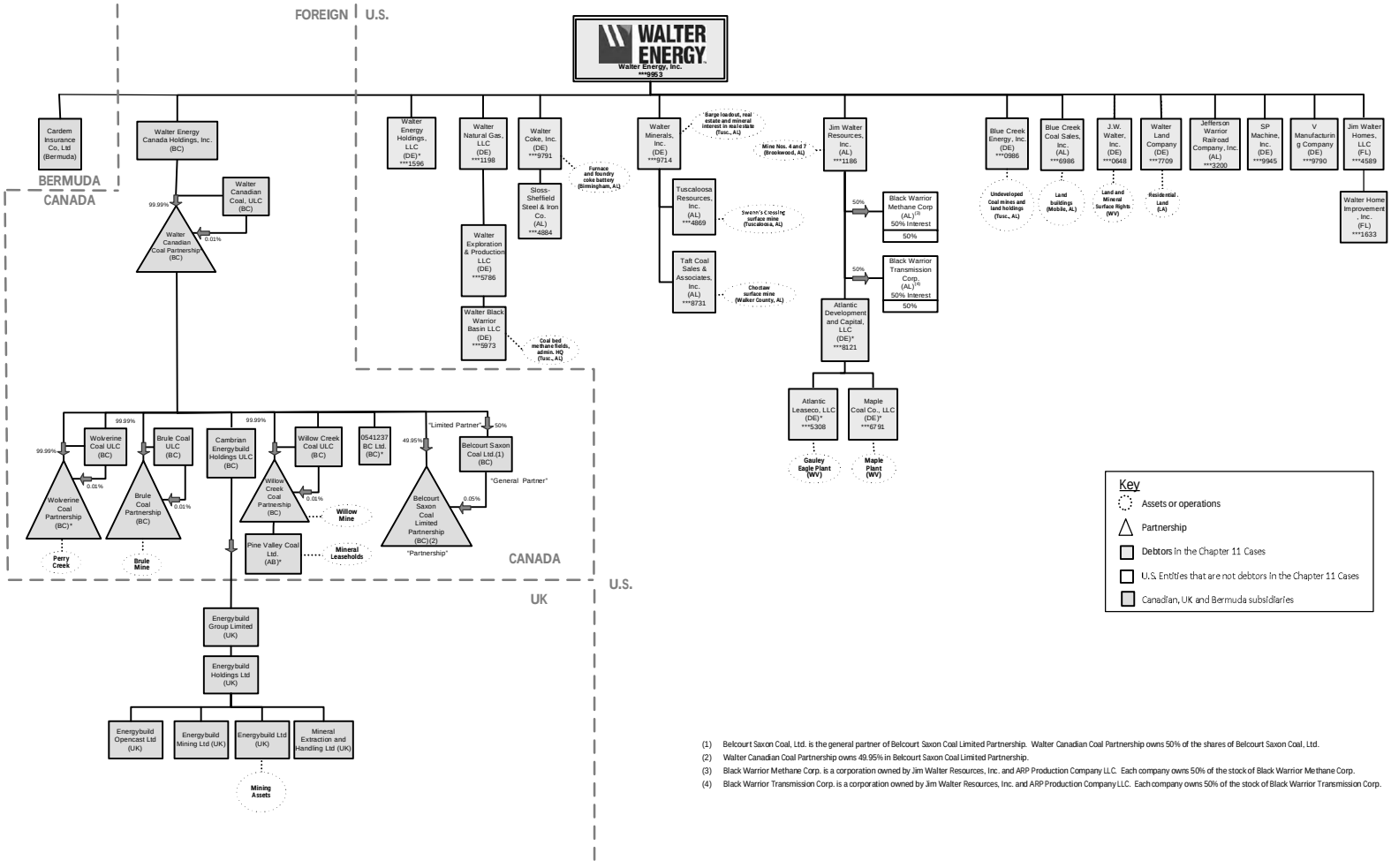
TAB 2

This is Exhibit "**D**" referred to in Affidavit #1 of **William G. Harvey** sworn December 4, 2015 at Birmingham, Alabama, United States.

Kathy C. Lott

A Notary Public in the State of Alabama

KATHY C. LOTT
MY COMMISSION EXPIRES
October 24, 2018
NOTARY PUBLIC
STATE OF ALABAMA



(1) Belcourt Saxon Coal, Ltd. is the general partner of Belcourt Saxon Coal Limited Partnership. Walter Canadian Coal Partnership owns 50% of the shares of Belcourt Saxon Coal, Ltd.

(2) Walter Canadian Coal Partnership owns 49.95% in Belcourt Saxon Coal Limited Partnership.

(3) Black Warrior Methane Corp. is a corporation owned by Jim Walter Resources, Inc. and ARP Production Company LLC. Each company owns 50% of the stock of Black Warrior Methane Corp.

(4) Black Warrior Transmission Corp. is a corporation owned by Jim Walter Resources, Inc. and ARP Production Company LLC. Each company owns 50% of the stock of Black Warrior Transmission Corp.

TAB 3

NO. S1510120
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. c. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS LISTED IN SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

WALTER CANADA GROUP'S STATEMENT OF UNCONTESTED FACTS

For the Court's convenience, in this document the Walter Canada Group lists the facts that the Court can accept as true based on admissions in the pleadings or that are otherwise uncontested and supported by documents that this Court can consider without additional formal proof, all of which are contained in the Walter Canada Group's Book of Evidence, as follows:

Admitted by the Walter Canada Group ("A"): These facts were pleaded by the 1974 Plan and admitted by the Walter Canada Group. This category of admitted facts includes facts in respect of which the United Steelworkers, Local 1-424 (the "Respondent Steelworkers") have no knowledge. Should a subsequent proceeding be required to resolve the 1974 Plan's Claim, the Respondent Steelworkers may wish to lead evidence contradicting these facts.

Facts pleaded by 1974 Plan of which Walter Canada Group has no knowledge but is prepared to accept as true for the purposes of this application ("NK"): These are facts pleaded

by the 1974 Plan in respect of which the Walter Canada Group has no knowledge but is prepared to admit in this application without prejudice to its ability to lead contrary evidence in any subsequent proceeding involving the 1974 Plan or any other respondent.

Facts contained in Court records that the Supreme Court of British Columbia can consider without formal proof ("CR"): The Court is entitled to look at its own records in any proceeding before it: *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367 (CanLII).[1] The Walter Canada Group has included in its Book of Evidence: (1) decisions in this CCAA Proceeding; (2) the decision of the Supreme Court of British Columbia in the application for approval of the plan of arrangement related to the Western Acquisition; and (3) evidence previously filed in this CCAA Proceeding or the Western Acquisition proceeding. Much of the evidence included in the Book of Evidence was filed by the 1974 Plan. Where the evidence was originally filed by the Walter Canada Group, we have included only evidence in respect of which the 1974 Plan expressly stated an intention to rely on that evidence.[2]

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1 The Court of Appeal for British Columbia stated:

> [36] It is well established, however, that proof in accordance with s. 26 is not needed in order for a court to make use of its own records. Courts have long accepted that they are entitled to look at their own records even if those records have not been formally proven and entered in evidence: *R v Jones* (1839), 8 Dowl 80; *Craven v Smith* (1869), LR 4 Exch 146. In *R v Lewis*, [1941] 4 DLR 640, this Court accepted that a judge of the County Court was entitled to rely on the notice of appeal in the court file to show that a notice had been filed on time. In *R v Hunt* (1986), 18 OAC 78 at 79, the Ontario Court of Appeal stated the general proposition that "[t]he Court has at all times the power to look at its own records and take notice of their contents".
>
> [37] Such documents do not have to be attached to affidavits, or presented to the court in the same way that most documentary evidence is presented. In *R v Truong*, 2008 BCSC 1151 (CanLII) at para. 57, 235 CCC (3d) 547, Smart J. described the situation as follows:
>
> > [57] It has been said that documents do not walk into a courtroom unaccompanied. Usually, this is true. Documents are typically introduced into evidence through the evidence of a witness or by affidavit evidence pursuant to a statutory provision. See for example s. 29 and s. 30 of the *Canada Evidence Act*. However, documents in the court's own files are an exception to this usual rule.

2 In particular, in its January 4, 2016, Application Response, the 1974 Plan listed as "Materials to be Relied On" the 1st Affidavit of William G. Harvey sworn December 4, 2015. In its March 29, 2016, Application Response, the 1974 Plan listed as "Materials to be Relied On" the 1st Affidavit of William E. Aziz sworn March 22, 2016.

Facts contained in Public Documents ("PD"): The Court is permitted to rely on public documents for the truth of their contents: *Finestone v The Queen*, [1953] 2 SCR 107, 1953 CanLII 81 (SCC).[3] This exception to the hearsay rule applies when four conditions are met: (1) The subject matter of the statement must be of a public nature; (2) The statement must have been prepared with a view to being retained and kept as a public record; (3) It must have been made for a public purpose and available to the public for inspection at all times; and (4) It must have been prepared by a public officer in pursuance of his duty: *Radke v MS et al*, 2005 BCSC 1355 (CanLII), at para 51. Pursuant to the public documents exception to the hearsay rule, the Walter Canada Group includes in its Book of Evidence an affidavit attaching Corporations Reports maintained and prepared by provincial governments.

Other Documentary Evidence ("DE"): The Walter Canada Group includes in its Book of Evidence an affidavit attaching materials filed by Western Energy with the United States Securities and Exchange Commission ("SEC") and available on the SEC's publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR"). These documents are not filed to prove the truth of their contents but rather to prove that the statements in the documents were made.

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[3] At p. 109, the Supreme Court of Canada said: "As early as 1785 in *R v Aickles*, it is said: 'The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.'"

Walter US Corporate Parties

1. A: Walter Energy Inc. ("Walter Energy") is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama (*Claim para. 24; Walter admits; USW no knowledge*).

2. A. Walter Energy did business in West Virginia and Alabama (*Claim para. 79; Walter admits; USW no knowledge*)

3. NK: Walter Energy's board of directors and its management team operated out of Birmingham, Alabama (*Claim para. 80; Walter no knowledge; USW no knowledge*).

4. A: Jim Walter Resources Inc. ("Walter Resources") is wholly owned by Walter Energy (*Claim para. 25; Walter admits; USW no knowledge*).

5. NK: Walter Resources is incorporated in Alabama and did business in Alabama (*Claim para. 81; Walter no knowledge; USW no knowledge*).

6. NK: Walter Resources' management team operated out of Birmingham, Alabama (*Claim para. 82; Walter no knowledge; USW no knowledge*).

The 1974 Plan

7. NK: The United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") is a pension plan and irrevocable trust established in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5) (*Claim para. 1; Walter no knowledge; USW no knowledge*).

8. CR: The 1974 Plan was established in 1974 (*1st Affidavit of Miriam Dominguez, Exhibit A (1974 Proof of Claim), para. 2*).

9. NK: The 1974 Plan is resident in Washington, DC (*Claim para. 83; Walter no knowledge; USW no knowledge*).

10. NK: The trustees of the 1974 Plan are resident in the United States (*Claim para. 84; Walter no knowledge; USW no knowledge*).

11. NK: The 1974 Plan is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA, 29 U.S.C. § 1002(2), (3), (35), (37)(A) (*Claim para. 22; Walter no knowledge; USW no knowledge*).

12. NK: All participating employers in the 1974 Plan are resident in the United States (*Claim para. 85; Walter no knowledge; USW no knowledge*).

13. CR: Only one of the Walter US entities, Walter Resources, is a party to a collective bargaining agreement with the 1974 Plan (*Reasons for Madam Judgment of Justice Fitzpatrick dated January 26, 2016, para. 13*).

14. NK: Walter Resources (or a predecessor entity) had been a signatory to the 1978, 1981, 1984, 1988, 1993, 2002, 2007 and 2011 National Bituminous Coal Wage Agreements (the 2011 National Bituminous Coal Wage Agreement, the "CBA"), and, pursuant thereto, had been a participating employer in the 1974 Plan (*Claim para. 23; Walter no knowledge; USW no knowledge*).

15. CR: No member of the Walter Canada Group is or ever has been party to the CBA (*Inference based on Claim para. 23; Walter Response para. 24*; *Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*).

16. NK: The 1974 Plan is in financial distress and had unfunded vested benefits of approximately US$5.8 billion as of July 1, 2015 (*1974 Plan Reply to USW, para. 3*).

The Western Acquisition

17. A: Before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom (*Claim para. 47; Walter admits; USW no knowledge*).

18. A: On March 9, 2011, Walter Energy incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") (*Claim para. 40; Walter admits; USW no knowledge*).

19. A: Canada Holdings is a company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 2; Walter admits; USW admits*).

20. A: Canada Holdings is wholly owned by Walter Energy (*Claim para. 41; Walter admits; USW admits*).

21. A: Canada Holdings was incorporated specifically to hold the shares of Western Coal Corp. ("Western") and its subsidiaries (*Claim para. 42; Walter admits; USW no knowledge*).

22. A: Western and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States (*Claim para. 43; Walter admits; USW no knowledge*).

23. CR: Walter Energy's Western Acquisition was publicly announced and was completed pursuant to a plan of arrangement approved by the British Columbia Supreme Court (*Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement*).

24. CR: Walter Energy and Western began negotiating the Western Acquisition in late October 2010 (*1st Affidavit of Keith Calder dated February 1, 2011, para. 35*).

25. DE: On November 18, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly-available EDGAR system. In the press release, Walter Energy stated that Walter Energy had entered into a share purchase agreement seeking to acquire approximately 19.8% of the outstanding common shares of Western. The press release referred to Walter Energy's intention to complete a "business combination" with Western (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit A*).

26. DE: On December 2, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that it had extended its exclusivity agreement with Western. Walter Energy also stated "Under the terms of the agreement, which was announced on November 18, 2010, both companies are working exclusively with each other toward the negotiation of a definitive agreement to give effect to Walter Energy's proposal to acquire Western" (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit B*).

27. DE: On December 2, 2010, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that:

    (a) it had entered into an Arrangement Agreement with Western whereby Walter Energy would acquire all of the outstanding common shares of Western;

(b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

(c) in connection with the arrangement, Walter Energy entered into a debt commitment letter pursuant to which Walter Energy would borrow $2,725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of the Company and its subsidiaries" (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit C*).

28. DE: On January 21, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy stated that the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 had expired and that the Canadian Competition Bureau had issued a "no-action" letter (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit D*).

29. DE: On February 15, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced the Company's fourth quarter and full-year 2010 results. Walter Energy also reported that the Western Acquisition was progressing (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit E*).

30. DE: On March 2, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that once the Western Acquisition was complete, Joseph B. Leonard (then-

CEO of Walter) would step down from his position and Keith Calder (then-CEO of Western) would be appointed as CEO (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit F*).

31. DE: On March 11, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that the shareholders of Western overwhelmingly voted in favour of the proposed plan of arrangement. Walter Energy also attached a press release stating that the Supreme Court of British Columbia had issued a final order approving the proposed plan of arrangement (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit G*).

32. CR: No one filed a Response to Petition in respect of the application to approve the Plan of Arrangement (*2nd Affidavit of Keith Calder dated March 8, 2011, para. 16*).

33. DE: On March 28, 2011, Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on EDGAR. In the press release, Walter Energy announced that the Minister of Industry, under the *Investment Canada Act*, approved the proposed acquisition of Western (*2nd Affidavit of Linda Sherwood dated November 14, 2016, Exhibit H*).

34. A: On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (the "Western Acquisition") (*Claim para. 44; Walter admits; USW no knowledge*).

35. NK: At the time of the Western Acquisition, the 1974 Plan had an unfunded liability of greater than US$4 billion (*Claim para. 56; Walter no knowledge; USW no knowledge*).

36. A: The Western Acquisition included the Brule, Wolverine and Willow Creek mines (*Claim para. 45; Walter admits; USW no knowledge*).

37. A: Total consideration paid by Walter Energy in respect of the Western Acquisition was approximately US$3.7 billion (*Claim para. 46; Walter admits; USW no knowledge*).

38. A: Concurrently, and in connection with entering into the arrangement agreement with Western, Walter Energy, Western, and Canada Holdings entered into a credit facility (the "Credit Facility") with Morgan Stanley Senior Funding, Inc., the Bank of Nova Scotia and the other lenders thereunder (the "Bank Lenders") (*Claim para. 48; Walter admits; USW no knowledge*).

39. CR: The Credit Facility was also used to pay existing Walter US Group debt and to pay fees (*Walter Response para. 34; 1st Affidavit of William G. Harvey dated December 4, 2015, para. 32*).

40. A: The majority of the funding Canada Holdings paid for the Western Acquisition was obtained under a hybrid debt transaction (the "Hybrid Financing") (*Claim para. 51; Walter admits; USW no knowledge*).

41. A: As part of the Hybrid Financing, in substance, Walter Energy advanced approximately US$2 billion in cash to Canada Holdings to enable Canada Holdings to purchase the Western Coal entities (*Claim para. 52; Walter admits; USW no knowledge*).

42. A: Walter Energy incurred significant debt in relation to the Western Acquisition (*Claim para. 54; Walter admits; USW no knowledge*).

43. CR: After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments, the Walter US Group, the Walter Canada Group and the Walter UK Group (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 36*).

Walter Canada Corporate Parties and Structure

44. A: The Petitioners in these CCAA Proceedings comprise Canada Holdings and all entities owned directly or indirectly by Walter Energy that are incorporated or organized under the laws of Canada or its provinces (*Claim para. 27; Walter admits; USW no knowledge*).

45. A: Walter Canadian Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 3; Walter admits; USW no knowledge*).

46. CR: Walter Canadian Coal ULC was formed on June 28, 2012 (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 12*).

47. A: Walter Canadian Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 11; Walter admits; USW no knowledge*).

48. A: Canada Holdings is the general partner of Walter Canadian Coal Partnership (*Claim para. 29; Walter admits; USW no knowledge*).

49. PD: Walter Canadian Coal Partnership was registered on July 25, 2012 (*1st Affidavit of Linda Sherwood, Exhibit D*).

50. A: Walter Canadian Coal Partnership is the Petitioners' principal operating entity (*Claim para. 28; Walter admits; USW no knowledge*).

51. A: Walter Canadian Coal Partnership is a partner of each of the three B.C. partnerships that operate the Canadian mines: Wolverine Coal Partnership, Brule Coal Partnership and Willow Creek Coal Partnership (*Claim para. 31; Walter admits; USW no knowledge*).

52. A: Each of the partnerships has a separate B.C. unlimited liability company as its other partner (*Claim para. 32; Walter admits; USW no knowledge*):

(a) A: Wolverine Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 4; Walter admits; USW admits*).

(b) PD: Wolverine Coal ULC was incorporated on June 27, 2012 (*1st Affidavit of Linda Sherwood, Exhibit E*).

(i) A: Wolverine Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 12; Walter admits; USW no knowledge*).

(ii) PD: Wolverine Coal Partnership was registered on July 16, 2012 (*1st Affidavit of Linda Sherwood, Exhibit F*).

(c) A: Brule Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West

Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 5; Walter admits; USW no knowledge*).

(d) PD: Brule Coal ULC was incorporated on June 27, 2012 (*1st Affidavit of Linda Sherwood, Exhibit A*).

(i) A: Brule Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 13; Walter admits; USW no knowledge*).

(ii) PD: Brule Coal Partnership was registered on July 25, 2012 (*1st Affidavit of Linda Sherwood, Exhibit B*).

(e) A: Willow Creek Coal ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 7; Walter admits; USW no knowledge*).

(i) A: Willow Creek Coal Partnership is a partnership organized under the laws of British Columbia, with an address for service at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 10; Walter admits; USW no knowledge*).

53. A: Cambrian Energybuild Holdings ULC is an unlimited liability company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 6; Walter admits; USW no knowledge*).

54. PD: Cambrian Energybuild Holdings ULC was incorporated on June 27, 2012 (*1st Affidavit of Linda Sherwood, Exhibit C*).

55. A: Pine Valley Coal Ltd. is a company incorporated under the laws of Alberta, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 8; Walter admits; USW no knowledge*).

56. A: 0541237 BC Ltd. is a company incorporated under the laws of British Columbia, with a registered and records office at: 1600-925 West Georgia Street, Vancouver, BC V6C 3L2 (*Claim para. 9; Walter admits; USW no knowledge*).

The Walter Canada Group's Business

57. CR: The Walter Group operates its business in two distinct segments: (i) US Operations, and (ii) Canadian and UK Operations (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 10(c)*).

58. CR: After the Western Acquisition, the Walter Group's public reporting divided the Walter Group into the Walter US Group and the Walter Non-US Group reporting segments (*Walter Response para. 14; 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 106-107*).

59. CR: Walter Energy, a public company, reported its financial results by segment and does not provide financial reporting for the Walter Canada Group or the Walter UK Group independently (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 10(c)*).

60. CR: The Walter Canada Group and the Walter UK Group are operated separately and there is little overlap between the two corporate groups, other than the fact that the President of Canada Holdings is also the President of Energybuild Group Limited, the

parent company of all of the UK members of the Walter Group (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 48*).

61. CR: British Columbia is the Walter Canada Group's chief place of business (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 15*).

62. CR: The Walter US Group provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*).

63. CR: Walter Energy and its subsidiaries provided these services to the Walter Canada Group, including services pursuant to certain management agreements and other intercompany agreements (collectively, the "Shared Services") (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 149*).

64. CR: As of December 2015, the Walter Canada Group paid approximately $1 million per month to the Walter US Group for the Shared Services, based on a historical overhead allocation methodology (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*).

65. CR: Given the importance of these Shared Services to the Walter Canada Group's operations, the expertise and experience of the Walter US Group and the significant extent to which the Walter Canada Group relied on the Walter US Group to provide these essential services, the Walter Canada Group paid the Walter US Group during the CCAA proceeding on a basis consistent with then-current payment terms and business practices

but subject to certain changes to reflect the set of services then needed by the Walter Canada Group (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 149*).

66. CR: The Walter Canada Group and the Walter US Group negotiated to address the provision of these Shared Services and the pricing of such services until the consummation of the transaction contemplated by the US APA (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 30*).

67. CR: William Harvey, of the City of Birmingham, Alabama, was the Executive Vice President and Chief Financial Officer of Canada Holdings (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 1*).

68. A: Mr. Harvey was also the Chief Financial Officer and Executive Vice President of Walter Energy (*Claim para. 90; Walter admits; USW no knowledge*).

69. CR: Mr. Harvey, and four other officers of various Walter Canada Group companies who were also employees of Walter Energy, resigned on January 20, 2016 (*1st Affidavit of William E Aziz dated March 22, 2016, para. 21*).

70. CR: In certain circumstances, directors and officers of the Walter Canada Group can be held liable for certain obligations owing to employees and government entities. As of December 2015, the Walter Canada Group estimated (with the assistance of the Proposed Monitor) that the obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 155*).

71. CR: The Canadian operations principally included the Brule and Willow Creek coal mines, located near Chetwynd, BC, and the Wolverine coal mine, near Tumbler Ridge, BC (*Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 3*).

72. CR: The principal assets of the Petitioners are the cash proceeds of the Brule, Willow Creek and Wolverine mines, located in northeast British Columbia, and the Petitioners' 50% interest in the Belcourt Saxon Coal Limited Partnership (*Claim para. 30, which did not refer to the cash proceeds; Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016, paras. 12 and 14*).

73. CR: The Walter Canada Group did not and does not have assets or carry on business in the United States (*Walter Response para. 28; 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 48-70*).

74. CR: As of December 4, 2015, the Walter Canada Group cumulatively employed a total of approximately 315 active and inactive employees in Canada, including approximately 280 inactive, unionized employees employed at the Wolverine Mine and certain employees on disability leave (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 72*).

75. CR: Some of the Walter Canada Group's former employees were members of one of the following two unions: the Respondent Steelworkers (para. 80) and the Christian Labour Association of Canada (para. 76) (*1st Affidavit of William G. Harvey dated December 4, 2015*).

76. CR: The collective agreements with the Respondent Steelworkers and the Christian Labour Association of Canada were governed by the B.C. *Labour Relations Code* (*1st Affidavit of William G. Harvey dated December 4, 2015, paras. 76 and 81*).

77. CR: The Respondent Steelworkers asserted claims relating to the Northern Living Allowance and certain claims related to the notice provisions under s. 54 of the B.C. *Labour Relations Code* (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 84*).

78. CR: The 1974 Plan does not allege that the Walter Canada Group employed any beneficiaries of the 1974 Plan or any person who was a member of the United Mine Workers of America union. As a matter of fact, the Walter Canada Group did not employ any such persons (*Walter Response para. 25; Inference drawn from 1st Affidavit of William G. Harvey dated December 4, 2015, paras. 76, 80*).

79. CR: The 1974 Plan does not allege that the Walter Canada Group contributed to the 1974 Plan. As a matter of fact, the Walter Canada Group did not contribute to the 1974 Plan (*Walter Response para. 26; Inference based on Claim para. 23; Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*).

80. CR: In the period when Walter Resources was a contributing employer to the 1974 Plan, the Walter Canada Group did not have any obligation to contribute to the 1974 Plan nor does the 1974 Plan allege that the Walter Canada Group had such an obligation (*Walter Response para. 27; Inference based on Claim para. 23; Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 13*).

81. CR: The Walter Canada Group's operations were subject to environmental assessment under the B.C. *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act*. Each mine was issued an environmental assessment certificate that sets out the criteria for designing and constructing the project, along with a schedule of commitments the Walter Canada Group made to address concerns raised through the environmental assessment process. If, for any reason, the Walter Canada Group's operations were not conducted in accordance with the environmental assessment certificate, the Walter Canada Group's operations could have been temporarily suspended until such time as its operations were brought back into compliance (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 85*).

82. CR: Any significant changes to the Walter Canada Group's operations or further development of its properties in B.C. could have triggered a federal or provincial environmental assessment or both (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 86*).

83. CR: Each of the Walter Canada Group's mining sites were inspected by the British Columbia Ministry of Energy and Mines in September 2014 (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 87*).

84. CR: Pursuant to the BC *Mines Act*, the Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine. The Chief Inspector of Mines could issue a permit with conditions, including requiring that the owner, agent, manager or permittee give security in an amount and form specified by the Chief Inspector for mine reclamation and

to provide for the protection of watercourses and cultural heritage resources affected by the mine. The reclamation security could have been applied towards mine closure or reclamation costs and other miscellaneous obligations if permit conditions were not met. Detailed reclamation and closure requirements are contained in the *Health, Safety and Reclamation Code for Mines in British Columbia* (the "*Mine Code*") established under *Mines Act* (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 88*).

85. CR: Under the *Mines Act* and the *Mine Code*, the Walter Canada Group filed mine plans and reclamation programs for each of its operations. The Walter Canada Group accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines. Additionally, under the terms of each mine permit, the Walter Canada Group was required to submit an updated mine plan every five years. The Walter Canada Group submitted updated five-year mine plans for Wolverine Mine and Brule Mine in 2013 (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 89*).

86. CR: The Walter Canada Group experienced some issues in meeting the revised provincial water quality guidelines relating to selenium, nitrate and sulphate levels at the Brule Mine (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 57*).

87. CR: The Walter Canada Group's Mining Permits were non-assignable and non-transferrable unless amended, pursuant to s. 11.1 of the *Mines Act*, by way of application to the Chief Inspector or its delegate. The Mining Permits also required the permittee to notify the Chief Inspector of Mines of any intention to depart from either the work plan or reclamation program "to any substantial degree", and to not proceed without written authorization (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 92*).

88. CR: In addition to the Mining Permits, each of the mining sites had obtained the following types of permits/licenses to operate:

(a) Environmental Assessment Certificates ("EACs");

(b) Coal leases or licences;

(c) Various environmental permits including (i) air contaminant discharge permits (due to the dust or fine particulate matter created during the operations), (ii) water permits (due to the need to use or divert water existing on the site for the operations) and (iii) waste / effluent discharge permits (together, "Environmental Permits");

(d) licenses to cut and remove timber and permits to use forestry service roads issued under the *Forestry Act*;

(e) Explosive storage and handling permits issued under the *Mines Act*; and

(f) Other land tenures such as statutory right of ways and licenses of occupation (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 93*).

89. CR: It was imperative that the Walter Canada Group retain all of their EACs, coal leases and licenses, Environmental Permits and other rights throughout the restructuring proceedings to ensure that they could continue to operate and, should conditions prove favourable, ramp up mining at one or more of the Canadian mines. Without the EACs, coal leases and licences, Environmental Permits and other rights described above, the Walter Canada Group was prohibited from undertaking any activity on the site, including

ongoing maintenance and remediation (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 94*).

Walter US Chapter 11 Proceedings

90. A: On July 15, 2015, the US Debtors commenced proceedings (the "Chapter 11 Proceedings") under Chapter 11 of Title 11 of the United States Code (the "US Bankruptcy Code") (*Claim para. 58; Walter admits; USW no knowledge*).

91. CR: The US Bankruptcy Court found as a fact that: "However, despite the high quality of met coal that the Debtors sell, the Debtors, like many other US coal producers, were unable to survive the sharp decline in the global met coal industry and filed for Chapter 11 relief on July 15, 2015" (*1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 3, para. 1*).

92. CR: The US Bankruptcy Court found as a fact that: "The decline of the global met coal industry since 2011 is well established and has devastated the industry. Fundamental downward shifts in the Chinese economy, coupled with the increase of low-cost supply of met coal from Australia and Russia, have driven met coal prices down from their historic high of $330 per metric ton in 2011 to their current low of $89 per metric ton." (*1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 6, para. 7*).

Walter Canada Group CCAA Proceedings

93. CR: The timing of the Western Acquisition could not have been worse. Since 2011, the market for metallurgical coal fell dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines

were placed in care and maintenance between April 2013 and June 2014 (*Reasons for judgment of Madam Justice Fitzpatrick dated January 26, 2016, para. 4*).

94. CR: As part of the CCAA Proceedings, the Willow Creek Coal Partnership and Brule Coal Partnership planned to enter into an agreement with Walter Resources whereby Walter Resources would buy three bulldozers from the Partnerships (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 97*).

95. CR: Only one of the three bulldozers met certain US regulatory requirements for import into the United States (*1st Affidavit of William E. Aziz dated March 22, 2016, para. 28*).

96. CR: By way of Bill of Sale dated December 29, 2015, Brule Coal Partnership sold one bulldozer to Walter Resources (*1st Affidavit of William E. Aziz dated March 22, 2016, Exhibit A*).

97. CR: The Bill of Sale was "made under and shall be governed by and construed in accordance with the law of the Province of British Columbia and the federal laws of Canada applicable in the Province of British Columbia" (*1st Affidavit of William E. Aziz dated March 22, 2016, Exhibit A*).

1974 Plan's Proofs of Claim in the Chapter 11 Proceedings

98. NK: On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings (*Claim para. 59; Walter no knowledge; USW no knowledge*).

99. CR: The 1974 Plan filed a proof of claim against Walter Resources (*1st Affidavit of Miriam Dominguez, Exhibit A*).

100. CR: The 1974 Plan filed a proof of claim against Walter Energy (*1st Affidavit of Miriam Dominguez, Exhibit B*) and all other US Debtors (*2nd Affidavit of Miriam Dominguez, Exhibit D, p. 82*).

101. CR: The 1974 Plan filed a proof of claim against Walter Energy which refers to "each of the debtors and debtors-in-possession" in the Chapter 11 Proceedings (*1st Affidavit of Miriam Dominguez, Exhibit B, para. 4*).

102. CR: The Proofs of Claim filed by the 1974 Plan in the Chapter 11 Proceedings do not refer to the Walter Canada Group (*USW response para. 9; 1st Affidavit of Miriam Dominguez, Exhibits A & B*).

The Granting and Implementation of the Global Settlement Order in the Chapter 11 Proceedings

103. CR: On December 22, 2015, the US Bankruptcy Court entered an order (the "Global Settlement Order") (*2nd Affidavit of Miriam Dominguez, Exhibit A*).

104. CR: The Global Settlement Order states: "The terms of the Global Settlement set forth in the Settlement Term Sheet, a copy of which is attached hereto as Exhibit 1, are approved and are binding on the Parties to the extent provided therein" (*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 2, para. 2*).

105. CR: The Settlement Term Sheet entitles unsecured creditors to receive 1% of the common equity issued in the Stalking Horse Purchaser on closing as well as the right to participate in any exit financing (*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 7, para. 2(a)*).

106. CR: The Global Settlement Order states: "This Court shall retain jurisdiction to hear and determine all matters arising from or related to the interpretation, implementation, or enforcement of this Order" (*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 4, para. 4*).

107. CR: Exhibit 1 to the Global Settlement Order states: "This Term Sheet constitutes a legally binding obligation of the Debtors, Steering Committee, Stalking Horse Purchaser and UCC" (*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 6*).

108. CR: Exhibit 1 to the Global Settlement Order does not include the Walter Canada Group as Parties (*2nd Affidavit of Miriam Dominguez, Exhibit A, p. 6*).

109. CR: The Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief filed jointly by the US Debtors and the Unsecured Creditors Committee states: "Notably, the relief this Motion requests does not increase or diminish the aggregate distribution to unsecured creditors from the Chapter 11 Estates. Unsecured creditors are not entitled to any recovery from the Chapter 11 Estates beyond that established by the Global Settlement, which is fixed at the Equity and corresponding participating in any exit financing" (*2nd Affidavit of Miriam Dominguez, Exhibit D, p. 65, para. 11*).

110. CR: On March 24, 2016, the US Bankruptcy Court entered an order (the "Global Settlement Implementation Order") (*2nd Affidavit of Miriam Dominguez, Exhibit E*).

111. CR: The Global Settlement Implementation Order stated: "The Global Settlement may be implemented and consummated in accordance with its terms and the terms hereof, including the application of the Participation Procedures, the Aggregate Claim Amount, and the Minimum Claim Amount for purpose of making distributions on account of the

Global Settlement to holders of unsecured claims and the solicitation of creditors in any exit financing" (*2nd Affidavit of Miriam Dominguez, Exhibit E, para. 3*).

112. CR: Pursuant to the Global Settlement Implementation Order, the Equity Trust is not permitted to make a distribution to claims below $2 million (*2nd Affidavit of Miriam Dominguez, Exhibit D, p. 64, para. 10*; *2nd Affidavit of Miriam Dominguez, Exhibit E, para. 3*).

The US Bankruptcy Court Grants the 1113/1114 Order in the Chapter 11 Proceedings

113. NK: On December 28, 2015, the US Bankruptcy Court entered an order (the "1113/1114 Order") authorizing Walter Energy and its US affiliates to reject the CBA and declaring that Walter Resources had no further obligation to contribute to the 1974 Plan (*Claim para. 16; Walter no knowledge; USW no knowledge; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order)*).

114. CR: The 1113/1114 Order was issued following a hearing on December 15 and 16, 2015, of the US Bankruptcy Court (*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1*).

115. CR: The US Debtors and the 1974 Plan participated in the US Bankruptcy Court hearing in respect of the 1113/1114 Order (*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1*).

116. CR: None of the Walter Canada Group participated in the US Bankruptcy Court hearing in respect of the 1113/1114 Order (*USW response para. 5; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order), P. 1-2*).

117. CR: In granting the 1113/1114 Order, the US Bankruptcy Court did not consider any of the assets of the Petitioners or the Canadian operations in making the 1113/1114 Order. The US Bankruptcy Court did not treat the Petitioners as a controlled group with the Walter Energy US affiliates (*USW response para. 8; 1st Affidavit of Miriam Dominguez, Exhibit C (Memo of Opinion re 1113/1114 Order)*).

118. CR: On January 4, 2016, the 1974 Plan filed an Application Response in the Supreme Court of British Columbia stating:

(a) At paragraph 10: "As set forth in the findings of fact in the 1113/1114 Order, Walter Energy US intends to seek approval of a stalking horse bid or superior bid at the scheduled sale hearing, which will require a rejection, and sale free and clear, of Walter Energy US' obligations under the CBAs. If such sale is not approved or fails to close, Walter Energy US is expected to withdraw from the 1974 Plan"; and

(b) At paragraph 11: "If the 1974 Plan's claim remains a contingent claim, Walter Energy US has expressed its intention to cause the contingency – withdrawal from the 1974 Plan – to come to pass, the US Bankruptcy Court has confirmed and authorised the actions that Walter Energy US must take to cause the contingency to come to pass, and such actions are expected to take place in the very near term" (*Application Response of the 1974 Plan filed January 4, 2016*).

119. CR: On March 29, 2016, the 1974 Plan filed an Application Response in the Supreme Court of British Columbia stating at paragraph 7: "On February 16, 2016, the collective bargaining agreement was ratified by the UMWA, resulting in the withdrawal by the UMWA of its appeal of the 1113/1114 Order, pending closing of the sale to CA.

Accordingly, the appeal of the 1113/1114 Order is not proceeding with respect to the 1974 Plan" (*Application Response of the 1974 Plan filed March 29, 2016*).

The US Bankruptcy Court Approves a Sale of the US Assets

120. NK: During the Chapter 11 Proceedings, the US Debtors sought authority from the Bankruptcy Court to sell their US assets and operations free and clear of all liabilities, including any obligations to make ongoing monthly pension contributions to the 1974 Plan under the CBA (*Claim para. 63; Walter no knowledge; USW no knowledge*).

121. NK: On April 1, 2016, the US Debtors closed a sale of its core mining assets in the United States to Coal Acquisition, LLC (*Claim para. 70; Walter no knowledge; USW no knowledge*).

122. CR: The equity interests in the members of the Walter Canada Group and the assets held by the members of the Walter Canada Group are not part of the purchased assets under the credit bid (*1st Affidavit of William G. Harvey dated December 4, 2015, para. 6*).

Walter Canada Group's address for service:	**DLA Piper (Canada) LLP** Suite 2800, Park Place 666 Burrard St Vancouver, BC V6C 2Z7 Attention: Mary I.A. Buttery and **Osler, Hoskin & Harcourt LLP** Box 50, 1 First Canadian Place Toronto, Ontario M5X 1B8 Attention: Marc Wasserman
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Date: November 14, 2016	Signature of lawyer for the Walter Canada Group DLA Piper (Canada) LLP (Mary I.A. Buttery and Lance Williams) and Osler, Hoskin & Harcourt LLP (Marc Wasserman, Mary Paterson and Patrick Riesterer)

TAB 4

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. c. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED IN SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

EXPERT REPORT OF MARC ABRAMS

Expert Report Filed by: Petitioners (the "Walter Canada Group")

I. INTRODUCTION

a. Personal Background

My name is Marc Abrams, and my home address is 1 Clark Smith Drive, Old Tappan, New Jersey 07675. I am a partner at Willkie Farr & Gallagher LLP and I am Co-Chair of the Firm's Business Reorganization and Restructuring Department. My curriculum vitae is attached hereto as Exhibit A.

I have been practicing law for over 38 years, and am admitted to practice before multiple state, federal and appellate courts. During this time, I have been engaged in numerous complex restructurings, both in and out of court, representing companies, creditors' committees and ad hoc groups, and other parties in interest. I also have substantial cross-border insolvency experience involving foreign insolvency regimes and related cases under the U.S. Bankruptcy Code. Many of these engagements have had significant pensions-related components, including a number of cases where I represented the administrators of pension plans or other statutory bodies in respect of pension plans, such as Nortel Networks, Inc., Reader's Digest Association, Inc., AMF Bowling and Sea Containers Services, Ltd. A number of my company-side representations have also involved significant claims asserted by multiemployer and single employer pension plans, including Petrie Retail, Inc., LTV Steel Corp., Delphi Corp., Journal Register Co. and Woodward & Lothrop Holdings, Inc.

Among other honors, I am a member of the Board of Directors and a Fellow of the American College of Bankruptcy. I have published numerous articles related to bankruptcy law and cross-border insolvency issues. I have also lectured at numerous conferences, including speaking engagements related to cross-border insolvency issues and pensions issues.

b. Instructions Provided To Expert In Relation to Proceedings

I have been retained by the law firm Osler, Hoskin & Harcourt LLP ("Osler"), who are counsel for Walter Energy Canada Holdings, Inc. ("Walter Energy Canada"), its direct and indirect subsidiaries and affiliates listed on Schedule "A" (collectively with Walter Energy Canada, the "Petitioners") and the partnerships listed on Schedule "C" to the Order of this Honourable Court made on December 7, 2015 (the "Initial Order") (collectively with the Petitioners, the "Walter Canada Group"), as an independent expert in connection with Walter Energy Canada's insolvency proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] In particular, I was asked to opine on the following question of U.S. law:

> If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?[2]

As set forth in more detail below, it is my opinion that a U.S. court should conclude that the "controlled group" liability provisions of the U.S. Employee Retirement Income Security Act of 1974 ("ERISA") do not have extraterritorial application.

c. Overview of The Report

This report begins by providing an overview of the provisions of ERISA governing withdrawal liability in the context of a multiemployer pension plan, such as the 1974 Plan, as well as the statute's "controlled group" liability provisions. Assuming, without opining, that the 1974 Plan could establish that the Walter Canada Group are within Walter Resource's

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[1] Prior to this retention, I was retained by KPMG LLP, in its capacity as monitor of Walter Canada in Walter Canada's CCAA proceedings, with respect to issues relating to ERISA and U.S. employee benefits and bankruptcy laws.

[2] A copy of the instructions I received from Osler is attached hereto as Exhibit B.

"controlled group," the report proceeds to analyze, in the same manner a U.S. federal court would, whether ERISA's "controlled group" provisions apply extraterritorially with respect to a claim for withdrawal liability. The report also addresses certain jurisdictional considerations under U.S. law that may impact application of ERISA's liability provisions to a non-U.S. entity.

II. FACTUAL BACKGROUND

In connection with my assignment, I have reviewed, among other materials, pleadings filed in the 1974 Plan's civil claim against Walter Canada Group arising under ERISA as well as Walter Canada Group's Statement of Uncontested Facts. A list of the materials I have reviewed in connection with this opinion is attached hereto as Exhibit C.[3]

Based on my review of those materials, I understand the following facts to be relevant to this opinion:

- The 1974 Plan seeks to hold the Walter Canada Group jointly and severally liable for the claimed pension withdrawal liability of Jim Walter Resources Inc. ("Walter Resources").
- The Walter Canada Group and Walter Resources are direct or indirect wholly owned subsidiaries of Walter Energy Inc. ("Walter Energy"), a public corporation incorporated under the laws of the State of Delaware.
- On April 1, 2011, Walter Energy, through a Canadian holding company, acquired all of the outstanding shares of Western Coal Corp. (the "Western Acquisition").
- Prior to the Western Acquisition, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom.

[3] I understand the parties may submit additional evidence prior to the hearing in this matter. I reserve the right to address such evidence in a reply submission.

- The Western Acquisition was completed pursuant to a plan of arrangement approved by the British Columbia Supreme Court.
- At the time of the Western Acquisition, the 1974 Plan had an existing unfunded liability of greater than US$4 billion.
- After the completion of the Western Acquisition, Walter Energy engaged in a series of internal restructurings to rationalize operations and to organize the corporate group into geographic business segments – *i.e.*, U.S., Canadian and U.K. I understand that in connection with the internal reorganization, U.S.-based assets or operations owned by Western Coal Corp. and acquired in the Western Acquisition were transferred to the group's U.S. business segment, but no assets or operations were transferred to the Canadian business segment.
- The Walter Canada Group does not have any assets or carry on any business in the U.S.
- The Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan.
- Pursuant to certain management and other intercompany agreements, Walter Energy and its subsidiaries, based in the U.S., provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions and legal advice.
- After the Western Acquisition, the Executive Vice President and Chief Financial Officer of Walter Canada resided in and worked out of Birmingham, Alabama.
- On July 15, 2015, Walter Energy and certain of its affiliates, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the United States Code in the U.S. Bankruptcy Court for the Northern District of Alabama ("U.S. Bankruptcy Court").

- On December 28, 2015, the U.S. Bankruptcy Court issued an order authorizing, among other things, Walter Resources to discontinue any further contributions to, and effect a withdrawal from, the 1974 Plan.

III. RELEVANT PROVISIONS UNDER ERISA

a. Withdraw Liability Under ERISA

The 1974 Plan is a multiemployer defined benefit pension plan under Section 3(37)(A) of ERISA.[4] A multiemployer plan is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries.[5] If one of the contributing employers withdraws from a multiemployer plan, either partially or completely, ERISA requires the employer to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs.[6] The withdrawing employer's liability is referred to as "withdrawal liability."

Withdrawal liability is measured in terms of the plan's unfunded vested benefits allocated to the employer at the time of withdrawal.[7] The plan has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer.[8] If the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection.[9]

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4 Amended Notice of Civil Claim ("1974 Plan Claim") ¶ 22.

5 29 U.S.C. § 1301(a)(3).

6 29 U.S.C. § 1401; 29 U.S.C. § 1386.

7 29 U.S.C. §§ 1391(a), (b); 29 U.S.C. §§ 1391(a), (b).

8 29 U.S.C. § 1382.

9 29 U.S.C. § 1399(c)(5).

b. "Controlled Group" Liability

Under ERISA, withdrawal liability is the joint and several obligation of not only the withdrawing employer (as a contributing employer) but also each member of the employer's "controlled group."[10] A contributing sponsor's "controlled group" consists of the contributing employer and any other entity that conducts a "trade or business" and is under "common control" with the employer.[11] Courts have described the operation of ERISA's "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.[12]

For purposes of ERISA, the three principal types of "controlled groups" are: (i) Parent-Subsidiary Controlled Groups; (ii) Brother-Sister Controlled Groups; and (iii) Combined Groups.[13] Here, the 1974 Plan asserts that Walter Canada is part of Walter Resources's Parent-Subsidiary Controlled Group.[14] Under ERISA, a Parent-Subsidiary Controlled Group is a group consisting of entities connected through a controlling interest with a common parent where stock with at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations.[15]

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[10] 29 U.S.C. § 1301(a)(2); 29 U.S.C. §§ 1381(a), (b).

[11] 29 U.S.C. §§ 1301(a)(14)(A), (B); 29 U.S.C. § 1002(40)(B); *see also* 29 C.F.R. § 4001.2.

[12] *See, e.g.*, *Sun Cap. Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 138 (1st Cir. 2013) (ERISA's "broad definition of 'employer' extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures."); *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 877 (7th Cir. 2013) ("When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses.").

[13] 26 C.F.R. § 1.1563-1(a)(1)(i).

[14] 1974 Plan Claim ¶¶ 26-27, 33, 37-39.

[15] 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1).

As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership."[16] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."[17]

For purposes of this report, I assume that the 1974 Plan can establish that the Walter Canada Group meets the numerical tests for stock ownership or voting control with respect to a "controlled group" under ERISA. Therefore, I will next address, as a matter of U.S. law, whether ERISA's "controlled group" liability provisions apply extraterritorially.

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[16] *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982).

[17] *See Bd. of Trustees of Trucking Employees of N.J. Welfare Fund, Inc.–Pension Fund v. Gotham Fuel Corp.*, 860 F. Supp. 1044, 1051 (D.N.J. 1993) ("Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing."); *PBGC v. Smith-Morris Corp.*, C.A. No. 94-cv-60042-AA, 1995 U.S. Dist. LEXIS 22510, at *8 (E.D. Mich. Sept. 13, 1995) (ERISA's concern is not "whether a stockholder who has controlling share actually exercised control over corporate affairs" but simply whether it had "the ability to control," as evidenced through stock ownership). Nevertheless, some courts have considered a controlled group member's actual control or involvement with the employer in imposing controlled group liability. *See, e.g., Asbestos Workers Local 24 Pension Fund v. NLG Insulation, Inc.*, 760 F. Supp. 2d 529, 541-42 (D. Md. 2010) (noting additional facts supporting court's conclusion that two companies were under "common control": overlapping officers, common ownership and clients, and shared offices and employees).

IV. EXTRATERRITORIAL APPLICATION OF ERISA'S "CONTROLLED GROUP" LIABILITY

I am not aware of any U.S. court that has directly addressed the question of whether ERISA's "controlled group" liability provisions have extraterritorial application. I will therefore analyze the question in the same manner as would a U.S. federal court presented with the issue.

a. Presumption Against Extraterritorial Application

As the U.S. Supreme Court recently reaffirmed, "[i]t is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world."[18] "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[19] The U.S. Supreme Court directs courts to "assume that Congress legislates against the backdrop of the presumption against extraterritoriality,"[20] and, therefore, the relevant inquiry is "whether Congress has affirmatively and unmistakably instructed that the statute will" apply to foreign conduct.[21] "When a statute gives no clear indication of an extraterritorial application, it has none."[22]

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18 *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

19 *RJR Nabisco,* 136 S. Ct. at 2100.

20 *Arabian Am. Oil Co.*, 499 U.S. at 248.

21 *RJR Nabisco,* 136 S. Ct. at 2100.

22 *Id.* (quotations omitted).

In determining whether the presumption against extraterritoriality applies in a particular case, courts consider two factors.[23] First, a court determines "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[24] If the statute does not reflect a clear Congressional intent, "then at the second step [courts] determine whether the case involves a domestic application of the statute . . . ."[25] Courts do this by looking at the statute's "focus."[26] As the U.S. Supreme Court has explained with respect to this step of the analysis:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[27]

b. Determining Congressional Intent

Courts determine whether Congress intended a statute to apply extraterritorially by looking at the statutory text and the "context" of the statute.[28]

On their face, the "controlled group" liability provisions of ERISA are silent as to any Congressional intent of extraterritorial application. The statutory language relating to each of the three types of "controlled groups" referenced above merely describes the types of entities that may form part of a "controlled group" and the requisite stock ownership or voting control among related entities that would satisfy the tests.

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23 *RJR Nabisco,* 136 S. Ct. at 2100.

24 *Id. at* 2101.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659, 1665-66 (2013).

Notwithstanding the absence of express statutory language supporting extraterritorial application, the U.S. Pension Benefit Guaranty Corporation ("PBGC"), a federal agency created under ERISA and tasked with administering and enforcing certain ERISA provisions, took the position, in a 1997 advisory opinion, that ERISA liability applies to "controlled group" members located outside of the U.S.[29]

Specifically, the PBGC based its argument on Section 4001(b)(1) of ERISA, which directs the PBGC to develop "controlled group" regulations that are "consistent and coextensive" with the Department of Treasury regulations related to Section 414(c) of the Internal Revenue Code (the "IRC").[30] Section 414(c) of the IRC, in turn, authorizes the Secretary of the Treasury to prescribe regulations based on "principles similar to the principles which apply" to Section 414(b) of the IRC.[31] The Department of Treasury regulations under Section 414(b), with regard to the meaning of "members of a controlled group" under that section, do not incorporate another IRC provision that specifically ***excludes***, among other things, foreign corporations from the meaning of a "controlled group."[32] Thus, the PBGC argued that the failure to incorporate the foreign corporation exclusion, coupled with the mandate under ERISA that the PBGC promulgate regulations "consistent and coextensive" with Treasury

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[29] *See* PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997 ("PBGC Advisory Opinion"), at *5-6.

[30] *Id.* at *6-7.

[31] *Id.* at *7-8. Section 414(c) of the IRC provides that, for purposes of certain sections of the IRC, "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer." Section 414(b) of the IRC provides that, for purposes of certain sections of the IRC, "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer." 26 U.S.C. § 414(b).

[32] PBGC Advisory Opinion 97-1, at *8.

regulations, means that foreign corporations are included within a "controlled group" under ERISA.[33]

As further support for its position, the PBGC observed that Congress had visited and expanded the concept of "controlled group" liability on several occasions since ERISA was initially enacted, but at no time did these legislative acts "indicate[] any Congressional intent that controlled group liability be limited to domestic entities"[34] – even though Congress was fully capable of, and had, excluded or specified particular treatment for foreign corporations in other contexts.[35]

I do not believe a U.S. court would find this analysis persuasive in demonstrating the "clear indication" from Congress that is required to overcome the strong presumption against extraterritorial application of federal laws.[36] It would be unusual for Congress to express its intention that ERISA's "controlled group" liability applies extraterritorially solely by means of a passing reference to an entirely different statutory scheme pertaining to the U.S. tax laws that is silent on whether it applies extraterritorially.[37]

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33 *Id.* at *8-10.

34 *Id.* at *7.

35 *Id.* at *9.

36 In seeking to determine congressional intent, U.S. courts often defer to interpretations of specialized federal agencies tasked with implementing and enforcing the statute where the agency's interpretation is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984). Courts have applied this form of "*Chevron*" deference to the PBGC with respect to ERISA. *See, e.g.*, *Davis v. PBGC*, 596 F. Supp. 2d 1, 2 (D.D.C. 2008), *aff'd sub nom.*, *Davis v. PBGC*, 571 F.3d 1288 (D.C. Cir. 2009) ("PBGC's interpretations of ERISA . . . are customarily entitled to *Chevron* deference."). Such deference may be limited, however, where, as here, the agency's interpretation was "not the result of public notice and comment." *Sun Capital Partners*, 724 F.3d at 140 (informal adjudication by PBGC resolving a dispute between a pension fund and third party was entitled to "no more deference than the power to persuade"). Further, at least one federal appellate court recently declined to afford *Chevron* deference to an IRS interpretation giving extraterritorial application to the U.S. tax code on the grounds of, among other things, the presumption against extraterritoriality. *See Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039 (D.C. Cir. May 26, 2015).

37 *See Arabian Am. Oil Co.*, 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

Indeed, the PBGC's reasoning relies on language in the Treasury regulations under ***Section 414(b)*** of the IRC, set forth in 26 C.F.R. § 1.414(b)-1. However, Section 4001(b) of ERISA references the Treasury regulations under ***Section 414(c)*** of the IRC, not Section 414(b) (in contrast, Section 4001(a)(14) of ERISA, which relates to "controlled group" liability for *single*-employer plans, expressly references the Treasury regulations for both Sections 414(b) and (c) of the IRC). The regulations related to Section 414(c), which are set forth in 26 C.F.R. §§ 1.414(c)-1 and 1.414(c)-2, do not contain the exclusion in 26 C.F.R. § 1.414(b)-1 that the PBGC relies upon as supposed evidence of Congress intent to apply the statute extraterritorially. Rather, 26 C.F.R. §§ 1.414(c)-1 and 1.414(c)-2 do not reflect any indication, much less clear and unmistakable intent, that they be applied extraterritorially.

Further, the statutory language on which the PBGC relies stands in stark contrast to the text of other statutes reflecting a clear Congressional intent to provide for extraterritorial application. *See, e.g.*, Export Administration Act of 1979, 50 U.S.C. App. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President"); the Logan Act, 18 U.S.C. § 953 (applying the Act to "[a]ny citizen . . . wherever he may be . . . ."); Section 30 of the Securities Exchange Act, 15 U.S.C. §§ 78dd(a),(b) (proscribing the "use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security . . . in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate . . . .").

Nor do I believe a court will find persuasive the PBGC's argument that Congress's failure to expressly limit the "controlled group" provisions to domestic entities in prior ERISA amendments evidences its intent to permit extraterritorial application. That assertion effectively reverses the judicial presumption against extraterritoriality. By virtue of the presumption, Congress need not express an intent that its laws be limited to domestic entities. As the U.S. Supreme Court held, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[38]

Further, other provisions of Title IV of ERISA undermine the notion that Congress intended for ERISA's "controlled group" liability provisions to apply extraterritorially. For example, ERISA contemplates that pension plans or sponsoring employers will file their lawsuits relating to Title IV of the statute in federal or state courts in the U.S., not foreign jurisdictions.[39] In particular, ERISA provides that U.S. federal courts have exclusive jurisdiction over lawsuits, including those asserting claims for withdrawal liability, by a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining."[40] These provisions undercut the inference that Congress intended for ERISA to apply outside of the U.S.

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38 *Morrison*, 561 U.S. at 255.

39 *See, e.g.*, 29 U.S.C. § 1401(b)(1) (collection proceeding by plan sponsor may be brought in "a State or Federal court of competent jurisdiction").

40 29 U.S.C. § 1451(a)(1); *see also* 29 U.S.C. § 1370(c) (similar jurisdictional provision in respect of single-employer pension plans).

When faced with two plausible but competing interpretations of a statute—one supporting an extraterritorial application and the other not—the presumption against extraterritoriality obviates the need for a court to choose one over the other. As the U.S. Supreme Court counseled in *Arabian Oil*, "[w]e need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application . . . . Each is plausible, but no more persuasive than that."[41]

In short, ERISA's "controlled group" liability provisions do not reflect a "clearly expressed congressional intent" that "affirmatively and unmistakably" authorizes extraterritorial application.

c. Courts Addressing The Extraterritorial Effect Of Other ERISA Provisions

My conclusion that Congress did not intend for ERISA's "controlled group" liability provisions to apply extraterritorially is consistent with court decisions reaching the same conclusion with respect to other ERISA provisions. In *Chong v. InFocus Corp.*,[42] a Singaporean citizen working in Singapore for the Singaporean subsidiary of a U.S. company commenced a suit in a U.S. court asserting that he was entitled to benefits under a severance plan established by the U.S. company under ERISA. The district court granted summary judgment against the plaintiff on his ERISA claims on the grounds that absent clear Congressional intent to extend the reach of ERISA extraterritorially, the statute would not apply to a foreign employee providing services outside of the U.S. for a foreign subsidiary even if the applicable plan was administered by a U.S. company in the U.S. and the decision to deny the employee benefits was made in the U.S.[43]

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41 *Arabian Am. Oil Co.*, 499 U.S. at 250.

42 No. CV-08-500-ST, 2008 WL 5205968 (D. Ore. Oct. 24, 2008).

43 *Id.* at *5-6.

In *Maurais v. Snyder*,[44] a Canadian doctor who performed medical services on a U.S. citizen in Canada sought compensation for his services from the patient and the patient's U.S. insurance company. The doctor sued in U.S. court and asserted claims under Pennsylvania state law. In response, the insurance company argued that the Canadian doctor's state law claims should be dismissed because they were preempted by ERISA as claims related to an employee benefit plan.[45] In considering this defense, the court concluded that the plaintiff's claims could be preempted by ERISA only if the statute applied extraterritorially, *i.e.*, to the medical procedures performed by the Canadian doctor in Canada.[46] Relying on the presumption that federal laws do not apply extraterritorially and the U.S. Supreme Court's precedent in *Arabian Oil*,[47] the court concluded that there was no language in ERISA evidencing clear congressional intent to legislate extraterritorially and preemption was therefore inapplicable.[48]

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Based on the foregoing, I find no evidence of congressional intent in the statutory text of ERISA's "controlled group" provisions that would overcome the strong presumption that the laws of the U.S. do not apply extraterritorially.

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44 No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000).

45 *Id.* at *2.

46 *Id.*

47 499 U.S. 244 (1991).

48 *Maurais,* 2000 WL 1368024, at *2-3.

d. Domestic Application of ERISA to Foreign Entities

Where, as here, the presumption against extraterritoriality is not rebutted, a court would then proceed to the second step to determine "whether the case involves a domestic application of the statute . . . ."[49] Put another way, a court looks to "whether the factual circumstances at issue require an extraterritorial application of the relevant statutory provision,"[50] or whether it is being applied to domestic activity. This is done by looking to the statute's "focus" or purpose and determining whether the conduct relevant to that focus primarily occurred in the U.S.[51]

"[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[52] Importantly, more than just *some* of the relevant conduct must occur in the U.S. Rather, that conduct must touch the U.S. "with sufficient force to displace the presumption against extraterritorial application."[53] As the U.S. Supreme Court noted in *Morrison*, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States."[54] For that reason, the Court cautioned that "the presumption

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[49] *RJR Nabisco, Inc.*, 136 S. Ct. at 2101; *see also Kiobel*, 133 S. Ct. at 1670; *Morrison*, 561 U.S. at 265-270. In its 1997 Advisory Opinion, the PBGC opined that the facts before it did not implicate an extraterritorial application of ERISA because the events that triggered liability occurred in the U.S. and involved the cessation of pension contributions of U.S. entities. PBGC Office of General Counsel, Opinion 97-1, dated May 5, 1997, at *5. As noted above, that interpretation has never been adopted by any U.S. court. Moreover, I do not find this reasoning persuasive because it only examines facts related to the triggering of the withdrawal liability, rather than facts related to the extension of such liability to members of the "controlled group." If the PBGC were correct, every application of "controlled group" liability to foreign affiliates would be domestic for purposes of the extraterritoriality analysis.

[50] *Sec. Investor Protection Corp. v. Bernard L. Madoff Investment Sec. LLC*, 513 B.R. 222, 226 (S.D.N.Y. 2014).

[51] *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

[52] *Id.*

[53] *Kiobel*, 133 S. Ct. at 1669.

[54] *Morrison*, 561 U.S. at 266 (emphasis in original).

against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[55]

The "focus" of ERISA's "controlled group" liability provisions is to "prevent businesses from shirking their ERISA obligations by fractioning operations into many separate entities."[56] While I am unaware of any case that has analyzed the conduct or transactions that may be relevant to this statutory "focus" in the context of a claim against a foreign member of the contributing employer's "controlled group," numerous courts have considered that issue in a related context – whether a foreign "controlled group" member has sufficient minimum contacts with the U.S. to subject them to personal jurisdiction of the U.S. courts in a lawsuit alleging liability under ERISA.

Before addressing those cases, I will briefly summarize applicable principles of U.S. law relating to personal jurisdiction. Under federal law, courts recognize two types of personal jurisdiction over a defendant: (i) general, or all-purpose jurisdiction; and (ii) specific, or case-related jurisdiction. A court exercising general jurisdiction over a defendant can hear any and all claims against that defendant. A court may assert general jurisdiction over a foreign

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[55] *Morrison*, 561 U.S. at 266 (emphasis in original); *see also Bernard L. Madoff Investment Sec. LLC*, 513 B.R. at 227 ("[A] mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic.").

[56] *Messina Prods.*, 706 F.3d at 878; *Tamko Asphalt Prods., Inc. of Kan. v. Comm'r of Internal Revenue*, 658 F.2d 735, 740 (10th Cir. 1981); *NYSA-ILA Pension Trust Fund v. Lykes Bros., Inc.*, No. 96 civ. 5616 (DLC), 1997 WL 458777, at *6 (S.D.N.Y. Aug. 11, 1997) (same); *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 648 (N.D. Ill. 1986) (same); *cf. Vogel Fertilizer*, 455 U.S. at 26-27 ("Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation – large corporations subdividing into smaller corporations and receiving unintended tax benefits . . . ."); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. El Paso CGP Co.*, 525 F.3d 591, 595-96 (7th Cir. 2008) (affirming ERISA liability against U.S. members of withdrawing employer's "controlled group" and stating that "the controlled group provision allows a plan to deal exclusively with the defaulting employer known to the fund, while at the same time assuring itself that legal remedies can be maintained against all related entities in the controlled group") (internal quotations omitted).

defendant where the foreign defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[57]

In contrast, to exercise specific jurisdiction over a foreign defendant, the plaintiff must demonstrate that the defendant has purposeful "minimum contacts" with the forum state such that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice."[58] The defendant's contacts with the forum must be extensive enough that he could "reasonably anticipate being haled into court there."[59] Importantly, the defendant's contacts with the forum state must be related to and give rise to the plaintiff's claim against the defendant.[60]

Virtually all of the U.S. courts that have addressed this issue in the context of ERISA claims have found that they could not exercise personal jurisdiction over a foreign defendant alleged to be in a "controlled group" for purposes of joint and several pension liability under Title IV of ERISA. For example, in *GCIU-Employer Retirement Fund v. Goldfarb Corp.*,[61] the court affirmed dismissal of a claim for withdrawal liability against a Canadian indirect parent of a U.S. subsidiary for lack of personal jurisdiction. There, the plaintiff alleged that the Canadian parent had significant contact with the U.S. employer's lenders—including negotiating a loan agreement, and amendments thereto, with a U.S. based forum-selection clause—and engaged in conduct that ultimately resulted in the employer's withdrawal from the plan.[62] But the court there found that the foreign defendant's interactions with the lenders "were

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57 *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal citations omitted).

58 *Id.* (internal citations and quotation marks omitted).

59 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

60 *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

61 565 F.3d 1018 (7th Cir. 2009).

62 *Id.* at 1020-22.

too attenuated" and "do not 'directly' relate" to the subsidiary's withdrawal to provide specific jurisdiction over the plaintiff's claims.[63]

Similarly, in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*,[64] the plaintiff pension plan alleged that the U.S. employer's Canadian affiliates were liable under ERISA based on their stock ownership in or corporate affiliation with the U.S. entity and the provision of certain payroll services by one of the affiliates to the U.S. entity.[65] The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the lawsuit, holding that "stock ownership in or affiliation with a corporation, without more, is not a sufficient minimum contact" upon which a U.S. court can exercise personal jurisdiction over foreign entities.[66]

More recently in *GCIU Employer Retirement Fund v. Coleridge Fine Arts*,[67] a U.S. district court held that it could not exercise personal jurisdiction over two Irish companies that the plaintiff, a retirement fund, alleged were subject to the withdrawal liability of their wholly-owned U.S. subsidiary.[68] The court concluded that it could not exercise personal jurisdiction over the Irish defendants because: (i) the defendants did not employ individuals in the U.S.; (ii) the defendants and the American subsidiary did not conduct business on behalf of one another; and (iii) the defendants and the American subsidiary maintained separate budgets, payroll, and business records.[69]

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63 *Id.* at 1025.

64 230 F.3d 934 (7th Cir. 2000).

65 *Id.* at 943-45.

66 *Id.* at 943.

67 154 F. Supp. 3d 1190 (D. Kan. 2015).

68 *Id.* at 1192-93.

69 *Id.* at 1201.

In contrast, personal jurisdiction was established against a foreign affiliate in *PBGC v. Asahi Tec Corp.*[70] That case involved a claim under Title IV of ERISA against a Japanese parent company, Asahi Tec Corp. ("Asahi") arising out of a U.S. subsidiary terminating its pension plan. The court concluded that it could exercise personal jurisdiction over the foreign defendant because when the Japanese parent had purchased the U.S. subsidiary, the parent undertook due diligence in the U.S., which diligence uncovered the possibility of "controlled group" liability and the parent incorporated this risk in negotiating the acquisition price.[71] The court held that these minimum contacts – the knowing decision to acquire a company in the U.S. and subject itself to "controlled group" liability – were sufficiently related to plaintiff's claims for termination liability.[72] The court distinguished *Reimer* and *Goldfarb* on grounds that here, unlike there, Asahi's minimum contacts—knowingly assuming the pension liability of a U.S. company and adjusting the deal price to reflect that liability—gave rise to its pension liability.[73] The court also distinguished *Goldfarb* and *Reimer* on the ground that they pertained to multiemployer withdrawal liability, whereas Asahi's pension liability arose from the termination of a single employer pension plan.[74]

Based on these cases, it is my opinion that if a U.S. court is asked to determine whether the ERISA's "controlled group" liability provisions have extraterritorial application, the relevant "conduct" for the second step of the extraterritoriality analysis would be the

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[70] 839 F. Supp. 2d 118 (D.D.C. 2012); *see also PBGC v. Satralloy, Inc.*, No. C-2-90-0630, 1993 U.S. Dist. LEXIS 21422, at *13 (S.D. Ohio Aug. 6, 1993) (finding general personal jurisdiction over an English affiliate for ERISA claims based on the defendant's use of a U.S. subsidiary to conduct business in the U.S. as its agent).

[71] *Asahi,* 839 F. Supp. 2d at 124-26.

[72] *Id.* at 130.

[73] *Id.* at 127.

[74] *Id*. at 128.

circumstances and transaction(s) leading to the foreign entity coming under the common control of the group parent. In addition, although the "controlled group" test itself applies mechanically based on stock ownership or voting control, given that Congress's "focus" in enacting those provisions was to deter corporate groups "shirking" their ERISA obligations by "fractioning operations" (*see supra*), I believe a U.S. court would also consider other conduct such as transactions between the foreign entity and the contributing employer or other group entities; contributions or other connections between the foreign entity and the pension plan or its members; and any acts or omissions of the foreign entity relating to withdrawal of the contributing employer.

As noted above, under U.S. Supreme Court precedent (*Morrison*, *RJR Nabisco*, *Kiobel*, *et al.*), if the relevant conduct predominantly occurred outside the U.S., applying ERISA's "controlled group" provisions to the Walter Canada Group would be an impermissible extraterritorial application of the statute. On the other hand, if the conduct primarily occurred in the U.S., application of ERISA's "controlled group" liability provisions to Petitioners would constitute a permissible domestic application of the statute.

Based on my review of materials provided to me, I believe the following facts support a finding that the relevant conduct occurred outside the U.S.:

- The Western Acquisition, pursuant to which Walter Energy acquired its Canadian operations, was consummated in Canada and approved by the British Columbia Supreme Court.
- Western Coal Corp. and its subsidiaries were in existence and operated in Canada prior to the Western Acquisition; they were not incorporated in an effort to fractionalize the group or shield the Canadian assets from the U.S. pension liabilities.

- In connection with the internal restructuring that followed the Western Acquisition, subsidiaries or assets of Walter Canada were transferred to the U.S. entities (thereby providing additional resources for the U.S. pension liabilities). I am unaware of any subsidiaries or assets of the U.S. entities that were transferred to Walter Canada.
- The Walter Canada Group does not have any assets or carry on any business in the U.S.
- The Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan.
- The Walter Canada Group was not responsible for making the decisions leading to Walter Resources's withdrawal from the 1974 Plan.

On the other hand, the following facts point to relevant conduct that was domestic, *i.e.*, occurred in the U.S.:

- Pursuant to certain management and other intercompany agreements, Walter Energy and its subsidiaries, based in the U.S., provided services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions and legal advice.
- As of the time of the Western Acquisition, the 1974 Plan had an unfunded liability of greater than US$4 billion.

V. CONCLUSION

In light of the strong presumption recognized by U.S. courts that federal laws only apply within the territorial jurisdiction of the U.S. and given the absence of clear Congressional intent to extend the reach of ERISA's "controlled group" liability provisions to foreign entities, it is my opinion that a U.S. court should conclude that as a matter of U.S. law "controlled group" liability for withdrawal liability related to a multiemployer pension plan under ERISA does not extend extraterritorially.

VI. CERTIFICATION

Pursuant to Rule 11-2 of the Supreme Court of British Columbia's Civil Rules, I hereby certify:

(a) I am aware of the duty of expert witnesses referred to in subrule (1) of Rule 11-2 that, in giving an opinion to the court, an expert appointed by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party;

(b) I have made this report in conformity with such duty; and

(c) I will, if called on to give oral or written testimony, give such testimony in conformity with such duty.

Marc Abrams

WILLKIE FARR & GALLAGHER LLP

ATTORNEY BIOGRAPHY

PRACTICE

Marc Abrams is a partner and Co-Chair of the Business Reorganization and Restructuring Department of Willkie Farr & Gallagher LLP. He has served as a member of the firm's Executive Committee and is a member of its European Committee, in which capacity he is currently co-directing the firm's London based restructuring practice. Mr. Abrams has been instrumental, principally on behalf of debtors, in several complex chapter 11 cases and non-judicial restructurings. He also has extensive experience representing creditors' committees and groups, opportunistic investors, and lenders. Mr. Abrams has also maintained a substantial cross-border practice involving foreign insolvency regimes and related cases under the Bankruptcy Code, including chapter 15 cases.

Company Side

Throughout his career, Mr. Abrams has regularly produced superior results on behalf of company-side clients in numerous complex chapter 11 cases and in several out-of-court restructurings, including seminal cases such as Adelphia Communications Corp., Angiotech Pharmaceuticals (chapter 15) and Teksid, Inc. In addition, Mr. Abrams is a recognized leader and key advisor in cross-border representations. Mr. Abrams frequently represents clients in the automotive, cable, construction, entertainment/recreation, financial products, health care, high-tech, hospitality, manufacturing, media, mining, retail, telecommunications and transportation industries.

Transactional Side

Mr. Abrams also regularly represents key stakeholders in both chapter 11 and out-of-court restructurings, including official and unofficial committees, strategic investors, purchasers and major creditors. As an industry leader, Mr. Abrams is regularly called upon for his guidance and expertise. Mr. Abrams has regularly counseled many institutional clients, including: AlixPartners, LLC; Barclays Bank PLC; Brookfield Asset Management Inc.; and Monarch Alternative Capital LP.

MARC ABRAMS
New York/London*
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EDUCATION

Widener University
JD, 1978
Villanova University
BA, 1975

WILLKIE FARR & GALLAGHER LLP

MARC ABRAMS
New York/London
Biography, Continued

SELECTED PROFESSIONAL AND BUSINESS ACTIVITIES

- Member of Board of Directors and Fellow, American College of Bankruptcy (Former Circuit Regent 2010-2014)
- Fellow, Litigation Counsel of America, The Trial Lawyer Honorary Society
- Member, Diversity Law Institute
- Member, Trial Law Institute
- Advisory Board Member - ABI's Annual "Views from the Bench" Conference

BAR ADMISSIONS

Mr. Abrams is admitted to the Delaware Bar (1978), the Pennsylvania Bar (1981), and the New York Bar (1985); the United States Courts of Appeal for the Second and Third Circuits; and the U.S. District Courts of Delaware and the Southern and Eastern Districts of New York.

EDUCATION

Mr. Abrams received a JD (cum laude) from Widener University in 1978 and a BA (cum laude) from Villanova University in 1975.

SELECTED SIGNIFICANT MATTERS

Company Side

Mr. Abrams' representative in-court and out-of-court restructuring matters include:

- Adelphia Communications Corp.
- Alliance Entertainment Corp.
- Allis-Chalmers Corp.
- AMF Bowling Worldwide, Inc.
- APS, Inc.
- Community Newspapers, Inc.
- Days Inn of America, Inc.
- Integrated Resources, Inc.

WILLKIE FARR & GALLAGHER LLP

SELECTED SIGNIFICANT MATTERS, Continued

- Journal Register Company
- L.M. Sandler & Sons, Inc.
- LandAmerica Financial Group, Inc.
- Mosler, Inc.
- Orion Pictures, Inc.
- Petrie Retail, Inc.
- Phoenix Steel Corp.
- Prime Hospitality Corp.
- RathGibson, Inc.
- Schwinn Cycling & Fitness, Inc.
- Starter Corp.
- Sunterra Corp.
- The LTV Corp.
- The Multicare Companies
- The Weinstein Company
- USinternetworking, Inc.
- Woodward & Lothrop, Inc.

Mr. Abrams' representative cross-border matters include:

- Vivarte (ad hoc lender committee and anchor investors in the largest-ever fully consensual French restructuring; named as a 2015 Am Law Global Legal Awards "Deal of the Year")
- Angiotech Pharmaceuticals, Inc. (chapter 15 on behalf of the company)
- Arctic Glacier International, Inc. (chapter 15, pending; on behalf of CCAA Monitor)
- Crystallex International Corp. (chapter 15, pending; on behalf of the company)
- Great Basin Gold (chapter 15, on behalf of CCAA Monitor)
- Nortel Networks, Inc. (pending; on behalf of UK Pension Schemes and UK PPF)

WILLKIE FARR & GALLAGHER LLP

SELECTED SIGNIFICANT MATTERS, Continued

- Readers' Digest Association, Inc. (on behalf of UK PPF)
- AMF Bowling (pending; on behalf of UK PPF)
- Teksid, Inc. (out-of-court restructuring involving operating assets located in 12 countries)

Transactional Side

Mr. Abrams' representative transactional side matters include:

- Cengage Learning, Inc. (pending; Investigations Counsel)
- Delphi Corporation (on behalf of the Ad Hoc DIP Lender Committee)

  General Growth Properties (on behalf of Brookfield Asset Management as cornerstone investor)
- Next Wave Communications (on behalf of Northrop Grumman)
- Residential Capital, LLC (on behalf of the Ad Hoc Committee)
- Resort Finance America, LLC (on behalf of GMAC)
- Rothschild, Inc. (as financial advisor to a major government-controlled company)
- Sea Containers Services, Ltd. (on behalf of the Official Committee of UK Pension Schemes)
- TOUSA, Inc. (pending; on behalf of the major debtholder)

PUBLICATIONS, NEWS AND EVENTS

Mr. Abrams serves as a contributing editor for *Collier on Bankruptcy,* the preeminent treatise on bankruptcy law. Mr. Abrams has authored or co-authored numerous published articles, including "Setting up the Sale: Bankruptcy 2015 – Views from the Bench," *Best of ABI 2015: The Year in Business Bankruptcy*, "Second Circuit Articulates the Standard for the Extinguishment of Liens Under a Chapter 11 Bankruptcy Pan," *Pratt's Journal of Bankruptcy Law* (November/December 2015), "Third Circuit Holds That Claims Are Disallowable Under Section 502(d) of the Bankruptcy Code No Matter Who Holds Them," *Metropolitan Corporate Counsel* (January 2014), "Exceptional Results Through Cross-Border Coordination," 24 Comm. Insol. R. 49-57 (June 2012), "Implications of the "Bad Faith Filing" Decision in GGP's Bankruptcy Proceeding", BNA, Inc., *Real Estate Law & Industry* (2009), and "Key Rulings from the Delaware

WILLKIE FARR & GALLAGHER LLP

PUBLICATIONS, NEWS AND EVENTS, Continued
Bankruptcy Court's Rejection of Washington Mutual's Plan of Reorganization," *Pratt's Journal of Bankruptcy Law*, Vol. 7, Number 8 (2011). Two of Mr. Abrams' articles are published in *the Best of ABI 2012: The Year in Business Bankruptcy*, including "Confirmation Roundtable: Planning for an Exit and Other Developments in Confirmation Jurisprudence" and "Tranche Warfare II: Multifaceted Intercreditor Disputes." Mr. Abrams is the co-author of the LexisNexis *Practitioner's Guide to Chapter 15 Bankruptcies*, an extensive chapter in the *Lexis* Bankruptcy Portal. He lectures frequently, including at conferences sponsored by the American College of Investment Counsel, the American Bankruptcy Institute, Valcon, the American College of Bankruptcy, National Conference of Bankruptcy Judges and the Association of the Bar of the City of New York. He is also a certified mediator for the U.S. Bankruptcy Courts for the Southern District of New York and the District of Delaware.

AWARDS AND RECOGNITIONS

- Member of Vivarte deal team, named a 2015 Am Law "Global Finance Deal of the Year (Restructuring)"
- 2011 Professor Lawrence P. King Award in recognition of his achievements in the field of bankruptcy law and for his leadership in philanthropy
- "2009 Dealmaker of the Year" by *The American Lawyer* (April 2010) for his work in the Delphi Corporation restructuring
- Recognized as one of the 500 Leading Lawyers in America in the *Lawdragon 500* guide (2010)
- Received the 2012 IFLR Americas Awards in the "Restructuring Deal of the Year" category for his lead role in the cross-border (Canada/U.S.) restructuring of Angiotech Pharmaceuticals, Inc.
- Consistently recognized by *Chambers Global* and *Chambers USA* as a leading practitioner in Bankruptcy/Restructuring
- Member of Board of Directors and Fellow with the American College of Bankruptcy

Abrams, Marc **EXHIBIT B**

From: Paterson, Mary <MPaterson@osler.com>
Sent: Tuesday, November 08, 2016 8:08 PM
To: Abrams, Marc
Cc: Caitlin Fell; Wael Rostom; Peter Reardon; Riesterer, Patrick; Buttery, Mary; Advani, Sameer; Eguchi, Weston
Subject: RE: Walter - Retainer of Willkie as Independent Expert

Marc,

Further to my note below, we understand that the question should be expanded as follows:

> If the 1974 Pension Plan's claim against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially?

Please answer this question.

Best regards,

Mary

Mary Paterson
Partner
Ext. 4924

From: Abrams, Marc [mailto:mabrams@willkie.com]
Sent: Wednesday, November 2, 2016 11:40 AM
To: Paterson, Mary <MPaterson@osler.com>
Cc: Caitlin Fell <Caitlin.Fell@mcmillan.ca>; Wael Rostom <Wael.Rostom@mcmillan.ca>; Peter Reardon <Peter.Reardon@mcmillan.ca>; Riesterer, Patrick <PRiesterer@osler.com>; Buttery, Mary <mary.buttery@dlapiper.com>
Subject: RE: Walter - Retainer of Willkie as Independent Expert

Thank you Mary. This is informative.

Marc

Marc Abrams
Willkie Farr & Gallagher LLP
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From: Paterson, Mary [mailto:MPaterson@osler.com]
Sent: Wednesday, November 02, 2016 11:31 AM
To: Abrams, Marc <mabrams@willkie.com>
Cc: Caitlin Fell <Caitlin.Fell@mcmillan.ca>; Wael Rostom <Wael.Rostom@mcmillan.ca>; Peter Reardon <Peter.Reardon@mcmillan.ca>; Riesterer, Patrick <PRiesterer@osler.com>; Buttery, Mary <mary.buttery@dlapiper.com>
Subject: Walter - Retainer of Willkie as Independent Expert

Marc,

This email is intended to be the "instructions provided to the expert in relation to the proceeding" (see Rule 11-6) and should be included in your report.

We understand that Willkie Farr is acting as counsel to the Monitor in the Canadian Walter Petitioners insolvency matter. We propose to retain Willkie Farr to act as the Walter Petitioners' independent expert on matters of US law to assist the Court in adjudicating the claim brought by the 1974 Plan in the Walter estate claims process. Given Willkie Farr's general familiarity with this issue as it affects the Walter estate, this is the most cost-efficient use of the estate's resources.

We have attached for your review an excerpt of the Supreme Court Civil Rules (BC), which includes the statement, "In giving an opinion to the court, an expert appointed under this Part by one or more of the parties or by the court has a duty to assist the court and is not to be an advocate for any party". It is our understanding that the Monitor has taken the position in its Response to Notice of Civil Claims that "the Monitor takes no position with respect to the adjudication of the 1974 Plan" (para. 5). We also note that the Monitor is an officer of the court and obliged to act independently (see *United Used Auto & Truck Parts Ltd. (Re)*, 1999 CanLII 5374 (BC SC) at para. 20; and *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760 (CanLII)). As a result, Willkie Farr's role as independent expert is consistent with its role as counsel to the Monitor in the specific context of the 1974 Plan's claim. Although this is not intended to be a joint retainer by the Monitor and Walter Petitioners, we have copied counsel to the Monitor for their information.

The specific question on which you will be asked to opine will be included in the Notice of Application (to be filed shortly) and is expected to be:

> If the 1974 Plan's claim against the Walter Petitioners is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially to corporations existing solely outside the territorial United States?

We expect that your report will be due on Monday, November 14. To the extent you require any factual evidence, you can rely on the admissions in the pleadings (attached) and the compendium of evidence (affidavits, Monitor's reports previously filed with the CCAA Court etc.). We currently expect the compendium to be served on November 7.

We acknowledge that you have a solicitor-client relationship with the Monitor and request that you not disclose any solicitor-client privileged material to us. Given the nature of the issue on which you have been asked to opine and the specific factual information that will be available in the adjudication proceeding, we do not anticipate that this will be an issue.

We look forward to working with you.

Mary

OSLER

Mary Paterson
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EXHIBIT C

Index of Materials Reviewed

- Walter Canada Group's Statement of Uncontested Facts
- Notice of Civil Claim (1974 Plan)
- Amended Notice of Civil Claim (1974 Plan)
- Response to Civil Claim (Walter Canada Group)
- Amended Response to Civil Claim (Walter Canada Group)
- Response to Civil Claim (the Monitor)
- Response to Civil Claim (United Steelworkers)
- Amended Response to Civil Claim (United Steelworkers)
- Reply to United Steelworkers (1974 Plan)
- Order of Madam Justice Fitzpatrick dated December 7, 2015
- Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016
- Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016
- 1st Affidavit of William G. Harvey ("1st Harvey Aff.") dated December 4, 2015
    - List of Canadian Petitioners (Ex. A to the 1st Harvey Aff.)
    - List of U.S. Petitioners (Ex. C to the 1st Harvey Aff.)
- 1st Affidavit of Miriam Dominguez ("1st Dominguez Aff.") dated January 4, 2016
    - Proof of Claim filed by the 1974 Plan against Walter Resources in the US Bankruptcy Proceedings against Jim Walter Resources, Inc. dated October 8, 2015 (Ex. A. to the 1st Dominguez Aff.)
    - Proof of Claim filed by the 1974 Plan against Walter Energy, Inc. in the US Bankruptcy Proceedings dated October 8, 2015 (Ex. B. to the 1st Dominguez Aff.)
    - US Bankruptcy Court Memorandum of Opinion and Order granting Walter US Debtors' 1113/1114 Motion dated December 28, 2015 (Ex. C. to the 1st Dominguez Aff.)

- 2nd Affidavit of Miriam Dominguez dated March 29, 2016 ("2nd Dominguez Aff.")
    - US Bankruptcy Court Order Approving Global Settlement Among the Debtors, Official Committee of Unsecured Creditors, Steering Committee and Stalking Horse Purchaser Pursuant to Fed. R. Bankr. P. 9019 dated December 22, 2015 (Ex. A. to the 2nd Dominguez Aff.)
    - Order Granting Motion to Alter or Amend Memorandum Opinion and Order dated December 30, 2015 (Ex. B. to the 2nd Dominguez Aff.)
    - Appellants' Reply Brief seeking reversal of Bankruptcy Court's 1113/1114 Order dated February 15, 2016 (Ex. C. to the 2nd Dominguez Aff.)
    - Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 17, 2016 (Ex. D. to the 2nd Dominguez Aff.)
    - Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 24, 2016 (Ex. E to the 2nd Dominguez Aff.)
- 1st Affidavit of Linda Sherwood ("1st Sherwood Aff.") dated November 7, 2016, exhibiting corporation reports
    - BC Company Summary for Brule Coal ULC (Sch. A to the 1st Sherwood Aff.)
    - General Partnership Summary for Brule Coal Partnership (Sch. B to the 1st Sherwood Aff.)
    - BC Company Summary for Cambrian Energybuild Holdings ULC (Sch. C to the 1st Sherwood Aff.)
    - General Partnership Summary for Walter Canadian Coal Partnership (Sch. D to the 1st Sherwood Aff.)
    - BC Company Summary for Wolverine Coal ULC (Sch. E to the 1st Sherwood Aff.)
    - General Partnership Summary for Wolverine Coal Partnership (Sch. F to the 1st Sherwood Aff.)
- 2nd Affidavit of Linda Sherwood ("2nd Sherwood Aff.") dated November 14, 2016, exhibiting corporation reports
    - Form 8-K with attached press release filed by Walter Energy with the United States Securities and Exchange Commission (the "SEC") on its publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR") on November 18, 2010 (Sch. A to the 2nd Sherwood Aff.)

  - Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on December 2, 2010 (Sch. B to the 2nd Sherwood Aff.)
  - Form 8-K with attached presentation and press release filed by Walter Energy with the SEC on EDGAR on December 3, 2010 (Sch. C to the 2nd Sherwood Aff.)
  - Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on January 21, 2011 (Sch. D to the 2nd Sherwood Aff.)
  - Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on February 15, 2011 (Sch. E to the 2nd Sherwood Aff.)
  - Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on March 2, 2011 (Sch. F to the 2nd Sherwood Aff.)
  - Form 8-K with two attached press releases filed by Walter Energy with the SEC on EDGAR on March 11,2011 (Sch. G to the 2nd Sherwood Aff.)
  - Form 8-K with attached press release filed by Walter Energy with the SEC on EDGAR on March 28, 2011 (Sch. H to the 2nd Sherwood Aff.)

- Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement
- 1st Affidavit of Keith Calder dated February 1, 2011
- 2nd Affidavit of Keith Calder dated March 8, 2011
- 1st Affidavit of William Aziz ("1st Aziz Aff.") dated March 22, 2016
  - Monitor's First and Second Certificates related to Bulldozer Transaction (Ex. A to the 1st Aziz Aff.)
- Application Response of the 1974 Plan filed January 4, 2016
- Application Response of the 1974 Plan filed March 29, 2016

TAB 5

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

WALTER CANADA GROUP'S BOOK OF AUTHORITIES RE: EXPERT REPORT OF MARC ABRAMS SERVED NOVEMBER 14, 2016 (VOL. 1)

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TAB 6

860 F.Supp. 1044
United States District Court,
D. New Jersey.

BOARD OF TRUSTEES OF TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC. —PENSION FUND, Plaintiff,

v.

GOTHAM FUEL CORPORATION, a New Jersey Corporation, and Hobin Fuel Oil, a New Jersey Corporation, Oil City Petroleum, a New York Corporation, Ray Combustion Corporation, a New Jersey Corporation, Jersey York Corporation, a New Jersey Corporation, Murray Haber, a sole proprietorship, jointly and severally, Defendants.

Civ. A. No. 92–4094.
|
April 27, 1993.

Welfare and pension plan trustees sought to impose withdrawal liability under ERISA and Multiemployer Pension Plan Amendments Act (MPPAA). Trustees moved for partial summary judgment and to strike defenses, and the members of a controlled group moved for summary judgment. The District Court, Harold A. Ackerman, J., held that: (1) trades or businesses under common control with a withdrawing employer were liable for withdrawal liability under MPPAA; (2) the controlled group waived the right to contest the amount of withdrawal liability by not demanding review or arbitration of the assessment; (3) once a judgment had been obtained against any member of the controlled group, any subsequent action against other members of the group was an action to enforce the judgment, governed by the state statute of limitations for enforcement of judgments; and (4) the action to enforce withdrawal liability was to be treated like an ERISA action for delinquent contributions and, thus, the trustees who prevailed were entitled to a mandatory award of interest on the unpaid contributions, reasonable attorney fees and costs, and liquidated damages of the greater of 20% of the withdrawal liability assessment or the amount of accrued interest.

Trustees' motion for summary judgment granted; motion to strike defenses denied; cross-motion for summary judgment denied.

West Headnotes (12)

[1] **Labor and Employment**
Multi-Employer Plans

Under Multiemployer Pension Plan Amendments Act (MPPAA), when contributing employer withdraws from participation, plan's trustees may collect withdrawal liability from employer. Employee Retirement Income Security Act of 1974, § 4201(b)(1), as amended, 29 U.S.C.A. § 1381(b)(1).

1 Cases that cite this headnote

[2] **Labor and Employment**
Trade or business under common control

Under Multiemployer Pension Plan Amendments Act (MPPAA), all trades or businesses under "common control" with contributing employer are treated as single employer and each member of controlled group is liable for withdrawal liability of any other member of group. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 4201(b)(1), as amended, 29 U.S.C.A. §§ 1301(b)(1), 1381(b)(1).

1 Cases that cite this headnote

[3] **Labor and Employment**
Trade or business under common control

Primary purpose of controlled group concept under Multiemployer Pension Plan Amendments Act (MPPAA) is to prevent employer from avoiding its responsibilities under ERISA by conducting its operations through many related but separate entities. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001(b)(1), 4201(b)(1), as

amended, 29 U.S.C.A. §§ 1001 et seq., 1301(b)(1), 1381(b)(1).

Cases that cite this headnote

[4] **Federal Civil Procedure**

Burden of proof

Party moving for summary judgment bears burdens of production—of making prima facie showing that it is entitled to summary judgment—and of persuasion. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**

Burden of proof

Party moving for summary judgment can meet its burden of production by demonstrating that there is no genuine issue of fact and that party must prevail as matter of law or by demonstrating that nonmoving party has not shown facts relating to essential element of issue for which nonmoving party bears burden. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[6] **Labor and Employment**

Trade or business under common control

Trades or businesses under common control of withdrawing employer were liable for withdrawal liability imposed under Multiemployer Pension Plan Amendments Act (MPPAA). Employee Retirement Income Security Act of 1974, § 4001(b)(1), as amended, 29 U.S.C.A. § 1301(b)(1).

1 Cases that cite this headnote

[7] **Labor and Employment**

Exhaustion of remedies

Trades or businesses under common control of withdrawing employer waived right to contest amount of withdrawal liability imposed under Multiemployer Pension Plan Amendments Act (MPPAA) by not demanding review or arbitration of withdrawal liability assessment. Employee Retirement Income Security Act of 1974, § 4001(b)(1), as amended, 29 U.S.C.A. § 1301(b)(1).

1 Cases that cite this headnote

[8] **Limitation of Actions**

Liabilities Created by Statute

Cause of action arises for purposes of statute of limitations under Multiemployer Pension Plan Amendments Act (MPPAA) when employer fails to make its first payment following demand by pension fund. Employee Retirement Income Security Act of 1974, § 4301(f), as amended, 29 U.S.C.A. § 1451(f).

Cases that cite this headnote

[9] **Federal Courts**

Federally created rights

Labor and Employment

Time to sue and limitations

Once judgment for withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) has been obtained against any member of controlled group, any subsequent action against other members of controlled group is action to enforce judgment, governed by state statute of limitations for enforcement of judgments. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 4301(f), as amended, 29 U.S.C.A. §§ 1301(b)(1), 1451(f); N.J.S.A. 2A:14–5.

3 Cases that cite this headnote

[10] **Federal Courts**

Federally created rights

Labor and Employment

Time to sue and limitations

ERISA's preemption provision did not prevent application of state statute of limitations on enforcement of judgments to action against other members of controlled group once judgment for withdrawal liability under Multiemployer Pension Plan

Amendments Act (MPPAA) has been obtained against any member of controlled group; use of state limitations period would serve ERISA's and MPPAA's remedial policies. Employee Retirement Income Security Act of 1974, §§ 4001(b)(1), 4301(f), as amended, 29 U.S.C.A. §§ 1301(b)(1), 1451(f); N.J.S.A. 2A:14–5.

2 Cases that cite this headnote

[11] **Labor and Employment**

Judgment and relief

Labor and Employment

Actions to enforce contributions

Action to enforce withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) was to be treated like ERISA action for delinquent contributions and, thus, plan that prevailed was entitled to mandatory award of interest on unpaid contributions, reasonable attorney fees and costs, and liquidated damages of the greater of 20% of withdrawal liability assessment or the amount of accrued interest. Employee Retirement Income Security Act of 1974, §§ 502(g), 515, 4301(b), as amended, 29 U.S.C.A. §§ 1132(g), 1145, 1451(b).

Cases that cite this headnote

[12] **Federal Civil Procedure**

Motion and proceedings thereon

Factual issues existed on whether individual defendant was member of controlled group for purposes of imposing withdrawal liability under Multiemployer Pension Plan Amendments Act (MPPAA) and, thus, his defenses would not be stricken until completion of discovery. Employee Retirement Income Security Act of 1974, §§ 4221(b)(1), 4301, as amended, 29 U.S.C.A. §§ 1401(b)(1), 1451; Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

4 Cases that cite this headnote

Attorneys and Law Firms

***1046** Herbert New and David W. New, P.C., Clifton, NJ, Eames, Wilcox, Mastej, Bryant, Swift and Riddell, Elizabeth Roberto, Detroit, MI, for plaintiff.

Grotta, Glassman & Hoffman, P.A., Kirsten Hotchkiss, Roseland, NJ, for defendants.

OPINION

HAROLD A. ACKERMAN, District Judge:

In this action, plaintiff Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Fund ("Trustees") seeks to collect a statutory assessment of withdrawal liability from defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City Petroleum, Ray Combustion Corporation, Jersey York Corporation, and Murray Haber[1] pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* Before me now are the following motions: 1) plaintiff's motion for partial summary judgment pursuant to Fed.R.Civ.P. 56(a) as to the corporate defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City Petroleum, Ray Combustion Corporation, and Jersey York Corporation ("Oil Group") and to strike defenses as to all the defendants; 2) defendants' cross-motion for summary ***1047** judgment pursuant to Fed.R.Civ.P. 56(b). For the following reasons, plaintiff's motion for partial summary judgment is granted and defendants' cross-motion is denied. Plaintiff's motion to strike defenses is granted in part and denied in part.

I. Overview of ERISA and MPPAA

[1] Under ERISA, an employer may contribute to a pension plan on behalf of its employees who belong to a participating union. Congress found, however, that ERISA did not adequately protect pension plans from the adverse consequences that resulted when employers withdrew from the plans. *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia,* 830 F.2d 1241, 1243 (3d Cir.1987) (*quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 722, 104 S.Ct. 2709, 2714, 81 L.Ed.2d 601 (1984)). Congress, therefore, enacted the

MPPAA in order to protect the solvency of multiemployer pension plans. *See IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118, 127 (3d Cir.1986) ("The MPPAA was designed '(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) ... to ensure benefit security to plan participants.' ") (*quoting* H.R.Rep. No. 869, 96th Cong., 2d Sess. 71, *reprinted in* 1980 U.S.Code Cong. & Admin.News 2918, 2939). Pursuant to the MPPAA, when a contributing employer to a multiemployer pension plan withdraws from participation in the plan, the plan's trustees may collect withdrawal liability from the employer. [2]

Under the MPPAA's statutory scheme, once an employer withdraws from a pension plan, the plan's trustees must make a determination of the amount of the withdrawal liability owed. 29 U.S.C. §§ 1381, 1382(1). The trustees must then notify the employer of the amount of the liability assessed and demand payment. 29 U.S.C. §§ 1382(2), 1399(b)(1). The employer then has 90 days from receipt of the Notice to request a review of the liability determination by the trustees of the plan. 29 U.S.C. § 1399(b)(2)(A)(i). If the dispute over the existence or amount of the liability is not resolved, either party may institute arbitration proceedings. 29 U.S.C. § 1401(a)(1). If the employer fails to initiate arbitration proceedings, the withdrawal liability assessment becomes due and owing and the trustees may commence an action to collect the unpaid withdrawal liability from the employer. 29 U.S.C. §§ 1401(b)(1), 1451.

[2] **[3]** Under the MPPAA, all trades or businesses under "common control" with a contributing employer are treated as a "single employer." 29 U.S.C. § 1301(b)(1). Such a group of business entities is known as a "controlled group." Since all the members of a controlled group are to be treated as one employer, each member is liable for the withdrawal liability of any other member of the controlled group. *Flying Tiger,* 830 F.2d at 1244. The primary purpose of the controlled group concept is to prevent an employer from avoiding its responsibilities under ERISA by conducting its operations through many related but separate entities. *See* S.Rep. No. 383, 93d Cong., 2d Sess. 43, *reprinted in* 1974 U.S.Code Cong. & Admin.News 4639, 4890, 4928; *see also* H.Rep. No. 807, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.Code Cong. & Admin.News 4670, 4716.

II. Factual Background

The following facts are undisputed.

Plaintiff Trustees is the plan sponsor of a multiemployer pension fund ("Fund") as defined under ERISA. 29 U.S.C. §§ 1002(37), 1301(a)(3). The Fund provides retirement benefits to plan participants who are members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 560 ("Local 560").

Oil City Petroleum Company, a New Jersey corporation, ("Oil City–NJ") was a contributing employer to the Fund. [3] Pursuant ***1048** to collective bargaining agreements with Local 560, Oil City–NJ agreed to make contributions to the Fund on behalf of its employees covered by the agreements. In September 1984, Oil City–NJ ceased operations and ceased paying contributions to the Fund.

The Trustees determined that Oil City–NJ had permanently terminated operations and calculated its withdrawal liability. On November 19, 1984, the Fund sent Oil City–NJ a notice and demand for payment of its withdrawal liability under the provisions of the MPPAA ("Notice"). The Notice set forth the total amount of the withdrawal liability assessment, $59,966.00, which was to be paid in monthly installments of $1,738.00 beginning on February 1, 1985. The Notice also informed Oil City–NJ that it had 90 days from receipt of the Notice to request a review of the Trustees' assessment determination and to seek arbitration before the New Jersey State Board of Mediation—Pension and Welfare Panel. The Notice also stated that the Trustees had a right to look to another company under common control with Oil City–NJ in the event the assessment could not be collected from it.

No review or arbitration proceedings were initiated within ninety days of receipt of the Notice and no payment of the withdrawal liability assessment was made. On February 7, 1985, the Trustees sent a past due Notice to Oil City–NJ.

On October 8, 1985, the Fund commenced an action in United States District Court in New Jersey against Oil City–NJ. *See Trucking Employees of North Jersey Welfare Fund, Inc. v. Oil City Petroleum,* Civ.Act. No. 85–4782. A default judgment was entered against Oil City–NJ on September 25, 1986 in the amount of $59,966.00, plus

interest of $10,194.22, liquidated damages of $11,993.20, and attorneys' fees and costs of $2,750.00, totalling $84,897.42. To date, no part of this judgment has been paid.

Over six years later, and eight years after Oil City–NJ first defaulted on its withdrawal liability, the Trustees instituted this action against the defendants, alleging that they are liable for the withdrawal liability assessment and the 1986 judgment.

It is conceded that defendants Gotham Fuel Corporation, Hobin Fuel Oil, Oil City–NY, Ray Combustion Corporation and Jersey York Corporation ("Oil Group") were, as of the date of the withdrawal, members of a controlled group with the contributing employer, Oil City–NJ.

III. Discussion

A. Standard for Summary Judgment

Summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Todaro v. Bowman,* 872 F.2d 43, 46 (3d Cir.1989); *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 896 (3d Cir.), *cert. dism'd,* 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller v. Indiana Hospital,* 843 F.2d 139, 143 (3d Cir.), *cert. denied,* 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986). A fact is material if it influences the outcome under the governing law. *Id.* at 248, 106 S.Ct. at 2510.

[4] **[5]** Within the framework set out above, the moving party essentially bears two burdens. First, there is the burden of production, of making a prima facie showing that it is entitled to summary judgment. This may be done either by demonstrating that there is no genuine issue of fact and that as a matter of law, the moving party must prevail, or by demonstrating that the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Once either showing is made, this burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden ***1049** as well as establish the existence of genuine issues of material fact. Second, there is the burden of persuasion. This burden is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 330–33, 106 S.Ct. 2548, 2556–58, 91 L.Ed.2d 265 (1986); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157–61, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Advisory Committee's Notes on Fed.R.Civ.P. 56(e), 1963 Amendment; *see generally* C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

B. Plaintiff's Motion and Defendants' Cross–Motion for Summary Judgment

The plaintiff seeks partial summary judgment against the Oil Group arguing that the members of the Oil Group, as members of a controlled group with Oil City–NJ, are liable jointly and severally for the withdrawal liability as a matter or law. Defendants have cross-moved for summary judgment arguing that the present action is time-barred.

[6] **[7]** As noted above, under the MPPAA, all trades or businesses under "common control" are treated as a "single employer." 29 U.S.C. § 1301(b)(1). Thus, members of a group of businesses under common control with a contributing employer are liable for the employer's withdrawal liability. *Flying Tiger,* 830 F.2d at 1244 ("Since a controlled group is to be treated as a single employer, each member of such a group is liable for the withdrawal of any other member of the group."). [4] Here, it is undisputed that the Oil Group defendants were trades or businesses under common control with Oil City–NJ at the time of withdrawal in 1984. Thus, as members of a controlled group with Oil City–NJ, they are liable for its withdrawal liability assessment. Moreover, by failing to demand review and arbitration of the withdrawal liability assessment, the controlled group has waived the right to contest the amount of withdrawal. *See Local 478 Trucking and Allied Industries Pension Fund v. Jayne,* 778 F.Supp. 1289, 1313 (D.N.J.1991). The only issue that remains therefore is whether this action is time-barred. [5]

[8] Defendants argue that the present action is barred by the statute of limitations set forth in the MPPAA. *See* 29 U.S.C. § 1451(f). Section 1451(f) provides:

> An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f). Defendants argue that because plaintiff did not institute this action until September 1992, more than six years after the cause of action arose, the action is time-barred. [6]

[9] Plaintiff argues, however, that the MPPAA statute of limitations applies only to the initial action against a controlled group member. Once a judgment is obtained against any one or more members of a controlled group, the judgment can be enforced against any other member of the controlled group and the MPPAA limitations period is no longer applicable. Rather, the applicable statute of limitations is the one governing enforcement of judgments. Plaintiff thus concludes that New Jersey's 20–year statute ***1050** of limitations applies to the present action. [7] Because the present action was commenced within six years after the judgment against Oil City–NJ was entered, application of this limitations period would render the present action timely commenced.

Plaintiff's argument that the judgment obtained against the employer can be subsequently enforced against controlled group members is based on the premise that under the MPPAA, members of a controlled group are statutory alter-egos. Plaintiff argues that the MPPAA makes members of a controlled group into a single entity and that once an action is brought the statute of limitations is tolled as to the entire controlled group.

Recently, my colleague, Judge Lifland, had occasion to consider this very same issue. *See Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Fund v. Able Truck Rental Corp., et al.*, 822 F.Supp. 1091 (D.N.J.1993). In *Able Truck,* the Court found that "pursuant to the single employer concept adopted by the Third Circuit ... only one withdrawal liability judgment can exist against members of a controlled group." *Id.*, 822 F.Supp. at 1095. The Court therefore concluded that "all subsequent actions against different members of the controlled group are actions to enforce the judgment previously entered, and such an action is timely if brought within the period of the statute of limitations for enforcement of judgments." *Id.*

I find Judge Lifland's reasoning persuasive. Members of a controlled group are deemed, by law, to constitute a single entity. *See* 29 U.S.C. § 1301(b)(1) (businesses under common control treated as a "single employer"); *Barker & Williamson,* 788 F.2d at 127 ("language of ERISA indicates that pension funds should be entitled to deal with members of a controlled group as a single entity."); *Connors v. Calvert Development Co.*, 622 F.Supp. 877, 881 (D.D.C.1985) ("The requirement that members of a controlled group, such as defendants, be treated as a single employer means that plan trustees can operate as if defendants were one entity."). Accordingly, the Third Circuit has held that notice to one controlled group member constitutes constructive notice to *all* members. *Barker & Williamson,* 788 F.2d at 127. Similarly, a judgment against one member constitutes a judgment against all other members. [8] As such, once a judgment is obtained against one controlled group member, any subsequent action against other controlled group members is an action to enforce the judgment, governed by the statute of limitations for the enforcement of judgments. *See* Fed.R.Civ.P. 69.

This analysis is consistent with the legislative intent underlying ERISA and the MPPAA.

> The legislative background of ERISA and the MPPAA makes it abundantly clear that, for the purpose of these two statutes, Congress was unconcerned with the actual ***1051** corporate form of a business. In promulgating the control group definition, Congress instructed the trustees, arbitrators, and the courts to disregard the corporate form and treat several

> inter-related corporations as one entity, the ERISA "employer"....

Robbins v. Pepsi–Cola Metropolitan Bottling Co., 636 F.Supp. 641, 659 (N.D.Ill.1986).

Members of a controlled group are, in effect, "statutory alter egos." *Able Truck*, 822 F.Supp. at 1095. As such, actions permitting a plaintiff to pierce the corporate veil and enforce a judgment against an alter ego of a judgment debtor are applicable. Courts have consistently held that the applicable statute of limitations in collection actions against an alter ego of a judgment debtor is the one governing enforcement of judgments. *See, e.g., Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 143 (2d Cir.1991); *United States v. Southern Fabricating Co.*, 764 F.2d 780, 783 (11th Cir.1985); *Matter of Holborn Oil Trading Ltd. & Interpetrol Bermuda Ltd.*, 774 F.Supp. 840, 847 (S.D.N.Y.1991); *United States v. Clawson Medical Rehabilitation & Pain Care Center*, 722 F.Supp. 1468, 1471 (E.D.Mich.1989); *see also* 1 *Fletcher's Cyclopedia on Corporations*, § 45 at 821 (Perm. ed.) ("the alter ego theory means that, when a party is regarded as identical to a corporation, the filing of a cause of action against the corporation will toll the limitations period as to the alter ego"). In such actions, the alter egos are treated as a single entity. Thus, because "the previous judgment is ... being enforced against entities who were, in essence, parties to the underlying dispute," the applicable limitations period is held to be the one governing enforcement of judgments. *Wm. Passalacqua*, 933 F.2d at 143.

Defendants argue that controlled group members are not *per se* alter egos and that controlled group liability is an independent cause of action, distinct from a claim based on alter ego liability. [9] Because plaintiff's action is brought pursuant to ERISA and the MPPAA, defendants contend that the only applicable statute of limitations is that set forth in ERISA. Defendants argument misses the point. Plaintiff is not relying on a common law alter ego theory and, indeed, such reliance is unnecessary. The MPPAA and the Third Circuit have established that controlled group members are to be treated as a single entity. Thus, the cases involving common law alter egos are being used by analogy. Certainly, controlled group members are at least analogous to common law alter egos. In fact, permitting a plaintiff to enforce a judgment against a controlled group member is more justified than in the case of common law alter egos. Controlled group members are statutorily determined to be "single entities," without the necessity of a finding of improper motive or wrongdoing. *See Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir.), *cert. denied*, 464 U.S. 961, 104 S.Ct. 393, 78 L.Ed.2d 337 (1983); *Jayne*, 778 F.Supp. at 1306. In essence, Congress intended to make it easier for pension funds to collect withdrawal liability from business entities related to a contributing employer. As this Court has recognized,

> The significance of the statutory determination that all members of the controlled group are to be treated as though they constitute a single employer is that the Fund is not required to prove that the controlled group members abused their separate identities to evade or avoid withdrawal liability. *The Fund is not required to show anything other than mere common ownership.*
>
> *Jayne*, 778 F.Supp. at 1306 (emphasis in original) (*quoting* ***1052** *O'Connor v. DeBolt Transfer, Inc.*, 737 F.Supp. 1430, 1442 (W.D.Pa.1990)). [10]

Defendants also rely on a report and recommendation of a Magistrate Judge who found in favor of defendants' position on this issue. *See Central States, Southeast and Southwest Areas Pension Fund v. Mississippi Warehouse Corporation*, 1992 U.S.Dist. LEXIS 14829 (N.D.Ill.1992). As in this case, the plaintiff in *Mississippi Warehouse* sought to enforce a judgment previously obtained against an employer against other controlled group members. The action was brought ten years after the initial default. Magistrate Weisberg held that the plaintiff was bound to the limitations period of Section 1451(f).

I find Magistrate Weisberg's opinion unpersuasive. First, the Magistrate found that although controlled group members constitute a "single employer," they are not the "same entity," explaining that "§ 1301(b)(1) does not purport to deny the separate existence of trades or businesses under common control with a withdrawing employer...." Slip. op. at 9. I emphatically disagree. The law is clearly to the contrary. *See Barker & Williamson*, 788 F.2d at 127 (controlled group members are to be treated as a "single" entity); *Robbins*, 636 F.Supp. at 641 (courts are to disregard the corporate form and treat controlled group members as "one" entity); *Calvert*, 622 F.Supp. at 881 (single employer concept "means that plan trustees can operate as if defendants were one entity.").

The Magistrate also reasons that if a pension fund brings an action under Section 1451, then it must be bound by the limitations period set forth in Section 1451(f). I believe the better view, one that comports with the policies underlying ERISA and the MPPAA, is that the initial action brought by a pension plan to obtain a judgment of withdrawal liability must be brought within the six-year limitation period set forth in Section 1451(f). Once a judgment is obtained, however, it can be enforced against other controlled group members in the same way it could be enforced against an alter ego, that is, pursuant to the statute of limitations governing enforcement of judgments.

[10] Finally, Magistrate Weisberg points to the ERISA preemption provision, 29 U.S.C. § 1144(a), which preempts all state laws relating to any employee benefit plan, concluding that Congress did not intend to give pension plans "alternate routes" to collect withdrawal liability. Slip op. at 9. First, it is doubtful that statutes of limitations are state laws "relating to any employee benefit plan." *See, e.g., Retirement Fund Trust of Plumbing v. Franchise Tax Board,* 909 F.2d 1266, 1274 (9th Cir.1990) ("state law of general application with only a 'tenuous' effect on an ERISA plan is not [preempted]."); *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir.1984) (to fall within preemption provision, state law must purport to regulate terms and conditions of employee benefit plans), *cert. denied,* 472 U.S. 1008, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985). Moreover, the Federal Rules of Civil Procedure expressly incorporate state procedures with respect to the enforcement of judgments. *See* Fed.R.Civ.P. 69. Finally, the Magistrate's assertion that Congress did not intend to give pension funds "alternate routes" to collect withdrawal liability is completely contrary to Congress express purpose in enacting the MPPAA. [11]

***1053** As noted above, Congress enacted the MPPAA to protect the solvency of multiemployer pension plans and the interests of participants and beneficiaries of pension plans. *See Barker & Williamson,* 788 F.2d at 127. As the Third Circuit has observed, "because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans." *Id.* Application of the limitations period for the enforcement of judgments clearly would further the policies underlying ERISA and MPPAA. [12]

Based on all these reasons, plaintiff's motion for partial summary judgment as against the Oil Group defendants is granted and defendants' cross-motion for summary judgment is denied. [13]

C. Plaintiff's Request for Interest, Liquidated Damages, Attorneys' Fees and Costs

Plaintiff also argues that it is entitled to an award of interest, double interest or liquidated damages, and attorneys' fees and costs.

[11] 29 U.S.C. § 1451(b) provides that the failure to make a withdrawal liability payment is to be treated as a delinquent contribution within the meaning of 29 U.S.C. § 1145. *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, 134 (3d Cir.1986), *aff'd,* 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987). Thus, plaintiff's action to enforce Oil City–NJ's withdrawal liability is to be treated as an action brought under Section 1145. 29 U.S.C. § 1132(g) provides that in any action brought by a pension plan to enforce Section 1145 in which a judgment is awarded in favor of the plan, the court must award interest on the unpaid contributions, reasonable attorneys' fees and costs, and the greater of either 20% of the unpaid contributions or an amount equal to the accrued interest. 29 U.S.C. § 1132(g). Such an award is mandatory. *See Yahn,* 787 F.2d at 134 ("§ 1132 made attorney's fees, costs and liquidated damages mandatory upon a judgment in favor of a pension plan").

As noted above, plaintiff is entitled to a judgment in its favor on defendants' withdrawal liability as a matter of law. Accordingly, pursuant to 29 U.S.C. §§ 1132(g) and 1145, it is entitled to an award of interest on the amount of the unpaid withdrawal liability assessment, liquidated damages (the greater of 20% of the withdrawal liability assessment or interest), and reasonable attorneys' fees and costs. *See Able Truck, supra,* at 1096. [14]

D. Motion to Strike Defenses

Plaintiff has also moved pursuant to Fed.R.Civ.P. 12(f) to strike defenses one through ***1054** nine against all defendants. These defenses are: 1) failure to state a claim; 2) failure to state a claim for liquidated damages; 3) failure to state a claim for an award of attorneys' fees; 4) waiver; 5) estoppel; 6) failure to pursue arbitration; 7) statute

of limitations; 8) noncompliance with administrative procedures; and 9) laches.

Defendants have not opposed plaintiff's motion as to the Oil Group defendants and expressly concede that if the court finds that New Jersey's 20–year statute of limitations applies to this action, the Oil Group defendants are subject to Oil City–NJ's withdrawal liability. Therefore, plaintiff's motion to strike defenses is granted as to the Oil Group defendants.

[12] Defendants oppose the motion, however, as to the individual defendant Murray Haber ("Haber"). They argue that the parties are in the midst of discovery and that in the absence of any proof that Haber is a member of the controlled group, the motion to strike his defenses is premature.

Rule 12(f) provides, in part: "[u]pon motion made by a party ... the court may order stricken from the pleading any insufficient defense." Fed.R.Civ.P. 12(f). Motions to strike are generally disfavored by the courts.

> Thus, even when technically appropriate and well-founded, they often are not granted in the absence of a showing of prejudice to the moving party.... [E]ven when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits.
>
> Nor will a Rule 12(f) motion be granted if there is a substantial question of fact or a mixed question of law and fact that cannot be resolved, even if it is possible to determine the issue by drawing inferences from facts and statements that are not disputed.... In sum, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits.

5A Wright & Miller, *Federal Practice and Procedure,* § 1380 at 672–78. "[T]he court's discretion is narrowly circumscribed on a motion to strike affirmative defenses." *United States v. Kramer,* 757 F.Supp. 397, 410 (D.N.J.1991). As the Third Circuit has cautioned, "a court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where, as here, the factual background for a case is largely undeveloped." *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 188 (3d Cir.1986) (citations omitted).

Here, the parties concede that they are in the middle of discovery with respect to the individual defendant Haber. Because the factual background remains undeveloped, I find that this part of plaintiff's motion to strike is premature. *See Kramer,* 757 F.Supp. at 410 (holding that it was premature to strike defenses where parties had little opportunity for discovery). Plaintiff's motion as to defendant Haber is, therefore, denied.

Conclusion

For the foregoing reasons, plaintiff's motion for partial summary judgment is granted and defendants' summary judgment motion is denied. Plaintiff is entitled to the full amount of the withdrawal assessment liability of $59,966, as well as interest, liquidated damages and reasonable attorneys' fees and costs from the Oil Group defendants. Plaintiff's motion to strike defenses is granted as to the Oil Group defendants and denied as to defendant Haber. Defendant's request for attorneys' fees is denied.

All Citations

860 F.Supp. 1044, 18 Employee Benefits Cas. 2510

Footnotes

1 Defendants have stipulated to the filing of an amended complaint which names Alfred Haber and Tessie Haber as additional defendants.

2 Withdrawal liability is defined as the employer's adjusted "allocable amount of unfunded vested benefits." 29 U.S.C. § 1381(b)(1).

3 Oil City–NJ is not a party to this action. Defendant Oil City Petroleum, a New York Corporation, is a separate entity and will be referred to as "Oil City–NY."

4 ERISA incorporates the Internal Revenue Code's "controlled group" standards for determining control group status under ERISA. 29 U.S.C. § 1301(b); *see* 26 U.S.C. §§ 414, 1563.

5 The Oil Group defendants concede that in the event plaintiff's action is found by the court not to be time-barred, they are subject to Oil City–NJ's withdrawal liability.

6 A cause of action arises when the employer fails to make its first payment following demand for payment by the pension fund. *See Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119, 1124 (D.C.Cir.), *cert. denied,* 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989).

7 Under Fed.R.Civ.P. 69, the procedure applicable to the enforcement of judgments is derived from the procedure of the state in which the district court sits. The New Jersey statute of limitations for the enforcement of judgments is set forth in N.J.S.A. 2A:14–5, which provides that an action on a judgment may be commenced within 20 years from the date of the judgment.

8 Although, as defendants argue, the statute of limitations issue was not before the Third Circuit in *Barker & Williamson,* the Court's reasoning nevertheless provides guidance for deciding other cases involving controlled group liability under the MPPAA.

> Defendants also rely on *Central States, Southeast and Southwest Areas Pension Fund v. Van Vorst Industries, Inc.,* 1992 WL 37448, 1992 U.S.Dist. LEXIS 5200 (N.D.Ill.1992) in arguing that the Third Circuit's holding in *Barker & Williamson* actually supports their position. Defendants' contention is unpersuasive. *Van Vorst* did not address the issue of whether a judgment against one controlled group member may be enforced against other controlled group members. In *Van Vorst,* none of the controlled group members had been sued within the six-year limitations period under Section 1451(f). The issue in *Van Vorst* was whether a cause of action arises under Section 1451(f) every time a pension fund learns of the existence of a controlled group member. The court relied on the holding that notice to one member constitutes notice to all members in reaching its conclusion that a cause of action arises as to all controlled group members at the same time, that is, when demand for payment has not been met. This conclusion, however, is consistent with a determination that a judgment against one member constitutes a judgment against all members.

9 In arguing that controlled group liability is an independent cause of action, distinct from alter ego liability, defendants rely on *Connors v. Peles,* 724 F.Supp. 1538 (W.D.Pa.1989). Defendants' reliance, however, is misplaced. In *Connors,* the plaintiffs proceeded exclusively on a common law theory of alter ego liability; no controlled group claim under ERISA was ever asserted in that case. Under those circumstances, the *Connors* court stated that the plaintiffs could not rely on controlled group concepts to establish liability under the common law alter ego theory advanced by plaintiffs. *Id.* at 1577.

10 See also 1 *Fletcher's Cyclopedia on Corporations,* § 45 at 822, which states:

> There is some authority for the position that the corporate form, being a creation of the state and controlled by state law, does not impose restrictions on the application of federal statutes.... Accordingly, in cases justified by underlying public policy purposes—such as the pension plan termination liability provisions of ERISA, the separate entities of an affiliated group of corporations may be disregarded without any need to demonstrate the existence of factors, such as fraud, wrongdoing, dominance, or undercapitalization, that are usually associated with state law alter ego principles.

11 I note that another Magistrate from the Northern District of Illinois recently reached the opposite conclusion from that of Magistrate Weisberg. In *Central States, Southeast and Southwest Areas Pension Fund v. Profit–Sharing Plan of G & S Terminals, Inc.,* Civ.Act. No. 92 C 0668 (March 26, 1993), Magistrate Pallmeyer held that the applicable statute of limitations was the one governing enforcement of judgments. The Magistrate reasoned that "controlled group members under ERISA, like common law alter egos, are deemed by law to constitute a single entity. Indeed, the argument for unitary treatment of controlled group members may be stronger than the argument for such treatment of alter egos...." Slip op. at 13. The Magistrate also found that application of the limitation period for enforcement of judgments would further congressional intent underlying ERISA. *Id.* at 14.

12 Defendants also argue that application of the limitations period for enforcement of judgments would permit piece-meal litigation and that the Trustees should have sued all the controlled group members together in the first action against Oil City–NJ. Defendants rely on *Connors,* 724 F.Supp. at 1579. As noted above, reliance on *Connors* is misplaced. The *Connors* court stated, in *dicta,* that the plaintiff was precluded from bringing the second action based on the doctrine of *res judicata.* Here, the defendants have not even raised a *res judicata* defense, nor could they. Liability under a controlled group theory is joint and several. It is well-settled that in the case of joint and several liability, the plaintiff can sue one or more defendants, separately or together, at the plaintiff's option. *Central States, Southeast & Southwest Areas Pension Fund v. Sztanyo Trust,* 693 F.Supp. 531, 540 (E.D.Mich.1988). Thus, "the Fund is not required to sue all of the controlled group in one action or lose its rights against unjoined parties; it may even sue each member separately

if it elects to." *Central States, Southeast & Southwest Areas Pension Fund v. Hayes*, 789 F.Supp. 1430, 15 EBC 1168, 1172 (N.D.Ill.1992).

13 In light of this court's disposition, the court need not consider plaintiff's alternative argument based on 29 U.S.C. § 1451(f)(2), which tolls the ERISA statute of limitations until plaintiff discovers or should have discovered the existence of a cause of action.

14 Defendants have also requested an award of their attorneys' fees pursuant to 29 U.S.C. § 1451(e), which permits a court to award reasonable attorneys' fees to the "prevailing party." Because defendants are not the prevailing party in this action, defendants' request is denied.

End of Document

TAB 7

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 AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

EXPERT REPORT OF JUDITH F. MAZO

Expert Report Filed by: United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**")

1. My name is Judith F. Mazo, and my personal address is 7826 Orchid Street, NW, Washington DC 20012. I am an attorney admitted to practice in several U.S. state and federal jurisdictions.[1] Since 1975 I have specialized in the development, interpretation and application of the rules under the Employee Retirement Income Security Act of 1974 (ERISA), including the periodic amendments to that Act, with a special emphasis on multiemployer pension plans.

2. As my attached resume shows, for the past five years I have worked as a consultant to The Segal Company, and to individual multiemployer pension plans and their representatives. From July 1, 1980 to July 31, 2011, I was employed by The Segal Company as Director of Research, ultimately as Senior Vice President and director of compliance for retirement plan clients. Before joining Segal, I was employed by the Pension Benefit Guaranty Corporation (PBGC), and briefly for a private law firm.

My Background and Expertise

PBGC Service

3. I worked at PBGC from 1975 to 1979, as Executive Assistant to the General Counsel. ERISA had become law in September 1974 and, in those early years, the PBGC, the Department of Labor (DOL) and the Internal Revenue Service (IRS) were hammering out the details of the law's core concepts. Some of the agency leaders had worked with Congress and its staff to draft the bill that became ERISA – the PBGC General Counsel, for instance, had represented the Labor Department during the law's crucial legislative development stages, and the PBGC Executive Director had worked on it on behalf of the Commerce Department. Now they and their staff were designing the policies and rules to put it into effect. My job was to initiate or review PBGC rulings and other policy documents and, where appropriate, tee them up for the General Counsel's final review and approval.

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[1] I have not been engaged in the formal practice of law since 1980, and accordingly have taken inactive status in the bars of Louisiana and the District of Columbia, where I have been admitted, but have been an active speaker, writer and member of professional organizations, and so have continued to keep up with legal developments in my field.

Controlled group rules.

4. Among my assignments were direction of the successful litigation of the agency's first claim for employer liability against corporations and other businesses (trusts holding real estate). I also oversaw the drafting of the PBGC's controlled-group regulations.

Multiemployer plans.

5. When Congressional leaders were putting in place the statutory underpinnings of ERISA and its plan termination insurance program, it was not clear how that coverage would work for multiemployer pension plans. Because those plans are maintained by more than one employer pursuant to collective bargaining agreements, they do not terminate when any one employer leaves or goes out of business; in the mid-1970s the assumption was that lost employers would be replaced by new companies that the union organized and brought into the plan. Congress gave itself a 2-year extension for deciding what to do, by making multiemployer coverage discretionary with the PBGC until 1976.

6. It shortly became apparent that a different paradigm was needed for multiemployer plans. While indeed they did not terminate when individual employers left, so they shielded the PBGC from the shower of terminations that it experienced early-on, but a multiemployer plan could terminate, and with a bigger impact, if the whole industry supporting the plan failed.[2] The Administration launched a concerted effort, led by the PBGC in collaboration with IRS and DOL, to rethink how to protect pensions in multiemployer plans and come up with a legislative solution. On behalf of the PBGC's General Counsel, I was charged with directing the legislative drafting.

7. After two extensions of the deadline, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),[3] in

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[2] Three multiemployer plans applied for coverage during the time PBGC had discretion to cover their benefits: two covering home-delivery milk drivers and one for cap-makers.

[3] References to MPPAA in the U.S. Code usually cite 29 U.S.C. §§ 1381 *et seq.* That is often enough for parties and courts to find what they need in individual cases, but technically it is not complete. MPPAA also made important changes to the Internal Revenue Code and Title I of ERISA, such as in the definition of "multiemployer plan", ERISA Section 3(37)(A), 29 U.S.C. § 1002(37)(A), and IRC Section 414(f), 26 U.S.C. §

substantially the same form and adopting substantially the same policies as we at PBGC had recommended.

Controlled group policy.

8. One of my early assignments was to handle the PBGC's first litigated claim for employer liability against members of the controlled group that included the company that had maintained the terminated pension plan, *PBGC v. Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied,* 450 U.S. 914 (1981), *affirming, PBGC v. Ouimet Corp.,* 470 F. Supp. 945 (D. Mass. 1979). To prosecute that litigation, which began in bankruptcy court as *In re Avon Sole,* we had to decide what the agency's position was on the operation of controlled group liability. *See, Ouimet Corp.,* 470 F.Supp at 947. The PBGC determined that it reached not only the plan sponsor's parent corporation, which owned 100% of its stock, but also real estate trusts whose sole beneficiary was the sole shareholder of the parent company.[4] The court agreed with PBGC that they constituted a brother-sister group of trades or businesses with Avon Sole Company.

9. The federal First Circuit Court of Appeals upheld the PBGC's determination and held that ERISA termination liability as applied to controlled group members that had not employed the terminated plan's participants was constitutional. The U.S. Supreme Court denied the companies' request for review.

10. I also helped formalize the PBGC's controlled-group policy through another channel, overseeing the drafting of its controlled-group regulations.

Law Firm Service

11. I left the PBGC in 1979 and joined the law firm of Burns, Jackson, Miller, Summit & Washington, the Washington, DC branch of a New York

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414(f), and the plan funding [reorganization] rules in ERISA Sections 4242-4244A, 29 U.S.C. §§ 1422-1425, IRC Sections 418A-418D, 26 U.S.C. §§ 418A-418D (repealed in 2004).

[4] One of the trusts owned the facility in which the Ouimet Company was located, the other owned the Ouimet family's homes. The tenants paid rent to the trusts whose property they inhabited – which accumulated in the trusts for their eventual benefit.

City firm. Although I was only there for a year, two of my assignments during that time are pertinent here.

12. First, I was retained as a consultant to the Pension Task Force of the Labor and Education Committee of the U.S. House of Representatives, to work with the Committee's staff on MPPAA as it wended its way through Congress.

13. Second, the PBGC retained me to handle the appeal in its policy-setting case on the controlled group principle, *Ouimet Corp.*, 630 F.2d 4. [5]

Segal Company Service

14. The Segal Company – the employer from which I retired – is an international firm[6] that provides comprehensive consulting and actuarial services to its clients. In particular, it has long been the predominant consultant to US multiemployer pension plans, advising perhaps one-third of the plans, covering roughly 40% of multiemployer plan participants. One of its clients is the National Coordinating Committee for Multiemployer Plans (the NCCMP), the largest and most influential advocacy group for US multiemployer plans, working with the Washington agencies that regulate them and the members of Congress who enact the rules that the agencies carry out. The NCCMP was especially active in the development of MPPAA, keeping in daily touch with the PBGC and then the pertinent members of Congress and their staff. That relationship with policy makers has persisted, with consultations intensifying whenever multiemployer legislation is under consideration.[7]

15. The Segal Company has been the NCCMP's technical advisor since the organization's inception in 1974. From the day I joined Segal in 1980 until I retired in 2011, I was a key member of the Segal team working with the group. Given the broad reach of Segal's consulting relationships in the multiemployer community, we would identify problems the plans

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[5] This claim was for plan termination liability under the single employer guaranty program, but the relevant controlled-group rules – and the policies behind them – are the same for multiemployer withdrawal liability.

[6] Among Segal's 23 offices are facilities in Toronto and Edmonton.

[7] See, e.g., the organization's website, www.NCCMP.org, detailing its activities and listing submissions it has made to Congress and the Administration since 2001.

were encountering with laws and regulations – or problems they would face with proposed laws and regulations. My task was the development and detailed description of possible solutions, to be worked through with the NCCMP's other professionals and submitted to whatever part of the government that was positioned to help. Often we would then spend some time with the government staff, providing further explanation and helping them evaluate solutions.

16. In addition to working with the NCCMP in what was almost a continuation of my governmental policy-development role, I also advised my Segal colleagues and, often, the attorneys for our multiemployer pension clients on effective ways to meet the ever-changing laws and requirements. This often included the preparation of standardized forms and procedures that individual clients could adapt.

17. Obviously the enactment of MPPAA was a major event in the life of multiemployer pension plans and those advising them. For several years I commuted to Washington at least weekly, for meetings and consultations with NCCMP colleagues and government staff working on MPPAA implementation. Back in New York (where I then lived and worked) I would try to explain what was going on to staff working directly with multiemployer clients, prepare draft compliance materials that individual plans could adapt and work with individual clients and their attorneys, trying to devise workable compliance strategies. Predictably, the determination and collection of withdrawal liability was a key theme.

18. This is how my career at Segal played out, and how my expertise with multiemployer pension plans deepened, over 30-some years. The extent of my policy work for the NCCMP waxed and waned, depending on the issues on the regulatory or legislative agendas, but the compliance needs of – and questions from – multiemployer pension clients did not slow down.

19. Given the role that Segal played in the multiemployer community and that I played at Segal, I needed to be actively involved with the plans' lawyers and other professionals and the communities of ERISA actuarial and legal practitioners, to learn about and to explain legal and regulatory issues. In addition to NCCMP conferences and events, I spoke frequently at union and industry gatherings, as well as symposia sponsored by the

ERISA committees of the American Bar Association (ABA). I was active in the employee benefits committees of the ABA's Sections on Tax, Labor Law and Trusts and Estates, attending meetings, chairing subcommittees and contributing to government submissions. In 1999-2000 I chaired the ABA's Joint Committee on Employee Benefits (JCEB).

20. In 2000, I and several other lawyers who had been active with the JCEB established the American College of Employee Benefits Counsel (ACEBC).[8] I am a charter Fellow of the ACEBC, headed its Admissions Committee for several years and served a term as its vice president and two terms on its Board. One activity of the ACEBC was to provide training to IRS agents and other staff on how their rules and practices were working "in the real world". Through this arrangement, I provided training to the IRS on multiemployer plans for a number of years.

21. My CV lists other professional organizations and boards with which I have been involved.

"Retirement"

22. While the pace of my professional engagement has slowed since my retirement, I have continued consulting with The Segal Company and select individual clients on multiemployer regulatory and legislative matters. In particular, I still work closely with the NCCMP on legislation to update MPPAA (and subsequent amendments to it) and create new options for multiemployer groups to survive and thrive.

2. Questions to Be Addressed[9]

A. Controlled Group Liability.

23. The first question posed to me by Dentons, counsel for the UMWA 1974 Plan in this matter, is:

> How do ERISA's provisions on controlled group liability for withdrawal liability operate and what is their purpose?

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[8] Our first induction dinner was held in July 2000, at Windows on the World, the restaurant at the top of the World Trade Center in New York City.

[9] A list of the documents made available to me for the purpose of preparing my report is attached hereto as Appendix A. A list of the facts I have assumed to be true for the purpose of my report is attached hereto as Appendix B.

24. These multiemployer provisions are modeled after the single-employer plan termination liability provisions that were originally part of ERISA and were in force when MPPAA was passed. So, to answer this question, it is helpful first to explain those rules, and then see how they were adapted for the then-new multiemployer program.

Employer Liability under ERISA, In General

25. The spark that started the campaign for a pension reform law was the closure of the Studebaker Company's 100-year old manufacturing operations in South Bend, Indiana in 1963. This prompted the termination of the pension plan for the people working there, and the loss of just about all of the active employees' pensions.[10] The drama of so many people losing their retirement benefits after they had been paid reliably for more than a century led to calls in Congress and the media for pension plan termination insurance.

26. The policy analysts realized the government could not offer such insurance unless the law also required employers to take responsible steps to fund the plans, so minimum funding standards were added to the statutory design, and those managing the plan's assets were held accountable for their decisions, which led to the introduction of federal fiduciary standards. And having a responsibly financed and managed pension fund would not help the plan's beneficiaries unless the law set minimum standards to assure that workers would have a reasonable chance to earn and become vested in their pensions, so minimum standards for plan eligibility, accrual and vesting were added. All of these rules for on-going plans, which are interpreted and enforced by the IRS and the DOL, became the heart of ERISA.

27. Title IV of ERISA established the PBGC as a mandatory insurance program for private-sector pension plans. From the start, a fundamental principle has been that the United States does not stand behind the agency's guaranty obligations.[11] The United States – "the government" – does not underwrite the costs that PBGC must absorb when an underfunded pension plan terminates without a payment from the employer to cover the loss.

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[10] Studebaker's Hamilton Ontario plant continued in operation through 1966.
[11] ERISA Sections 4002(g)(2), 4061, 29 U.S.C. §§ 1301(g)(2), 1361(g)(2).

28. Instead, the PBGC relies on the private sector plans whose benefits it guarantees to come up with the funds to pay for those guarantees. The premiums the law imposes on on-going plans are the agency's primary funding source. Under the single employer program, the PBGC premiums are supplemented by the employer liability that the agency collects from sponsors of underfunded terminated plans (including the commonly-controlled corporate relatives of those employers) and earnings on the assets left in the terminated plans that the PBGC takes over. So, under the statutory design, employer liability serves both as a deterrent to employers' abandoning their pension obligations and as funding for the guarantees. A robust employer liability collection program can ease the burden of premiums that must be imposed on the remaining pension plans.

Withdrawal Liability under the MPPAA

29. MPPAA created a different sort of guaranty program for multiemployer plans, but retained the concept of employer liability that is shared with the whole commonly controlled group.

30. Under MPPAA, "plan termination" is not the critical event for PBGC involvement. Rather, the agency steps in and provides the funds needed to pay guaranteed benefits only when a plan is insolvent and no longer has enough cash to pay currently due benefits. Most terminated, insolvent plans continue operating rather than being taken over by the PBGC. They have two basic responsibilities: to keep paying benefits, albeit only at the reduced level that is guaranteed by the PBGC, and to continue to collect withdrawal liability from employers that have stopped contributing.

31. As passed in 1974, ERISA simply copied the single employer rules and made employers that were contributing to a multiemployer plan when it terminated liable to the PBGC for the underfunding. This was destabilizing for plans that were beginning to falter, as employers would try to get out as early as possible before the plan failed. To correct for that, MPPAA imposes withdrawal liability on every employer[12] that leaves

[12] However, under special rules for the entertainment and building and construction industries, there is no liability for employers that withdraw solely because their assets are sold or they go out of business. ERISA Section 4203(b), (c), 29 U.S.C. § 1383(b), (c).

an underfunded multiemployer plan, even if there is little likelihood of plan termination or insolvency at that time.

32. The strategy was to make the contributing employers – and by extension the covered workers whose pay could drop if the employer must spend more on the pension plan – responsible for guaranteeing the plans' funding, before there is any call on PBGC assets. Thus rather than increasing PBGC's multiemployer premiums so that it could afford to pay guaranteed benefits,[13] through withdrawal liability the law sought to reduce the likelihood that multiemployer plans would need to draw on the PBGC guaranty, by requiring each departing employer to pay for a share of the plan's underfunding even if it stops contributing. And, of course, withdrawal liability is payable directly to the multiemployer plan, where it can be put to work paying benefits, in contrast with employer liability under the single employer program.

33. For the UMWA 1974 Plan, the law calls for allocating a share of the plan's unfunded vested liabilities to a withdrawing employer based on its proportional share of contributions over the prior 5-year period, with no distinction based on when the liabilities arose[14] It also details the terms and conditions on which the liability is payable,[15] and prescribes an arbitration process for enforcement of the liability.[16]

The Controlled Group Concept in ERISA

34. All three major segments of ERISA – Title I (the fiduciary, reporting and related standards administered by the Labor Department), Title II (the funding, vesting and plan nondiscrimination standards in the Internal Revenue Code) and the Title IV benefit guaranty programs – use an expansive definition of employer. That is, for most substantive purposes they define "the employer" to include the company sponsoring

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[13] Although MPPAA did increase annual multiemployer premiums from $0.50 per participant to $2.60 per participant in gradual steps over a 9-year period, these amounts were based on the new law, including withdrawal liability, rather than the assumption that there was no other change in plan financing or the PBGC guaranty program.

[14] ERISA Section 4211(d), 29 U.S.C. § 1391(d). Other plans can use methods that to some extent insulate new employers from the pre-MPPAA underfunding, *see* ERISA Section 4211, 29 U.S.C. § 1391.

[15] ERISA Section 4219, 29 U.S.C. § 1399.

[16] ERISA Section 4221, 29 U.S.C. § 1401.

the plan and all members of its commonly controlled group of trades or businesses. "Common control" is determined by using mathematical formulas to measure the levels of mutual ownership among related companies.

35. In considering a claim against distant controlled group members based on a pension plan to which they did not contribute, it is helpful to step back and see where that liability fits in the design of the PBGC's pension guaranty program. It is easy to get lost in the technical maze of the controlled group rules[17], and breathe a sigh of relief and move on, once the algebra is solved. It is true that application of the mechanical tests is all that is needed to answer the statutory question whether given trades or businesses are under common control. But in analyzing the issues here it is also useful to address the underlying question: why do sometimes distant corporate relatives share employer liability under the statute?

36. As noted, the broader concept of "employer" applies for many of the on-going plan rules and standards of ERISA as well as the liability provisions of Title IV. This means, for instance, that an employee of one controlled group member will receive credit for service with another member to determine whether she has a vested right to her accrued benefits under the current company's pension plan.[18] It also means that the demographics of the whole group can be considered when the IRS is judging whether a pension plan is discriminatory under the Internal Revenue Code standards of IRC § 401(a)(4).[19] The controlled-group

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[17] E.g., to be a commonly controlled group there must be both concentration of ownership and common control, and the rules describe how to measure each of them, separately. They also address such issues as how options, treasury stock and stock held in trusts are counted in the mathematical tests, as well as the rules for attribution of stock ownership among family members.

[18] ERISA section 210(c), (d), 29 U.S.C. § 1060, IRC Section 414(b), (c).

[19] The Internal Revenue Code has long provided that the federal income tax benefits for "tax-qualified" pension plans (those that meet the standards of IRC Section 401(a), including the ERISA minimum standards) are not available to plans that "discriminate", i.e., that go too far in favoring shareholders, owners and highly paid employees. Many rules and regulations have been developed for applying the crucial nondiscrimination principle. See, e.g., the meticulously detailed regulations on measuring nondiscrimination in benefits, 26 C.F.R. §§. 1.401(a)-1 – 401(a)-13, 401(a)(5)-1 and nondiscrimination in plan coverage, 26 C.F.R. §§. 1.410(b) –1 – 1.410(b)-10.

concept is part of the ERISA and Internal Revenue Code definitions of "multiemployer plan," so that a collectively bargained plan maintained, for example, by a parent corporation would not inadvertently shift to multiemployer status if the plan were also adopted by a wholly owned subsidiary.[20]

37. In each of these applications, the same arithmetic rules apply to determine common control. If the ownership numbers add up, companies are under common control, whether or not there was any intent to evade statutory standards by dividing into separate companies or operationally related operations or shared corporate missions. The bright lines make it easy to know whether a pension plan is in compliance, while they may on occasion make it harder to apply.

Controlled Group Liability Under Title IV

The Law.

38. Given how interwoven the controlled-group concept is with the operation of on-going pension plans under ERISA, it should be no surprise that it would be included in the Title IV benefit guaranty programs as well.

39. Section 4001 of ERISA defines most of the terms that have a distinctive meaning for the plan benefit guaranty program of Title IV of ERISA. Subsection (b)(1) prescribes the controlled-group rule, in relevant part:

> For purposes of this title, under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding

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The rules allowing companies to meet these standards separately for separate lines of businesses, ___, were added to the Code to mitigate problems caused by applying a strict "employer = controlled group" concept here.

[20] ERISA section 3(37)(B), IRC § 414(f)(2). The definition of "multiemployer plan" for the benefit guaranty program in Title IV of ERISA, section 4001(a)(3), does not include the controlled-group rule. That is because the special controlled-group definition of "employer" in section 4001(b)(1) of the law applies for all purposes under Title IV.

> sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of [the Internal Revenue Code].[21]

40. The implementing PBGC regulation that is relevant here is a brief paragraph stating simply that "The PBGC will determine that trades and businesses (whether or not incorporated) are under common control" if they meet the controlled group tests of IRC section 414(c).[22]

41. Section 414(c) of the Internal Revenue Code states briefly that the Treasury rules for determining common control when both incorporated and unincorporated businesses are involved "shall be based on principles similar to the principles which apply in the case of subsection (b)" of section 414 of the Code. Section 414(b), which applies for determining common control when the group is made up solely of corporations, adopts the rules in to IRC section 1563(a)[23]. Section 1563 and its implementing regulations provide the inspiration for the detailed rules, concepts and equations that govern the identification of a commonly controlled group of businesses under IRC sections 414(b) and (c) and ERISA section 4001(b)(1).[24]

42. The basic rules are fairly straightforward: businesses are under common control if they are part of a parent-subsidiary group, a brother-sister group, or a group that comprises both types of relationships.

43. As laid out in detail in the Treasury regulations under IRC Section 414(c), 26 C.F.R. §§ 1.414(c)-1 – 1.414(c)-5, companies are connected

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[21] 29 U.S.C. § 1301(b)(1).

[22] The most interesting thing about this regulation is the opening phrase, "PBGC will determine that ..." Washington DC regulars recognize that as a declaration that, PBGC will interpret and apply the controlled group rule when it is used under Title IV of ERISA, not the IRS, even though the IRS rules govern.

[23] However, section 414(b) excludes sections 1563(a)(4), relating to certain insurance companies, and 1563(e)(3)(C), relating to counting stock held by certain tax-qualified retirement plans. These exclusions are not relevant here.

[24] As this schematic demonstrates, the use of incorporation-by-reference in the drafting of U.S. tax and related laws has become a fine art. The governing ideas are so complex and detailed that drafters are wary of copying them when the same idea is used in different provisions, out of concern that something might be left out or they may make a formatting or other mistake that could change the meaning of the rule.

through a parent-subsidiary group if one owns at least 80% of the stock[25] of the other. There is a brother-sister group if the same five or fewer corporations, partnerships, trusts, or other businesses own at least 80% of each of them and has "effective control" of each of them through the same ownership proportions. A combined group is, of course, a group containing both as parent-subsidiary and brother-sister groups.

44. As discussed earlier, the employer liability imposed by ERISA helps to fund the benefit guarantees, albeit in a small way.[26] Applying it to the whole economic entity over which the group's assets are spread gives the controlling shareholders an incentive to keep their corporate relatives' plans funded or pay up on the claims of the PBGC, in a single-employer case, or the trustees, in the case of multiemployer plan withdrawal liability. Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

45. Withdrawal liability plays a broader and, frankly, more important role for multiemployer plans. Since it is owed to and collected by the plan itself, it is used exclusively for the payment of benefits, not for guaranteeing them at some future date if the plan fails. For that reason, safeguards like the controlled-group rules are essential to the withdrawal liability design.

Application to these facts.

46. For purposes of this discussion, I will assume the truth of the facts stated at the beginning of this Report. In sum, they show that Jim Walter Resources Inc. ("Walter Resources") was the company that had an

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[25] Similar concepts, such as profits-interest or actuarial interest, are used for unincorporated businesses.

[26] According to the PBGC's annual report for its 2016 fiscal year, that year's settlements with employers for single-employer plan underfunding and unpaid contributions totaled $88 million. Because these are usually claims against bankrupt plan sponsors, it is often likely that the employer is delinquent on its plan contributions. That, of course, adds to the plan underfunding, so in the end it does not matter from a substantive point of view whether the recovery is charged against delinquent contributions or general plan underfunding. The total income of the single employer program for the fiscal year was $15 billion. PBGC FY 2016 Annual Report at 29. http://www.pbgc.gov/Documents/2016-Annual-Report.pdf.

obligation to contribute to the UMWA 1974 Plan. Walter Resources withdrew from that Plan in 2015. At the time of its withdrawal it was part of a commonly controlled group (as determined under the applicable U.S. regulations) that included the Walter Canada Group ("Walter Canada"). Walter Energy Co., the parent of both Walter Resources and Walter Canada, had purchased the Western Coal Co., through its wholly owned subsidiary, Walter Canada, in 2011.

47. That transaction was exactly what the controlled group rules were aimed at: the parent company put some of its assets into a separate corporation that, without the controlled group rule, would not be available to satisfy Walter Resources' obligations to the UMWA 1974 Plan. Under ERISA it is not material whether Walter Energy intended that result or even considered the impact on Walter Resources and the UMWA 1974 Plan when it made the purchase.

B. Liability of Non-U.S. Controlled Group Member

48. The next question put to me by Dentons was:

> In answer to the declaration of Marc Abrams, is a member of a controlled group that is outside of the United States exempt from withdrawal liability for that reason?

49. I believe the answer under U.S. law is no. My view is that the collection of withdrawal liability from any and all components of the controlled group that constitute the employer is a paramount goal of ERISA, as amended by MPPAA. Given the law's focus on withdrawal liability and plans' ability to collect it from the "employer", I do not believe that a U.S. court would allow that goal to be frustrated by the fact that one member of the controlled group is located outside of the United States.

50. The U.S. Supreme Court's framework for analyzing questions of extraterritoriality is outlined in two recent decisions, *RJR Nabisco Inc. v. European Community et al.* (2016) ___ US ___, 136 S.Ct. 2090 and *Morrison v. National Australia Bank Ltd.* (2010) 561 US 247, 130 S.Ct. 2869. That approach entails a two-part test, asking (a) whether the law gives a clear indication that it is intended to have extraterritorial effect and (b) whether the contest involves "a permissible *domestic* application of the

law" because its focus is on activities that took place in the United States, *RJR Nabisco*, 230 S.Ct., at 2100.

51. PBGC's Opinion Letter 97-1 (May 1997)[27], addresses a question very similar to the one before us. The agency's examination of the issues comports with the Supreme Court's analytical framework. Unlike Mr. Abrams, I find its reasoning persuasive. I believe a U.S. court would reach the same conclusion, particularly as the statement is from the expert agency charged by Congress with interpreting the law.

52. The ruling addresses a U.S. company's withdrawal from a multiemployer plan and the plan's resulting claim for withdrawal liability. The plan was not able to collect the full amount from the direct employer, which was in a bankruptcy proceeding, so it sought to recover the rest from other members of the contributing employer's controlled group, which were located in the United Kingdom (the "UK Companies").[28] The UK Companies urged the PBGC to declare that applying the controlled group rule to a non-U.S. company that had not been involved with the plan or the contributing employer would be an unacceptable extraterritorial application of ERISA.

53. The PBGC disagreed, and so do I. When, as here, an employer doing business in the United States contributes to an underfunded multiemployer pension plan located in the United States under a collective bargaining agreement entered into in the United States with the labor union that represents people working for that employer in the United States, and the employer terminates that contribution obligation pursuant to the authorization of a U.S. Bankruptcy Court, a U.S. statute – ERISA – makes the employer liable to the pension plan for a share of its underfunding. In addition, the U.S. law makes all of the contributing employers jointly and severally liable for that debt to the pension plan.

54. Clearly the focus of the law is the multiemployer plan's underfunding and the employer's withdrawal from the plan. In the case before the PBGC in Opinion Letter 97-1 and in the case at bar, all of the events involved in the creation, computation and assertion of the withdrawal liability have taken place within the United States. The fact

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[27] http://www.pbgc.gov/docs/97-1.pdf.

[28] The contributing employer and the UK Companies were both wholly owned subsidiaries of the same corporation.

that one of the related corporate entities that share the liability is located out of the U.S. does not make the law, the debt or the provisions for its collection "extraterritorial". The controlled-group liability is a collection tool that supports the law's main focus, which is the employer withdrawal. That took place in the U.S.[29]

55. Mr. Abrams reaches a different conclusion, apparently by taking a much narrower view of the focus of the statute. Rather than recognizing that the focus of MPPAA was on strengthening the financial status of multiemployer plans through, among other things, the imposition of withdrawal liability, he considers a peripheral feature of the withdrawal liability design – the controlled group concept – to be the focus of the law. see Abrams Report at p. 17. Here he posits that the addition of the Canadian operations to the Walters Energy controlled group was the central event on which ERISA's withdrawal liability collection scheme is focused. With respect, I disagree and I believe a U.S. court would do so as well, just as the PBGC did in Opinion Letter 97-1.

56. Mr. Abrams also errs when he brings in principles of personal jurisdiction to determine whether ERISA is being applied extraterritorially, see Abrams Report, 17 – 19. But that is not relevant to what is happening here. The UMWA 1974 Plan has come to a Canadian court to collect on the statutory debt of a Canadian company. Since is not asking a U.S. court to exercise jurisdiction over that Canadian collection action, there is no reason to consider the points Mr. Abrams raises regarding personal jurisdiction.

C. Penalty or Public Revenue Law

57. The final question that Dentons poses is:

> As a matter of United States law, does controlled group liability for withdrawal liability constitute a "penal, revenue or other public law" of the United States?

58. Again, my answer is no, and I believe a U.S. court would give the same answer.

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[29] Mr. Abrams suggests that the focus of the law was Walter Energy's creation of Walters Canada and its acquisition of the Western mines.

Is it a penalty?

59. Clearly, withdrawal liability is not a penal provision. It is automatically incurred when an employer withdraws from an underfunded multiemployer plan, regardless of the employer's good faith or its reasons for withdrawing. Indeed, multiemployer plan trustees are required to collect the liability when an employer withdraws, ERISA s. 4202. There is no allowance for subjective distinctions between "innocent" and "blameworthy" withdrawing employers.

60. Similarly, as emphasized repeatedly above, the controlled group concept applies without regard to the intent behind the creation of the group or its structure. It is true that a much-cited purpose of the controlled group rule is to prevent companies from devising corporate structures in ways that could complicate a pension plan's recovery of withdrawal liability, or make it difficult for rank and file employees to earn vested rights to their benefits. But that is a prophylactic, not a penal application of the law. By preventing actions that could defeat the purposes of the various laws in which the controlled group concept is brought to bear, that rule is actually the opposite of a penalty.

Is it a tax or revenue law?

61. The answer to that is easy and obvious: multiemployer withdrawal liability, as bolstered by the controlled-group rules, is calculated and collected by the multiemployer plans, not the PBGC. The law says that it must be paid, but not to the government and not for the benefit of the government – it is payable to the plans, for the benefit of their participants and beneficiaries. It is no more a tax than other payments to or for the benefit of private parties that are required by law, such as child support or automobile liability insurance.

62. Indeed, section 4068 ERISA gives PBGC a lien against the assets of an employer that owes the single employer plan termination liability to the agency, and subsection (c) of section 4068 gives that PBGC lien the status of a tax lien in bankruptcy or insolvency proceedings but the law provides no such enforcement status for a multiemployer plan's claim for withdrawal liability. So there is not even an indirect implication in ERISA that withdrawal liability is a tax or public revenue measure. The fact that

it runs against the controlled group members as well as the direct employer is immaterial to that question.

63. In sum, I believe that United States law does not treat controlled group liability for withdrawal liability as a penal, revenue or other public law of the United States, and I believe that the courts in the United States would so rule.

3. Conclusion

64. The concept that all trades or businesses under common control are treated as a single employer runs throughout the ERISA rules for on-going pension plans as well as terminating plans. When Congress passed the MPPAA it adopted the same controlled-group rule as a facet of multiemployer plan withdrawal liability, which holds employers that withdraw from a multiemployer pension plan liable to that plan for a share of its unfunded vested liability. Withdrawal liability aims to bolster plans' funding to improve the security of participants' benefits, even if contributing employers are pulling out. The controlled group rules aim at strengthening the plans' ability to collect the withdrawal liability.

65. There is no indication that Congress expected controlled group membership to be cut off at the borders of the United States. The focus of ERISA's withdrawal liability provisions, including the extension of that liability to controlled group members, is the collection of funds to assure the payment of benefits to multiemployer plan participants. As PBGC concluded in Advisory Opinion 97-1, ERISA's liability and collection rules are not considered extraterritorial under U.S. law just because one of the controlled group members that shares the joint-and-several liability is outside the United States.

66. Finally, withdrawal liability and its application to controlled group members is not a penalty, nor are they revenue measures under United States law.

4. Certification

Pursuant to Rule 11-2 of the Civil Rules of the Supreme Court of British Columbia, I hereby certify:

(a) I am aware of the duty of expert witnesses referred to in subrule (1) of Rule 11-2 that, in giving an opinion to the court, an expert appointed by one or more parties or by the court has a duty to assist the court an is not to be an advocate for any party;

(b) I have made this report in conformity with such duty, and

(c) I will, if called on to give oral or written testimony, give such testimony in conformity with such duty.

Judith F. Mazo

November 2016

JUDITH F. MAZO

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WASHINGTON DC 20012

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2011 – Present

Independent Consultant on ERISA-Covered Benefit Plans

Since her retirement from The Segal Company, Ms. Mazo has been engaged on a range of assignments taking advantage of her expertise in employee benefit plans and the Employee Retirement Income Security Act (ERISA) and Internal Revenue Code (IRC) rules that govern them. These have included:

- Expert witness on behalf of Petco Corp. in litigation regarding the rules and practices governing funded welfare plan benefits;

- Mediator to help resolve a deadlock between the union and employer trustees of a national multiemployer pension fund;

- Ongoing engagement as a principal technical resource to the National Coordinating Committee for Multiemployer Plans (NCCMP) in its legislative effort to revise and modernize the ERISA and IRC rules governing multiemployer pension plans, to better serve the employees and retirees they cover and their contributing employers.

- Ongoing, as-need consultant to The Segal Company on compliance issues for multiemployer retirement plan clients.

1980 – 2011

The Segal Company: Senior Vice President and Director of Research

Ms. Mazo's responsibilities as Senior Vice President and Director of Research for The Segal Company, generally included directing research and providing guidance on public policy, legislative and regulatory issues and other matters of interest to clients of this national actuarial, benefits and compensation consulting firm. She served on Segal's Senior Management Team and chaired its National Practice Council, a forum for the top leadership of the Company's professional and technical practices. She was twice elected by her fellow shareholders to the company's board of directors.

During this period Ms. Mazo, who spoke and wrote frequently on employee benefits matters, was, among other things, a member of the Harvard/Kennedy School Health Care Delivery Policy Project, the Pension Research Council of the Wharton School and the Editorial Advisory Board of the BNA Pension and Benefits Reporter. A Charter Fellow of the American College of Employee Benefits Counsel, Ms. Mazo served as its Vice President for the 2002-2003 term, and was a member of its Board from 2000 to 2007. Active in the American Bar Association, she was Chair of its Joint Committee on Employee Benefits for the 1999-2000 term. In April 2002, the President of the United States appointed her to the Advisory Committee of the Pension Benefit Guaranty Corporation. She was appointed by Secretary of Labor Alexis Herman to the U.S. Department of Labor's ERISA Advisory Council, and chaired its Working Groups on Cash Balance Plans and on Disclosures Regarding Health Care Quality, and reappointed to the Council by Secretary Elaine Chao. In May 1998, the National Law Journal listed her as one of the country's top employee benefits lawyers.

From 1980 until her retirement, Ms. Mazo served as The Segal Company's principal consultant providing technical advice to the NCCMP. The NCCMP is the primary organization in Washington advocating on behalf of labor-management pension, health and other employee benefit plans. As its technical advisor, Ms. Mazo was deeply involved in the development of virtually all of the legislation and regulations governing the design and administration of these union-negotiated multiemployer retirement funds for over 30 years, as well as many of the rules affecting multiemployer health and welfare funds. Ms. Mazo is widely recognized for her technical expertise on multiemployer funds and tax qualified retirement plans generally and, as noted, continues to work with the NCCMP on many of those same issues.

1979 - 1980

Law Firm Associate Specializing in ERISA Matters

Assignments included serving as special counsel to the U. S. Pension Benefit Guaranty Corporation (PBGC) and as a consultant to the Pension Task Force of the Committee on Education and Labor of the U.S. House of Representatives.

1975-1979

Pension Benefit Guaranty Corporation

She was senior attorney for the PBGC and executive assistant to its general counsel from 1975 to 1979. In these early years of ERISA and of the Agency's operations, she played a significant role in virtually every decision setting the basic rules for regulating defined benefit employee retirement plans. Among her responsibilities were:

- Directing the PBGC's position in PBGC v. Ouimet Corp., the first case establishing a parent corporation's statutory liability for its subsidiary's

terminated pension plan under the ERISA controlled-group rules and

- Directing the Administration task force that prepared and drafted its proposed overhaul of the ERISA rules for multiemployer retirement plans, which Congress ultimately enacted as the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

Education and Background

Ms. Mazo graduated with honors from Yale Law School and Wellesley College and has been admitted to the bar in the District of Columbia and the State of Louisiana.

APPENDIX A

The following documents were made available to me for the purpose of preparing my report:

A. Amended Notice of Claim filed by the United Mine Workers of America 1974 Pension Plan and Trust, on November 9, 2016;

B. Amended Response to Civil Claim of the United Mine Workers of America 1974 Pension Plan and Trust, filed by the Petitioners, the Walter Canada Group on November 15, 2016;

C. Second Amended Response to Civil Claim, filed by the United Steelworkers, Local 1-424 on November 16, 2016;

D. Reply to the Response to Civil Claim of the United Steelworkers, Local 1-424 filed by the United Mine Workers of America 1974 Pension Plan and Trust, on October 5, 2016; and

E. Expert report of Marc Abrams, attached as Tab 20 to the Walter Canada Group's Book of Evidence dated November 14, 2016.

APPENDIX B

I have assumed the following facts to be true for the purpose of my report:

i. The 1974 Plan claims against Walter Canada Holdings, Inc. ("Canada Holdings") and related entities (described collectively as the "Walter Canada Group" and listed in Schedule "A" hereto) in relation to the pension withdrawal liability of Jim Walter Resources Inc. ("Walter Resources") arising under the provisions of ERISA. The amount of the claim is in excess of US$900 million.

ii. Walter Energy Inc. ("Walter Energy") is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama.

iii. Walter Energy did business in West Virginia and Alabama.

iv. Walter Energy's board of directors and its management team operated out of Birmingham, Alabama.

v. Canada Holdings is incorporated under the laws of British Columbia and has its registered and records office in Vancouver, British Columbia.

vi. Canada Holdings is wholly owned by Walter Energy.

vii. Walter Resources is wholly owned by Walter Energy.

viii. Walter Resources is incorporated in Alabama and did business in Alabama.

ix. Walter Resources' management team operated out of Birmingham, Alabama.

x. The 1974 Plan is a pension plan and irrevocable trust established in accordance with section 302(c)(5) of the Labor Management Relations Act.

xi. The 1974 Plan is a multiemployer defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA.

xii. The 1974 Plan is resident in Washington, D.C.

xiii. The trustees of the 1974 Plan are resident in the United States.

xiv. All participating employers in the 1974 Plan are resident in the United States.

xv. Walter Resources, as a signatory to National Bituminous Coal Wage Agreements ("CBA"), has been a participating employer in the 1974 Plan.

xvi. Walter Resources in the only U.S. entity affiliated with Walter Energy that has been party to a collective bargaining agreement with the 1974 Plan.

xvii. No member of the Walter Canada Group is or ever has been a party to a collective bargaining agreement with the 1974 Plan.

xviii. The Walter Canada Group comprises all entities owned directly or indirectly by Walter Energy that are incorporated under the laws of Canada or its provinces.

xix. Walter Energy affiliates in the United States provided essential management services to the Walter Canada Group, including accounting, procurement, environmental management, tax support, treasury functions, and legal advice.

xx. William Harvey, of the City of Birmingham, Alabama, was the executive vice president and chief financial officer of Canada Holdings.

xxi. Mr. Harvey was also the chief financial officer and executive vice president of Walter Energy.

xxii. Mr. Harvey, and four other officers of various Walter Canada Group companies who were also employees of Walter Energy, resigned on January 20, 2016.

xxiii. Before 2011 Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom.

xxiv. On March 9, 2011 Walter Energy incorporated Canada Holdings.

xxv. Canada Holdings was incorporated specifically to hold the shares of Western Coal Corp. and its subsidiaries.

xxvi. On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western Coal Corp.

xxvii. The acquisition was completed pursuant to a plan of arrangement approved by the Supreme Court of British Columbia.

xxviii. At that time the 1974 Plan had an unfunded liability of greater than US$4 billion.

xxix. Western Coal Corp. and its subsidiaries operated coal mines in British Columbia, the United Kingdom and the United States.

xxx. The operations of the Walter Canada Group principally included the Brule and Willow Creek coal mines, located near Chetwynd,

British Columbia, and the Wolverine coal mine, near Tumbler Ridge, British Columbia.

xxxi. The principal assets of the Walter Canada Group are the cash proceeds from the sale of the Brule, Willow Creek and Wolverine mines and a 50% interest in the Belcourt Saxon Coal Limited Partnership.

xxxii. The Walter Canada Group did not and does not have assets or carry on business in the United States.

xxxiii. The 1974 Plan is in financial distress and had unfunded vested benefits of approximately US$5.8 billion as of July 1, 2015.

xxxiv. On July 15, 2015 Walter Energy and related U.S. companies commenced proceedings under chapter 11 of title 11 of the United States Code.

xxxv. On December 28, 2015 the U.S. Bankruptcy Court entered an order authorizing Walter Energy and its U.S. affiliates to reject the CBA and declaring that Walter Resources had no further obligation to contribute to the 1974 Plan.

TAB 8

NO. S1510120
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 A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

UNITED MINE WORKERS OF AMERICA
1974 PENSION PLAN AND TRUST
BOOK OF AUTHORITIES RE: EXPERT REPORT OF JUDITH F. MAZO
(SERVED NOVEMBER 24, 2016)

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Canadian Counsel for the United Mine Workers of America 1974 Pension Plan and Trust

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18 26 C.F.R. §1.410(b)–9, Treas. Reg. §1.410(b)–9 Definitions

19 26 C.F.R. §1.410(b)–10, Treas. Reg. §1.410(b)–10 Effective dates and transition rules

20 26 C.F.R. §1.414(c)–3, Treas. Reg. §1.414(c)–3 Exclusion of certain stocks in determining control

21 26 C.F.R. §1.414(c)–4, Treas. Reg. §1.414(c)–4 Rules for determining ownership

22 26 C.F.R. §1.414(c)–5, Treas. Reg. §1.414(c)–5 Certain tax-exempt organizations

23 11 U.S.C.A. § 1112. Conversion or Dismissal

24 26 U.S.C.A. § 401, I.R.C. § 401 Qualified pension, profit-sharing, and stock bonus

25 29 U.S.C.A. § 186. Restrictions on financial transactions

26 29 U.S.C.A. § 1060. Multiple employer plans and other special rules

27 29 U.S.C.A. § 1361. Amounts payable by corporation

28 29 U.S.C.A. § 1368. Lien for liability

29 29 U.S.C.A. § 1383. Complete withdrawal

30 29 U.S.C.A. § 1422. Repealed

31 29 U.S.C.A. § 1423. Repealed

32 29 U.S.C.A. § 1424. Repealed

33 29 U.S.C.A. § 1425. Repealed

DOCUMENTS

34 2016 Annual Report of the Pension Benefit Guaranty Corporation

35 Opinion Letter of Pension Benefit Guaranty Corporation dated for reference May 5, 1997

TAB 9

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. c. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT
OF WALTER ENERGY CANADA HOLDINGS, INC., AND THE OTHER PETITIONERS
LISTED IN SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

EXPERT REPORT OF ALLAN L. GROPPER

Expert Report Filed by: Petitioners (the "Walter Canada Group")

A. Introduction

(a) Qualifications

I have been a member of the bar of the State of New York since 1969. From 1972 to 1999, I practiced commercial law in the New York office of the firm of White & Case, becoming a partner in the litigation department in 1978. In the 1980's I began to work extensively on bankruptcy and reorganization proceedings and was appointed head of the firm's Bankruptcy and Reorganization practice group. From 1999-2000 I was located in the firm's Hong Kong office.

In 2000 I was appointed a bankruptcy judge in the Southern District of New York, which encompasses Manhattan and the Bronx. I retired as a judge in January 2015 at the conclusion of my 14-year term. I am currently acting as an arbitrator and mediator and have provided expert testimony in the courts of Canada and England as well as in an arbitration proceeding in the United States.

I am an adjunct professor of law at Fordham Law School in New York City and have taught courses in basic business bankruptcy, Chapter 11 reorganization and international insolvency. I am a member of the National Bankruptcy Conference, the American College of Bankruptcy, and the National Conference of Bankruptcy Judges.

For many years I have had a particular interest in issues relating to cross-border insolvency. In addition to my judicial opinions, I was an editor of a two-volume text on International Insolvency, have written four articles on the subject published in law reviews, and have taught in the cross-border insolvency programs of the American College of Bankruptcy and INSOL International. I am a member of the United States delegation to UNCITRAL Working Group V on Insolvency Law. This is the working group that drafted the Model Law on Cross-Border Insolvency that has been adopted both in Canada and the United States, and it is now working on model laws on the enforcement of insolvency-related judgments and the insolvency of multinational enterprise groups.

During my pre-judicial career I was a member of White & Case's opinion committee and understand the nature and importance of a carefully considered and reasoned legal opinion.

A copy of my curriculum vitae is attached hereto as Exhibit A.

(b) Instructions Provided to Expert in Relation to Proceedings

I have been requested to reply to certain of the conclusions in the Report of Judith F. Mazo, submitted on behalf of the United Mine Workers of American 1974 Pension Plan and Trust (the "UMWA Plan"). Specifically, I have been asked for my opinion on the following question of United States law:[1]

Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially?

B. Factual Background

I have reviewed, among other materials, pleadings filed in the 1974 Plan's civil claim against Walter Canada Group arising under ERISA as well as Walter Canada Group's Statement of Uncontested Facts. A list of the materials I have reviewed in connection with this opinion is attached hereto as Exhibit C.

Based on my review of those materials, I adopt the statement of facts set out in the report of Marc Abrams submitted to this Court under the heading "Factual Background".

C. Opinion

Ms. Mazo's conclusion on the issue of controlled group liability is stated in paragraph 65 of her Report: "There is no indication that Congress expected controlled group membership to be cut off at the

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[1] A copy of the instructions I received from Osler is attached hereto as Exhibit B.

borders of the United States." In my view, the Mazo Report has it backwards, and applicable U.S law is precisely the reverse: where there is no indication that Congress intended legislation to apply overseas, it does not. I have reviewed the Abrams Report and agree fully with its reasoning and conclusions.

As the Abrams Report states, quoting the most recent U.S. Supreme Court authority on point, "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016). "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application....When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The key point is not whether there is language in the statute that would "cut off" controlled group liability "at the borders of the United States." The point is that there is nothing in the statute to support the proposition that Congress intended to extend controlled group liability to foreign entities throughout the world. See also *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The imposition of liability throughout a controlled group was itself a highly unusual result of ERISA pension legislation. It is a fundamental principle of American law – and I believe the law of most other nations – that each entity holds its own assets and is responsible for its own liabilities, and that creditors rely on the separateness of the entities with which they do business. In the event of an insolvency proceeding, U.S. bankruptcy courts have the power to pierce the corporate veil, and they also have the power to substantively consolidate separate entities, a power that many other countries refuse to countenance. But the cases make it clear that the power to ignore entity separateness can be used only "sparingly" and in extreme circumstances. A recent influential opinion reiterated that "respecting entity separateness is a fundamental ground rule", as the "general expectation of State law and of the

Bankruptcy Code, and thus of the commercial markets, is that courts respect entity separateness absent compelling circumstances.... Because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this rough justice remedy should be rare and, in any event, one of last resort. " *In re Owens Corning Corp.*, 419 F.3d 195, 211 (3d Cir. 2005) (internal citation omitted); see also *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518-19 (2d Cir. 1988).

If the imposition of controlled group liability domestically was unusual, there is no reason to assume that Congress intended to extend that liability beyond the borders of the United States in the absence of a clear, affirmative indication. The Mazo Report does not cite any case in which a U.S. court has imposed withdrawal liability on a foreign affiliate of a U.S. company, or for that matter, where such liability has been imposed in a foreign proceeding.

One reason for the presumption against extraterritoriality is that "it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. But it also reflects the more prosaic 'common sense notion that Congress generally legislates with domestic concerns in mind.'" *RJR Nabisco*, 136 S.Ct. at 2100. [citations omitted] Both of these considerations are present here. Walter Energy Canada Holdings, Inc. and its Canadian affiliates have their own assets and liabilities, including very substantial liabilities to Canadian employees. They paid their own taxes to Canada, not to the United States. These Canadian entities are subject to their own insolvency proceedings, and there is no indication in the record that they took any part in the settlement negotiated in the United States that resulted in the acceptance of controlled group liability by the U.S. entities. As stated more fully in the Abrams Report, there is nothing in the statute to support the proposition that Congress intended to impose this liability on foreign entities – particularly where the imposition of liability throughout a control group is highly unusual and might result in "international discord" if applied to companies incorporated outside the U.S. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The Mazo Report argues that Congress' purpose in adopting the principle of controlled group liability was to deter U.S. employers from shifting assets overseas to escape joint and several pension

liabilities as well as to impose as much liability as possible on as many entities as possible. I have seen nothing in the record to indicate that the purchase of Walter Canada shifted material assets outside of the United States. It appears that the U.S. entities became subject to the 2011 collective bargaining agreement at issue and liable to the joint and several pension liability asserted by the 1974 Plan *after* the acquisition – and that the Canadian entities did not. As to the collection of revenues, the PBGC and U.S. multiemployer plans would of course advocate collecting the maximum amount from as many sources as possible, but that does not mean that Congress, in adopting the underlying statute, not only pierced the corporate veil in a virtually unprecedented manner but also intended to pierce it internationally as well.

In my view, the Mazo Report also fails to take into account the important principle of comity. Both comity and extraterritoriality were considered extensively in the insolvency context in a decision released 9 days ago and a similar, earlier case, which addressed claims by a U.S. bankruptcy trustee to apply U.S. bankruptcy laws to foreign transactions. In connection with the collapse of the massive Ponzi scheme perpetrated by Bernard L. Madoff, several foreign investment funds that had acted as "feeder funds" investing most of their assets with Madoff also went into liquidation in their domestic jurisdictions. The trustee of the Madoff estate in the United States attempted to recover property redeemed from the feeder funds by feeder fund customers, on the theory that all redemptions made by the feeder fund had originated as transfers from Madoff. The trustee relied on §550(a)(2) of the Bankruptcy Code that allows a plaintiff in an avoidance proceeding to seek recovery not only from the immediate transferee (in this case, the feeder fund) but also from a subsequent transferee (the feeder fund's customer who received payment from the fund of money that originated from Madoff).

The U.S. courts have held that the Madoff trustee cannot recover from subsequent transferees for two reasons. *Picard, Trustee for the Liquidation of Bernard L. Madoff Inv. Sec. LLC v. Bureau of Labor Insurance,* Adv. No. 11-02732 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) First, they have held that application of U.S. avoidance law to a transfer that took place abroad would be an extraterritorial application of provisions of the U.S. Bankruptcy Code that Congress had not demonstrated a clear intent

to apply outside of the United States. Equally, they found that even if the presumption against extraterritoriality were rebutted, the principle of comity among nations required dismissal. Given the indirect relationship between the Madoff trustee and the subsequent transferees, and that the feeder funds were subject to their own insolvency proceedings where the liquidators had unsuccessfully sought similar relief from the same or similarly situated transferees, the U.S. courts have held that "those foreign jurisdictions had a greater interest in the application of their own laws than the United States had in the application of U.S. law."

This grant of comity is particularly interesting in that it demonstrates once again the principle that "Comity may have a strong bearing on whether application of U.S. law should go forward." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984); see also *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996), where the Court describes comity as, among other things, "a canon of construction [that] might shorten the reach of a statute".[2] Comity should shorten the reach of controlled group liability, and where foreign insolvency proceedings are pending, the U.S. courts should be particularly willing to apply comity in favor of the foreign proceeding. *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l. Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006).

The Mazo Report addresses the question of whether the controlled group liability provisions of ERISA constitute a "penal, revenue or other public law" of the United States. I would expect U.S. courts to defer to Canada on the issue of whether the imposition of controlled group liability internationally would be a penalty or revenue measure or against public policy.[3] The Mazo Report states, without citation of authority, that under U.S. law the imposition of controlled group liability on all members of a corporate group is not considered a penalty or the collection of a tax by the government. She does not, however,

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[2] In U.S. law the classic definition of comity is from *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895): "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

[3] In the United States, comity is not granted to a foreign insolvency law or judicial determination that would contravene United States law or public policy. *Overseas Inns v. United States*, 911 F.2d 1146 (5th Cir. 1990).

explain why U.S. law would be relevant. I believe that the only relevant law on this issue would be the applicable law in Canada.

D. Conclusion

You have asked me to review the reports of Judith Mazo and Marc Abrams and reply to the views expressed in the Mazo Report. For the reasons set out above and in the Abrams Report, it is my view that there is no indication that Congress intended the controlled group liability provisions to extend to foreign affiliates of United States entities and thus, as a matter of US law, there is no such application under the presumption against extraterritoriality.

E. Certification

Pursuant to Rule 11-2 of the Supreme Court of British Columbia's Civil Rules, I hereby certify:

(a) I am aware of the duty of expert witnesses referred to in subrule (1) of Rule 11-2 that, in giving an opinion to the court, an expert appointed by one or more parties has a duty to assist the court and not to be an advocate for any party;

(b) I have made this report in conformity with such duty; and

(c) I will, if called on to give oral or written testimony, give such testimony in conformity with such duty.

Allan L. Gropper

EXHIBIT A

ALLAN L. GROPPER
115 CENTRAL PARK WEST
NEW YORK, NEW YORK 10023
917-714-7605

CURRICULUM VITAE
November 2016

Professional Employment

Arbitrator, mediator and expert witness
2015-present

United States Bankruptcy Judge
Southern District of New York
2000-2015

Partner, White & Case LLP
New York, New York
1978-2000

Associate, White & Case LLP
New York, New York
1972-1978

Education

Yale University, B.A., cum laude, 1965

Harvard Law School, J.D., cum laude, 1969

Professional Activities

Member, Roster of Arbitrators, American Arbitration Association

Adjunct Professor of Law, Fordham Law School

Fellow, American College of Bankruptcy

Member, National Bankruptcy Conference

Treasurer, Association of the Bar of the City of New York, 2011-2015, and past member and chair of the Executive Committee; past member, Committee on Bankruptcy Law

Publications

Author, The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 57 (2015)

Author, The Arbitration of Cross-Border Insolvencies, 86 Amer. Bankr. L. J. 201 (2012)

Author, The Model Law After Five Years: The U.S. Experience with COMI, 2011 Norton Ann. Rev. of Intl. Insolvency 13

Author, The Payment of Priority Claims in Cross-Border Insolvency Cases, 46 Tex. Intl. L. J. 559 (2011)

Author, Comments on the Articles of Professors Baird and Janger, 4 Brook. J. Corp. Fin. & Com. L. 59 (2009)

Contributing author, Bufford, U.S. International Insolvency Law (Oxford Univ. Press 2009)

Author, Current Developments in International Insolvency Law, 15 J. Bankr. L. & Proc. 2 (Apr 2006)

Editor, International Insolvency, with Carl Felsenfeld and Howard Beltzer (2000)

Contributing Editor, Collier on Bankruptcy (to 2015)

Lectures, Continuing Legal Education, Awards

Adjunct Professor, Fordham Law School, teaching courses in Business Bankruptcy, Chapter 11 Reorganizations, and International Insolvency, since 2007

Lecturer, INSOL International Global Insolvency Practice Course, since 2012

Lecturer, Practicing Law Institute, on aspects of Chapter 11 practice, since 2006

Lecturer, American College of Bankruptcy course in international insolvency, since 2010

Frequent lecturer to bar and professional groups and to judges on all aspects of insolvency law and practice, in the United States, Canada and Europe

Recipient, International Insolvency Institute's Outstanding Contributions Award, 2016

Bar Admissions

New York, 1969

U.S. District Courts, Southern and Eastern Districts of New York, 1971, and U.S. Supreme Court and Circuit Courts, various since 1971

EXHIBIT B

Paterson, Mary

From: Paterson, Mary
Sent: Thursday, December 1, 2016 10:23 AM
To: 'Allan Gropper'
Cc: Patrick Riesterer (PRiesterer@osler.com); Wasserman, Marc; Buttery, Mary; Williams, Lance
Subject: Walter - Retainer of Judge Gropper as Independent Expert
Attachments: Supreme Court Civil Rules.pdf

Judge Gropper,

This email is intended to be the "instructions provided to the expert in relation to the proceeding" (see Rule 11-6) and should be included in your report.

I have attached for your review an excerpt of the Supreme Court Civil Rules (BC), which includes the statement, "In giving an opinion to the court, an expert appointed under this Part by one or more of the parties or by the court has a duty to assist the court and is not to be an advocate for any party".

The specific question on which we are asking you to opine is:

> Please review the report of Judith Mazo dated November 24, 2016, and provide such reply as you deem appropriate to the views expressed therein. In doing so, please review the report of Marc Abrams dated November 14, 2016, and advise whether or not you agree with his analysis of the question: If the claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") against the Walter Canada Group is governed by United States substantive law (including ERISA), as a matter of United States law does controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extend extraterritorially.

Thank you,

Mary

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EXHIBIT C

Index of Materials Reviewed

- Walter Canada Group's Statement of Uncontested Facts
- Amended Notice of Civil Claim (1974 Plan)
- Amended Response to Civil Claim (Walter Canada Group)
- Amended Response to Civil Claim (United Steelworkers)
- Response to Civil Claim (the Monitor)
- Reply to United Steelworkers (1974 Plan)
- Reasons for Judgment of Madam Justice Fitzpatrick dated January 26, 2016
- Reasons for Judgment of Madam Justice Fitzpatrick dated September 23, 2016
- Application Response of the 1974 Plan filed January 4, 2016
- Application Response of the 1974 Plan filed March 29, 2016
- Application Response of the Respondent Steelworkers filed November 24, 2016
- 1st Affidavit of William G. Harvey ("1st Harvey Aff.") dated December 4, 2015
    - List of Canadian Petitioners (Ex. A to the 1st Harvey Aff.)
    - List of U.S. Petitioners (Ex. C to the 1st Harvey Aff.)
- 1st Affidavit of William E. Aziz dated March 22, 2016
    - Monitor's First and Second Certificates related to Bulldozer Transaction
- 1st Affidavit of Miriam Dominguez ("1st Dominguez Aff.") dated January 4, 2016
    - Proof of Claim filed by the 1974 Plan against Walter Resources in the US Bankruptcy Proceedings against Jim Walter Resources, Inc. dated October 8, 2015 (Ex. A. to the 1st Dominguez Aff.)
    - Proof of Claim filed by the 1974 Plan against Walter Energy, Inc. in the US Bankruptcy Proceedings dated October 8, 2015 (Ex. B. to the 1st Dominguez Aff.)
    - US Bankruptcy Court Memorandum of Opinion and Order granting Walter US Debtors' 1113/1114 Motion dated December 28, 2015 (Ex. C. to the 1st Dominguez Aff.)

- 2nd Affidavit of Miriam Dominguez dated March 29, 2016 ("2nd Dominguez Aff.")
    - US Bankruptcy Court Order Approving Global Settlement Among the Debtors, Official Committee of Unsecured Creditors, Steering Committee and Stalking Horse Purchaser Pursuant to Fed. R. Bankr. P. 9019 dated December 22, 2015 (Ex. A. to the 2nd Dominguez Aff.)
    - Order Granting Motion to Alter or Amend Memorandum Opinion and Order dated December 30, 2015 (Ex. B. to the 2nd Dominguez Aff.)
    - Notice of Joint Motion for an Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 17, 2016 (Ex. D. to the 2nd Dominguez Aff.)
    - Order (A) Authorizing Procedures to Implement the Global Settlement and (B) Granting Related Relief dated March 24, 2016 (Ex. E to the 2nd Dominguez Aff.)
- Order of Mr. Justice McEwan dated March 10, 2011 approving Western Acquisition Plan of Arrangement
- 1st Affidavit of Keith Calder dated February 1, 2011 (without exhibits)
- 2nd Affidavit of Keith Calder dated March 8, 2011 (without exhibits)
- 1st Affidavit of Linda Sherwood ("1st Sherwood Aff.") dated November 7, 2016, exhibiting corporation reports
- 2nd Affidavit of Linda Sherwood ("2nd Sherwood Aff.") dated November 14, 2016, exhibiting selected items filed by Walter Energy with the United States Securities and Exchange Commission (the "SEC") on its publicly-available Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")
- 4th Affidavit of Miriam Dominguez ("4th Dominguez Aff.") dated November 24, 2016
    - 2016 Annual Report of the Pension Benefit Guaranty Corporation
- 1st Affidavit of Dale Stover ("1st Stover Aff.") unsworn, with exhibits
- Expert Report of Marc Abrams
- Expert Report of Judith F. Mazo

TAB 10

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

WALTER CANADA GROUP'S BOOK OF AUTHORITIES RE: EXPERT REPORT OF ALLAN L. GROPPER (SERVED DECEMBER 1, 2016)

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Ontario Counsel for the Petitioners

AUTHORITIES INDEX

TAB 11

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 A PLAN OF COMPROMISE AND ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A" TO THE INITIAL ORDER

PETITIONERS

WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS

PART I - INTRODUCTION

1. In this summary hearing, this Court is asked to decide whether ERISA[1], a US pension scheme, can override the separate corporate personalities of Walter Canada Group[2] to supplement the underfunded 1974 Plan[3] at the expense of Walter Canada Group's unsecured creditors. Walter Canada Group asks this Honourable Court to decide three of the four questions in its Notice of Application in a summary fashion in this CCAA claims process. If this Court decides any of the questions in Walter Canada Group's favour, the 1974 Plan Claim fails.

2. The three questions – and Walter Canada Group's position on each question – are:

(a) ***Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada Group governed by Canadian substantive law or US substantive law (including ERISA)?***

Under the 1974 Plan's theory, liability only attaches to Walter Canada Group if the Court ignores separate legal personalities and effectively amalgamates the Canadian and US Walter entities. As a result, under BC choice of law rules the Court should characterize

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1 The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406,88 Stat. 829, enacted September 2, 1974, codified in part at 29 USC. ch 18.

2 Walter Energy Canada Holdings, Inc. and the other Petitioners listed on Schedule "A" to the Initial Order (collectively with the partnerships listed on Schedule "C" to the Initial Order), the "Walter Canada Group".

3 The United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan").

the claim as one of corporate personality. Questions of corporate personality are governed by the law of the corporation's domicile, which is the place of incorporation. All Walter Canada Group entities were incorporated in Canada. ERISA is not part of Canadian law.

(b) ***If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially?***

ERISA does not extend extraterritorially under US law. Congress did not evidence a clear intention that ERISA's controlled group provisions would capture foreign corporations. ERISA's application to Walter Canada Group is not domestic.

(c) ***If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable because it conflicts with Canadian public policy?***

The controlled group provisions of ERISA are not enforceable in Canada because they conflict with Canadian public policy. Canadian courts should not enforce a foreign law that expropriates assets from Canadian companies based solely on their corporate relationship in order to fund highly regulated foreign pension plans.

PART II - SUMMARY OF FACTS

The Walter Group Chapter 11 and CCAA Proceedings

3. The Walter Group operates its business in two distinct segments: (i) US Operations, and (ii) Canadian and UK Operations (Statement of Uncontested Facts ("**SUF**") para 57).

4. On July 15, 2015, the US Debtors commenced proceedings (the "**Chapter 11 Proceedings**") under Chapter 11 of Title 11 of the US Code (SUF para 90).

5. The Walter US Debtors include Walter Energy Inc. ("**Walter Energy**"), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama (SUF para 1), as well as the other entities incorporated or organized in the US.

6. About five months later, on December 7, 2015, this Court granted an Initial Order in this proceeding. The Petitioners in these CCAA Proceedings comprise Canada Holdings and all entities owned directly or indirectly by Walter Energy that are incorporated under the laws of Canada or its provinces (SUF para 44).

7. Walter Canada Group did not seek recognition of the CCAA Proceedings in the US, and the Walter US Debtors did not seek recognition of the Chapter 11 proceedings in Canada.

The Walter US Group 2011 Acquisition of Western Coal Resulting in Walter Canada Group

8. Before 2011, Walter Energy did not have any operations or subsidiaries in Canada or the United Kingdom (SUF para 17).

9. In late October 2010, Walter Energy and Western Coal Corp. ("**Western**") began negotiating the acquisition of Western (the "**Western Acquisition**") (SUF para 24). Western and its subsidiaries operated coal mines in BC, the UK and the US (SUF para 22).

10. Walter Energy's Western Acquisition was publicly announced in November 2010, when Walter Energy issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy's intention to complete a "business combination" with Western (SUF para 25).

11. In the subsequent months, Walter Energy released many press releases and made many filings with the SEC. By December 2010, Walter Energy announced that:

(a) it had entered into an Arrangement Agreement with Western whereby Walter Energy would acquire all of the outstanding common shares of Western;

(b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

(c) in connection with the arrangement, Walter Energy had entered into a debt commitment letter pursuant to which Walter Energy would borrow $2,725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of the Company and its subsidiaries" (SUF para 27).

12. On March 9, 2011, Walter Energy incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") (SUF para 18). Canada Holdings was incorporated specifically to hold the shares of Western and its subsidiaries (SUF para 21).

13. On March 10, 2011, the BC Supreme Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished (SUF para 23).

14. On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western (SUF para 34).

15. After completing the Western Acquisition, the Walter Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Group into geographical business segments: the Walter US Group, the Walter Canada Group and the Walter UK Group (SUF para 43). As a result, the US assets previously held by Western were transferred from Canada Holdings to Walter Energy and no longer formed part of the Canadian assets.

Walter Resources and the 1974 Plan

16. The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the Labour Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (SUF para 7). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of ERISA, 29 U.S.C. § 1002(2), (3), (35), (37)(A) (SUF para 11). All participating employers in the 1974 Plan are resident in the US (SUF para 12).

17. Only one of the Walter US entities, Jim Walter Resources Inc. ("**Walter Resources**"), is a party to a collective bargaining agreement with the 1974 Plan (the "**2011 CBA**") (SUF para 13).

18. Walter Resources is wholly owned by Walter Energy (SUF para 4), is incorporated in Alabama, did business in Alabama (SUF para 5), and was operated out of Alabama (SUF para 6). Walter Resources (or a predecessor entity) had been a signatory to the 1978, 1981, 1984, 1988, 1993, 2002, and 2007 collective bargaining agreements, and, pursuant thereto, had been a participating employer in the 1974 Plan (SUF para 14).

19. No member of Walter Canada Group is or ever was party to any National Bituminous Coal Wage Agreement, including the 2011 CBA (SUF para 15). Walter Canada Group did not contribute to and had no obligations to contribute to the 1974 Plan (SUF para 79, 80).

20. At the time of the Western Acquisition, the 1974 Plan had an unfunded liability of more than US$4 billion (SUF para 35). The 1974 Plan did not take a position on the application in the BC Court seeking approval of the Acquisition (SUF para 32). Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

Walter Canada Corporate Parties and Structure

21. It is an admitted fact that all Walter Canada Group companies are incorporated in Canada, most in BC, and that all of the partnerships are organized under the laws of BC.

22. In particular, Canada Holdings, Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC and 0541237 BC Ltd. are all incorporated under the laws of BC (SUF paras 19, 45, 52, 53, and 56). Pine Valley Coal Ltd. is a company incorporated under the laws of Alberta (SUF para 55).

23. Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership are organized under the laws of BC (SUF paras 47 and 52).

1974 Plan's Proofs of Claim in the Chapter 11 Proceedings

24. On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against Walter Resources and the other Walter US Debtors (SUF paras 98-101). The Proofs of Claim filed do not refer to Walter Canada Group (SUF para 102).

The Global Settlement Order in the Chapter 11 Proceedings

25. On December 22, 2015, the US Bankruptcy Court entered an order (the "**Global Settlement Order**") (SUF para 103) approving a Settlement Term Sheet between the Walter US Debtors, Steering Committee, Stalking Horse Purchaser and UCC (SUF para 107). The Settlement Term Sheet entitles unsecured creditors to receive 1% of the common equity issued in the Stalking Horse Purchaser on closing as well as the right to participate in any exit financing (SUF para 105).

26. Walter Canada Group is not party to the Settlement Term Sheet (SUF para 108).

27. The Unsecured Creditors Committee made it clear that the Global Settlement and its implementation "does not increase or diminish the aggregate distribution to unsecured creditors from the Chapter 11 Estates" because "Unsecured creditors are not entitled to any recovery from the Chapter 11 Estates beyond that established by the Global Settlement" (SUF para 109).

28. Because the 1974 Plan became entitled to recovery through the Global Settlement, a negotiated agreement, the US Bankruptcy Court did not review the merits of the 1974 Plan's claim and "determine" that the 1974 Plan's claim was valid as against the Walter US Debtors.

29. On March 24, 2016, the US Bankruptcy Court entered an order (the "**Global Settlement Implementation Order**") (SUF para 110).

Walter Resources Withdraws from the 1974 Plan CBA

30. The parties agree that on December 28, 2015, the US Bankruptcy Court entered an order (the "**1113/1114 Order**") authorizing Walter Energy and its US affiliates to reject the 2011 CBA and declaring that Walter Resources had no further contribution obligations (SUF para 113).

31. The 1113/1114 Order was issued following a hearing on December 15 and 16, 2015, of the US Bankruptcy Court (SUF para 114). The US Debtors and the 1974 Plan participated in this hearing (SUF para 115); Walter Canada Group did not (SUF para 116). In granting the 1113/1114 Order, the US Bankruptcy Court did not consider any of the assets of the Petitioners or the Canadian operations in making the 1113/1114 Order. The US Bankruptcy Court did not treat the Petitioners as a controlled group with the Walter Energy US affiliates (SUF para 117).

32. The parties agree that as of January 4, 2016, Walter Resources had not withdrawn from the 2011 CBA. On January 4, 2016, the 1974 Plan filed an Application Response stating "Walter Energy US *is expected to withdraw* from the 1974 Plan" (SUF para 118).

33. Finally, the parties agree that the 1974 Plan appealed the 1113/1114 Order. The 1974 Plan represented to this Court that it only withdrew that appeal as of February 16, 2016 (SUF para 119). On that date, the 1113/1114 Order became final.

34. There is debate about when Walter Resources withdrew from the 1974 Plan. The 1974 Plan appears to suggest December 28, 2015 or January 11, 2016 as possible withdrawal dates. Walter Canada Group suggests February 16, 2016 as the earliest possible date. However, Walter Canada Group submits nothing turns on the resolution of this debate for the purposes of this application.

1974 Plan Files Notice of Civil Claim in this Court

35. On August 26, 2016, 1974 Plan filed a Notice of Civil Claim in accordance with the Claims Procedure Order. As set out in paragraph 14 of that document, the 1974 Plan alleges that the 1974 Plan has a claim pursuant to ERISA in conjunction with the Pension Document, Trust Document and 2011 CBA on the theory that pursuant to ERISA the Petitioners are jointly and severally liable to the 1974 Plan for the claimed pension withdrawal liability of Walter Resources.

36. Walter Canada Group, the Respondent Steelworkers and the Monitor filed responses, and Walter Canada Group filed a Notice of Application seeking summary determination of four issues.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

37. The Notice of Application lists four issues to be determined by this Court in a summary hearing. Walter Canada Group proposes to proceed on only three issues as follows:

(a) Under Canadian conflict of laws rules, is the 1974 Plan Claim against Walter Canada Group governed by Canadian substantive law or US substantive law (including ERISA)? ***Walter Canada Group submits that under BC choice of law rules, BC substantive law applies.***

(b) If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law does controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA extend extraterritorially? ***Walter Canada Group submits that ERISA does not extend extraterritorially under US law.***

(c) If the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), and ERISA applies extraterritorially, is that law unenforceable by Canadian courts because it conflicts with Canadian public policy? ***Walter Canada Group submits that applying ERISA conflicts with Canadian public policy.***

38. Before making its submissions on the merits, Walter Canada Group will explain why the evidence in its Book of Evidence is admissible in the summary hearing. After making its submissions on the merits, Walter Canada Group will submit that it is suitable to decide these three issues in a summary hearing.

Evidence in Walter Canada Group Book of Evidence Is Admissible

39. For the Court's convenience, Walter Canada Group compiled a Statement of Uncontested Facts at Tab 1, Volume 1 of its Book of Evidence (the "SUF"). Many of the facts in the SUF are not relevant to the questions this Court must decide. For each fact listed in the SUF, the source is identified and that source is included in the Book of Evidence. Furthermore, the evidentiary quality of the evidence supporting each statement is indicated for each fact (*i.e.*, "A" for admission, etc.).

40. The SUF includes (1) pleaded facts that were admitted or that have been admitted for the limited purpose of this summary hearing, and (2) facts based on three types of documents that this Court can consider without formal proof: court records, public documents, and other documents.

41. With respect to court records, the Court is entitled to look at its own records without further proof of those documents.[4] Walter Canada Group has included the following court records:

(a) *Decisions in this CCAA Proceeding*. Where this Court has made a factual finding, absent an appeal, that fact must be accepted as found. The 1974 Plan has participated in these proceedings since late December 2015.

(b) *Evidence previously filed in this CCAA Proceeding.* This evidence was filed by the 1974 Plan or referred to by the 1974 Plan as evidence on which it intended to rely. All of the statements in the SUF were in the affiant's personal knowledge, except for SUF paragraph 70, which states that liability can attach to directors and officers.

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[4] *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367, Walter Canada Group's Book of Authorities ("BOA") Tab 12 at paras 36-37.

(c) *The BC Court's decision approving the plan of arrangement related to the Western Acquisition.* This was a well-publicized event, and it would be an inappropriate collateral attack on this decision to not accept the facts found in that decision.

(d) *Evidence filed in the Western Acquisition proceeding.* This evidence was relied upon by the Court to make its decision.

42. With respect to the public documents included in the Book of Evidence, the Supreme Court of Canada has made it clear that this Court is permitted to rely on statements made in public documents for the truth of their contents.[5] This is a recognized exception to the hearsay rule. The only public documents are the Corporations Reports maintained by provincial governments.

43. The last category, "other documents", are materials filed by Western Energy with the SEC and retrieved through the SEC's EDGAR system. They are not filed for the truth of their contents but only for the fact that the statements were made. As a result, there is no hearsay concern.

44. Finally, Walter Canada Group served a notice to admit the facts listed in the Statement of Uncontested Facts and the authenticity of the documents included in the Book of Evidence. The 1974 Plan declined to admit the truth of any of the facts, even those facts the 1974 Plan pleaded, or the authenticity of any documents, even the affidavits filed by the 1974 Plan with this Court.

Question A: The 1974 Plan Claim is Governed by Canadian Law

45. The first question for this Court to consider is what choice of law governs the 1974 Plan's claim. Walter Canada Group submits that the 1974 Plan Claim is governed by the laws of BC. If this Court concludes that the proper law governing the 1974 Plan Claim is BC law, then the 1974 Plan Claim cannot succeed. The 1974 Plan conceded as much in the October 26 hearing.[6]

46. As the 1974 Plan has chosen to assert its claim in a Canadian Court, Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan Claim.[7] Determining choice of law is a

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5 *Finestone v The Queen*, [1953] 2 SCR 107, BOA Tab 7 at paras 7-8. This exception to the prohibition against hearsay applies when four conditions are met: (1) the subject matter of the statement must be of a public nature; (2) the statement must have been prepared with a view to being retained and kept as a public record; (3) the statement must have been for a public purpose and available to the public for inspection at all times; and (4) the statement must have been prepared by a public officer in pursuance of his duty: *Radke v S(M) (Litigation Guardian of)*, 2005 BCSC 1355, BOA Tab 13 at para 51.

6 Transcript of the October 26, 2016 hearing, Judge's Pleadings Binder Tab 62 (Affidavit #3 of Miriam Dominguez) p 8, lines 21-23: "And I'll say for today's purposes, My Lady, if the proper law governing this claim is British Columbia law then it's unlikely our claim can succeed."

7 Canadian courts apply conflict of laws principles of the forum, regardless of how far the claim is dominated by foreign elements: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, On; LexisNexis, 2005) (loose-leaf, 6 ed) [*Castel & Walker*] vol 1, ch 1, BOA Tab 22 at 1-2.

two-step process. First, the Court characterizes the claim to determine which choice of law rule applies. Second, the Court applies the proper choice of law rule to the claim.

47. As is set out below, the 1974 Plan's claim against Walter Canada Group does not flow from any conduct by or contract with Walter Canada Group. Rather, the 1974 Plan alleges that liability attaches to Walter Canada Group because ERISA overrides the separate legal personalities of Walter Canada Group. Under Canadian choice of law principles, the legal personality of corporations is governed by the law of the place of incorporation. It is an admitted fact that the Petitioners are incorporated under the laws of Canada or its provinces and the partnerships are organized under the laws of BC. As a result, under Canadian choice of law rules, BC law determines whether the separate legal personalities of Walter Canada Group can be ignored. As ERISA is not part of BC law, the 1974 Plan Claim must fail.

(a) The 1974 Plan Claim Is an Issue of Legal Personality

48. The 1974 Plan asserts that Walter Canada Group is liable under ERISA for Walter Resources' withdrawal from the 1974 Plan. Pursuant to ERISA, liability incurred by an employer for withdrawing from a multiemployer plan also attaches to businesses under "common control" with the employer.[8] Since Walter Canada Group entities and Walter Resources are owned directly or indirectly by Walter Energy, the 1974 Plan argues that the Petitioners are under "common control" and are liable under ERISA for Walter Resources' withdrawal from the 1974 Plan.

49. The starting point for any choice of law analysis is to classify the legal nature of the claim.[9] The legal nature of the claim dictates the choice of law principle pursuant to which the Court selects the applicable governing law. The importance of properly characterizing a claim is emphasized in the *Minera* decision, where the question of what law applied turned on whether the claim was properly characterized as a claim of breach of confidence or a claim of title over foreign land.[10] In that case, the Court determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation".

50. The legal nature of the claim can be equated with the manner in which liability is alleged to attach to the defendant. For example, liability can attach through breach of contract. If the claim is characterized as a contractual claim, the court will apply the law selected in a contract's express choice of law provision or, if there is no such clause, then the court will apply the law that has the closest and most real

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8 Expert Report of Marc Abrams, served November 14, 2016 ("Abrams Report"), Walter's Book of Evidence ("BOE"), vol 6, Tab 20 at p 6.

9 *Castel & Walker*, vol 1, ch 3, BOA Tab 22 at 3-1.

10 *Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA*, 2006 BCSC 1102 [*Minera*], BOA Tab 10 at paras 166-167, aff'd 2007 BCCA 319.

connection to the contractual claim. In contrast, where liability attaches to the defendant through tort, the court will apply the law of the place where the tort was committed.[11]

51. The 1974 Plan does not assert a contractual claim. It is admitted that Walter Canada Group has no contractual relationships with the 1974 Plan. Walter Resources, a Walter US entity, was the only Walter signatory to the 2011 CBA (SUF paras 13-15).

52. Similarly, the 1974 Plan does not assert that Walter Canada Group is liable based on its conduct. It is admitted that Walter Canada Group did not employ any beneficiaries of the 1974 Plan or have any type of direct relationship with 1974 the Plan. Nor did Walter Canada Group contribute to or have any obligations to contribute to the 1974 Plan (SUF para 78-80).

53. Rather, the 1974 Plan says that liability attaches to Walter Canada Group through the "common control" provisions of ERISA. The question of whether an entity is part of an ERISA "controlled group" is entirely mathematical. It is a bright-line ownership test that does not depend on conduct or contract.[12] The 1974 Plan says that because Walter Energy owned more than an 80% stake in both Walter Resources and Walter Canada Group, they are part of the same controlled group. The 1974 Plan therefore says that although Walter Canada Group engaged in no conduct and entered no contract related to the 1974 Plan, it is liable for the withdrawal liability that attached to Walter Resources through Walter Resources' contractual relationship with the 1974 Plan.

54. It is trite law in BC and Canada that corporations have separate legal personalities. It has been recognized for hundreds of years that a corporation is a legal entity distinct from its shareholders and affiliates.[13] A corporation has the rights and privileges at law of a natural person.[14] One of these rights and privileges is not to be liable for the debt of any other person. BC courts have repeatedly affirmed strict respect for separate corporate personality.[15]

55. The "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating "common control" entities.[16] US courts recognize this effect of the "controlled

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11 Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) [*Pitel*], BOA Tab 23 at 266 and 291.

12 Abrams Report, BOE, vol 6, Tab 20 at p 7; Expert Report of Judith Mazo of November 24, 2016 ("Mazo Report") at paras 43-44.

13 *Salomon v Salomon & Co*, [1897] AC 22 (HL), BOA Tab 15.

14 *British Columbia Business Corporations Act*, SBC 2002, C-57, s 30.

15 See for example *Edgington v Mulek Estate*, 2008 BCCA 505 [*Edgington*], BOA Tab 6; *BG Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 37 BCLR (2d) 258 (CA) [*BG Preeco*], BOA Tab 3.

16 Abrams Report, BOE, vol 6, Tab 20 at p 6.

group" liability provisions, describing ERISA as a "veil-piercing" statute that disregards formal business structures to impose liability on related businesses.[17]

56. Under the 1974 Plan's "controlled group" approach to liability, Walter Canada Group would become liable based ***solely*** on its corporate affiliation with Walter Resources. This method of attaching liability to Walter Canada Group strikes at the heart of their separate status and legal personalities. As the only way for liability to attach to Walter Canada Group is to ignore their separate legal personalities, the essence and legal nature of the 1974 Plan Claim is to challenge the status and legal personalities of Walter Canada Group.

57. Classifying the 1974 Plan Claim as one implicating legal personality is consistent with BC case law. In *JTI-Macdonald Corp v British Columbia (Attorney General)*,[18] the BC Supreme Court was asked to find – and did find – the *Tobacco Damages and Health Care Costs Recovery Act* (the "***Damages Act***") unconstitutional because it exceeded the Province's territorial legislative competence and trenched on Parliament's power to incorporate federal companies.

58. The *Damages Act* defined "manufacturer" broadly. Coupled with the group liability provisions, the Act extended liability to affiliated companies.[19] Similar to ERISA, the *Damages Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act."[20]

59. In finding that the *Damages Act* was unconstitutional, the Court noted that:

(a) The *Damages Act* had "the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia" (para. 173). The *Damages Act* therefore exceeded the Province's territorial legislative competence because, rather than regulating the operations of extra-provincial and foreign tobacco corporations within BC, it derogated from the status and legal personality of these corporations conferred on them by the laws of their domiciles; and

(b) The cumulative effect of the provisions of the *Damages Act* was to "amalgamate" or "merge" defendant companies to impose liability for civil claims. This type of involuntary merger was a "fundamental interference with a federal jurisdiction" under the CBCA and trenched on Parliament's power to incorporate federal companies (para. 214).

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17 Abrams Report, BOE, vol 6, Tab 20 at p 6.

18 2000 BCSC 312, BOA Tab 9 [*JTI-Macdonald*].

19 In the *Damages Act*, the affiliation between companies was based on: (i) shareholdings that entitle election of a director or have a market value equal to 50% of the total shares; (ii) a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution; and (iii) control by direct or indirect influence.

20 *JTI-Macdonald*, BOA Tab 9 at para 233.

60. Like ERISA, the *Damages Act* went beyond merely piercing the corporate veil. The Court characterized the *Damages Act*'s "affiliate group" liability scheme as being "not so much designed to "pierce the corporate veil" as [it is] to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the Act is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence" (para. 218). The Court viewed the "affiliate group" liability scheme through the lens of legal personality because liability only attached to affiliates by ignoring separation of legal personalities.

61. The decision in *JTI-Macdonald* confirms that claims dealing with the imposition of "affiliate group" liability are properly classified as claims concerning the status and legal personality of corporations. Accordingly, the 1974 Plan's claim that ERISA applies to impose extraterritorial "controlled group" liability on the Petitioners should be classified as concerning the status and legal personality of corporations.

(b) The Law of the Place of Incorporation Applies to Issues of Corporate Personality

62. Under Canadian choice of laws rules, issues concerning a person's legal personality are governed by the law of the person's domicile.[21] In the case of a corporation, the domicile is the place in which the corporation was incorporated. As the Ontario Court stated in *National Trust Co v Ebro Irrigation and Power Co*:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law* [citation omitted] it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicil... In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated."[22]

63. In the insolvency context, an Alberta court concluded that the question of whether one corporation can be assimilated into another is determined by the law of the place of incorporation. In *Singer Sewing Machine Co of Canada Ltd (Re)*,[23] a US court extended creditor protection to a wholly-owned Canadian subsidiary of a US-resident debtor company, reasoning that treating the group of companies as a single entity for insolvency purposes would advance the purpose of the Chapter 11 bankruptcy proceeding. The Alberta court refused to enforce the US court's stay order, emphasizing that

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21 *Pitel*, BOA Tab 23 at pp 26-27, 245-246; *Castel & Walker*, vol. 2, ch 30, BOA Tab 22 at 30:1; A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol 2, 15th ed (London: Sweet & Maxwell, 2012) [*Dicey*], BOA Tab 21 at pp 1528, 1532-1533).

22 [1954] OR 463 (SC), BOA Tab 11 at para 31.

23 2000 ABQB 116, BOA Tab 16.

the question of whether the Canadian subsidiary could be treated as a single entity with the US parent was governed by Canadian rather than US law:

> Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities. [...]
>
> The Murrays are creditors only of Singer Canada...If they are to be prohibited from pursuing their claim against Singer Canada it must be by Canadian law, not American law (paras 11, 24).

64. Similarly, the question of whether one corporation has merged with another is characterized as an issue concerning the legal personality of the corporation and is governed by the law of the place of incorporation.[24] If the corporations said to have merged were incorporated in different jurisdictions, then the merger must be valid under the laws of both jurisdictions.[25]

65. For instance, in the English case of *Concept Oil Services Ltd v En-Gin Group LLP*,[26] persons controlling an English company attempted to protect the assets of the company from its creditors by continuing the English company as an Anguillan corporation. The English Court refused to recognize the continuation, finding that the validity of a purported amalgamation is governed by the law of the place in which the company was incorporated. As English law did not embrace the Anguillan law concept of continuation, the continuation was not recognized.

66. The 1974 Plan Claim turns entirely on whether the separate legal personalities of Walter Canada Group on the one hand and Walter Resources on the other can be ignored. Whether Walter Canada Group's separate legal personalities can be ignored is subject to the rule that the status and legal personality of a corporation are governed by the law of the place in which it was incorporated.

(c) The Partnerships

67. Walter Canada Group notes that 1974 Plan has only filed its claim against the Petitioners (all of which are corporations listed in Schedule A to the Initial Order), not the other members of Walter Canada Group (*i.e.* the partnerships listed in Schedule C of the Initial Order). In the Amended Notice of Civil Claim, the 1974 Plan states (emphasis added):

(a) Paragraph 14: "The 1974 Plan's claim *against the Petitioners*..."

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[24] *Castel & Walker*, vol. 2, ch 30, BOA Tab 22 at 30-5.

[25] *Dicey*, BOA Tab 21 at p 1534 and fn 50.

[26] [2013] EWHC 1897 (QBD), BOA Tab 5 at paras 70-72.

(b) Paragraph 38: "As a result, under ERISA, *each of the Petitioners*, whether or not a participating employer under the 1974 Plan and whether or not a signatory to the CBA, is an employer."

(c) Paragraph 103: the 1974 Plan seeks a declaration that "US$904,367,132 is validly due and owing [...] on a joint and several basis by *each of the Petitioners*".

(d) Paragraph 104: the 1974 Plan seeks a declaration "that the 1974 Plan Claim in an amount of US$904,367,132 is an Allowed Claim against *each of the Petitioners*."

68. Furthermore, in this Court's reasons for decision released January 26, 2016, the Court approved the SISP, among other things, and described the 1974 Plan submissions on that motion as: "the 1974 Pension Plan contends that ERISA provides that all companies under common control with [Walter Resources] are jointly and severally liable for this withdrawal liability, *and that some of the entities in the Walter Canada Group come within this provision*".[27] The 1974 Plan did not correct this statement.

69. As 1974 Plan has chosen to assert its claim only against the Petitioners, any claim against the Schedule C partnerships is barred pursuant to the claims bar date.

70. Regardless, as with corporations, the question of whether a partnership has a legal personality is governed by the law of the place in which the entity was constituted.[28] The parties agree that the partnerships were organized under BC law (SUF paras 47 and 52). The choice of law analysis leads to the same result: to the extent the 1974 Plan is asserting or is able to assert a separate claim against the partnerships, BC law governs such claims.

(d) Walter Canada Group are Canadian Entities and Canadian Law Applies

71. All Walter Canada Group entities are incorporated or organized under the laws of Canada or its provinces. The places of incorporation or organization are pled by the 1974 Plan and admitted by Walter Canada Group.[29] These admitted facts are the only facts relevant to this Court's choice of law analysis.

72. Because all Walter Canada Group entities are incorporated or organized under the laws of Canada or its provinces, the question of whether their separate legal personalities can be ignored is governed by BC law. The 1974 Plan has not advanced any theory of liability under BC law, relying exclusively on the controlled group provisions of ERISA to ground its claim. ERISA is not part of BC law. The 1974 Plan claim must fail.

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27 BOE, vol 2, Tab 7 at para 14.

28 *Dicey*, BOA Tab 21 at p 1532-1533.

29 SUF, BOE, vol 1, Tab 1 at paras 45-56, Amended Notice of Civil Claim, BOE, vol 1, Tab 2 at paras 2-13 and 27.

Question B: Controlled Group Liability Under ERISA Does Not Extend Extraterritorially

73. In the alternative, if the Court concludes that the 1974 Plan claim should be characterized in a such a way that the applicable choice of law principle dictates that US law governs, then the Court must consider the second issue, which is whether as a matter of US law controlled group liability for withdrawal liability related to a multiemployer pension plan under ERISA extends extraterritorially to Walter Canada Group. According to the experts, ERISA's "controlled group" liability provisions do not apply extraterritorially to impose liability on Walter Canada Group.

74. US law is a matter of fact that must be proven. As is set out in more detail below, the evidence of two independent expert witnesses confirms that that (i) there is a presumption against extraterritorial application of US statutes; (ii) that presumption has not been rebutted by any statement in ERISA that "affirmatively and unmistakably" authorizes extraterritorial application of the "controlled group" liability provisions; and (iii) this case does not involve a domestic application of ERISA. As such, US law does not support the 1974 Plan Claim against Walter Canada Group.

(a) Presumption Against Extraterritorial Application of US Law

75. US law contains a strong presumption against extraterritoriality. As Marc Abrams and Judge Allan Gropper explain, the US Supreme Court reaffirmed in the recent *RJR Nabisco* decision that "[i]t is a basic premise of our legal system that, in general, US law governs domestically but does not rule the world."[30] "This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[31]

76. This presumption "serves to avoid the international discord that can result when US law is applied to conduct in foreign countries. But it also reflects the more prosaic 'common sense notion that Congress generally legislates with domestic concerns in mind.'"[32]

77. Pursuant to US law, the onus is on the 1974 Plan to rebut the presumption against extraterritoriality. The Walter Canada Group says that the presumption is not rebutted because ERISA

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30 Abrams Report, BOE, vol 6, Tab 20 at p 8,; *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016) [*RJR Nabisco*], Walter Canada Group's US Book of Authorities RE: Abrams Report, served November 14, 2016 ("US BOA") Tab 40; see also *Morrison v. Nat'l Australia Bank Ltd.*, 561 US 247 (2010) [*Morrison*], US BOA Tab 33 at 255 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) [*Arabian*], US BOA Tab 27 at 248).

31 Abrams Report, BOE, vol 6, Tab 20 at p 8; *RJR Nabisco*, US BOA Tab 40 at 2100. Although Ms. Mazo on behalf of the 1974 Plan concedes that *RJR Nabisco* is the leading case on this issue, she fails to apply the presumption against extraterritoriality in her analysis: Mazo Report at para 50.

32 Expert Report of Allan L Gropper, dated December 1, 2016 ("Gropper Report") at p 4, citing *RJR Nabisco*, US BOA Tab 40 at 2100.

does not contain "a clear, affirmative indication" that the "controlled group" liability provisions apply extraterritorially. In the second stage of the analysis, Walter Canada Group states that the 1974 Plan Claim does not involve a "domestic application" of ERISA.

(b) No Congressional Intent to Apply ERISA "Controlled Group" Provisions Extraterritorially

78. The US Supreme Court has held that the presumption against extraterritoriality is only rebutted where "Congress has affirmatively and unmistakably instructed that the statute will" apply to foreign conduct.[33] As Mr. Abrams notes, this approach is consistent with the US Supreme Court's direction that US courts should "assume that Congress legislates against the backdrop of the presumption against extraterritoriality."[34]

79. As explained by Mr. Abrams and Judge Gropper, the "controlled group" liability provisions of ERISA do not contain any clear, affirmative or unmistakable expression of Congress's intent that they should apply extraterritorially. To the contrary, these provisions are silent on the issue of extraterritorial application.[35]

80. The 1974 Plan asserts through Ms. Mazo that "there is no indication that Congress expected controlled group membership to be cut off at the borders of the US."[36] However, as Judge Gropper explains, this approach turns the presumption against extraterritoriality on its head.[37] As the US Supreme Court has repeatedly held, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[38] The importance of this principle is magnified in this case because imposing liability throughout a corporate group is "highly unusual", even under US law, and might result in "international discord".[39]

81. Furthermore, other provisions of ERISA indicate that Congress did not intend for ERISA's "controlled group" liability provisions to apply extraterritorially. For example, ERISA contemplates that pension plans or sponsoring employers will file their lawsuits relating to Title IV of the statute in federal or state courts in the US, not foreign jurisdictions.[40] Mr. Abrams notes that ERISA provides that US federal

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33 Abrams Report, BOE, vol 6, Tab 20 at p 8; *RJR Nabisco*, US BOA Tab 40 at 2100.

34 Abrams Report, BOE, vol 6, Tab 20 at p 8; *Arabian*, US BOA Tab 27 at 248.

35 Abrams Report, BOE, vol 6, Tab 20 at p 9; Gropper Report at p 4.

36 Mazo Report at para 65.

37 Gropper Report at pp 2-3.

38 Abrams Report, BOE, vol 6, Tab 20 at p 13; Gropper Report at p 4; *Morrison*, US BOA Tab 33 at 255; *RJR Nabisco*, US BOA Tab 40 at 2100.

39 Gropper Report at p 4.

40 Abrams Report, BOE, vol 6, Tab 20 at p 13; *See, e.g.*, 29 USC. § 1401(b)(1), US BOA Tab 16 (collection proceeding by plan sponsor may be brought in "a State or Federal court of competent jurisdiction").

courts have exclusive jurisdiction over lawsuits, ***including those asserting claims for withdrawal liability***, by a "plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining."[41] These provisions undercut any inference that Congress intended for ERISA to apply outside of the US.

82. The absence of any Congressional intent that ERISA's "controlled group" liability provisions apply extraterritorially is consistent with US court decisions that other ERISA provisions do not apply extraterritorially.[42] For example, in *Chong v InFocus Corp*,[43] a Singaporean citizen working in Singapore for the Singaporean subsidiary of a US company commenced a suit in a US court asserting that he was entitled to benefits under a severance plan established by the US company under ERISA. The district court granted summary judgment against the plaintiff on his ERISA claims because, absent clear Congressional intent to extend the reach of ERISA extraterritorially, the statute would not apply to a foreign employee providing services outside of the US for a foreign subsidiary even if the applicable plan was administered by a US company in the US and the decision to deny the employee benefits was made in the US.

83. Similarly, in *Maurais v Snyder*,[44] a Canadian doctor who treated a US citizen in Canada sought compensation from the patient and his US insurance company. The doctor sued in US court and asserted claims under Pennsylvania state law. In response, the insurance company argued that the Canadian doctor's state law claims should be dismissed because they were preempted by ERISA. In considering this defense, the court concluded that the plaintiff's claims could be preempted by ERISA only if the statute applied extraterritorially, *i.e.*, to the medical procedures performed by the Canadian doctor in Canada. Relying on the presumption that federal laws do not apply extraterritorially, the court concluded that there was no language in ERISA evidencing clear congressional intent to legislate extraterritorially.

84. For these reasons, and the reasons set out in Mr. Abrams' and Judge Gropper's reports, there is no evidence of congressional intent in the text of ERISA's "controlled group" provisions that would overcome the strong presumption that US statutes do not apply extraterritorially.[45]

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41 Abrams Report, BOE, vol 6, Tab 20 at p 13; 29 USC. § 1451(a)(1), US BOA Tab 17; *see also* 29 USC. § 1370(c), US BOA Tab 10 (similar jurisdictional provision in respect of single-employer pension plans).

42 Abrams Report, BOE, vol 6, Tab 20 at pp 14-15.

43 No. CV-08-500-ST, 2008 WL 5205968 (D. Ore. Oct. 24, 2008), US BOA Tab 24, at *5-6; Abrams Report, BOE, vol 6, Tab 20 at p 14.

44 No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000), US BOA Tab 32 at *2-3; Abrams Report, BOE, vol 6, Tab 20 at p 15.

45 Abrams Report, BOE, vol 6, Tab 20 at p 15; Gropper Report at p 4.

(c) The 1974 Plan Claim Is Not a Domestic Application of ERISA

85. As the presumption against extraterritoriality is not rebutted, the 1974 Plan must show that applying ERISA's "controlled group" liability provision to Walter Canada Group is a "domestic application" of US law. If the 1974 Plan Claim is *not* a "domestic application" of ERISA, then it is an impermissible extraterritorial application of the statute, and the 1974 Plan claim must fail.

86. Determining whether the application of ERISA is a "domestic application" of US law entails looking to the statute's "focus" and determining whether the conduct relevant to that focus primarily occurred in the US.[46] In the words of the US Supreme Court, "[i]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory."[47]

87. Importantly, more than just *some* of the relevant conduct must occur in the US. Rather, Mr. Abrams explains, that conduct must touch the US "with sufficient force to displace the presumption against extraterritorial application."[48] As the US Supreme Court cautioned in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[49]

88. No case considers whether applying ERISA's controlled group liability provisions to foreign defendants is a "domestic application" of US law. However, there is analogous law considering whether a US Court can exercise personal jurisdiction over foreign defendants alleged to be in a "controlled group" for purposes of joint and several liability under ERISA. In virtually every case, the US Court held that it did not have personal jurisdiction over the foreign defendant.[50]

(i) US Courts Decline to Take Personal Jurisdiction Over Foreign Defendants in ERISA Claims

89. Although they are not the same, under US law both the "personal jurisdiction" and "domestic application" analyses consider how closely a claim relates to the US. The domestic application analysis considers whether the conduct relevant to the focus of the statute touches the US "with *sufficient force* to

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46 Abrams Report, BOE, vol 6, Tab 20 at p 16; *RJR Nabisco*, US BOA Tab 40 at 2101.

47 *RJR Nabisco*, US BOA Tab 40 at 2101.

48 Abrams Report, BOE, vol 6, Tab 20 at p 16; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) [*Kiobel*], US BOA Tab 31 at 1669.

49 *Morrison*, US BOA Tab 33 at 266 (emphasis in original); *see also Sec. Investor Protection Corp. v. Bernard L. Madoff Investment Sec. LLC*, 513 B.R. 222 [*Madoff*], US BOA Tab 42 at 227 ("[A] mere connection to a US debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic.").

50 Abrams Report, BOE, vol 6, Tab 20 p 17-19.

displace the presumption against extraterritorial application".[51] Conduct relevant to the "focus" is conduct that ERISA is aimed at regulating.

90. Similarly, the personal jurisdiction analysis considers US contacts connected with the conduct that ERISA is aimed at regulating. A US court will have personal jurisdiction over a foreign "controlled group" member only if there are sufficient minimum contacts with the US that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice".[52] According to US law, the US contacts necessary to ground personal jurisdiction must be *related to and give rise to the claim.*[53] Relevant contacts *giving rise to the claim* for the purposes of the personal jurisdiction include conduct that ERISA is aimed at regulating (*i.e.*, the "focus" for the domestic application analysis). It would not seem to be possible for a contact to give rise to claim under a statute if that statute is not seeking to regulate that contact.

91. The domestic application analysis requires US conduct relevant to the focus of the statute that touches with sufficient force to characterize the conduct as domestic. If the conduct does not meet the "minimum contacts" threshold necessary for personal jurisdiction, it does not seem possible for a court to conclude that conduct displaces the presumption against extraterritoriality.

92. Establishing US personal jurisdiction over the foreign defendant is a threshold step that appears to be necessary, though not sufficient, to establish that the application of ERISA to the foreign defendant is a domestic application of the Act. If the plaintiff cannot establish sufficient minimal contacts with the US to justify taking jurisdiction over a foreign "controlled group" member, neither can the plaintiff establish that applying the common controlled liability provisions to that foreign "controlled group" member is a "domestic" application of ERISA.

93. As a result, US cases considering personal jurisdiction in ERISA "controlled group" cases are a useful comparison providing guidance on what conduct is relevant to the focus of ERISA, and when that conduct touches the US "with sufficient force" that the application of the Act is domestic.

94. In the context of considering a claim for withdrawal liability under ERISA, US jurisprudence on personal jurisdiction establishes that:

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51 *Kiobel*, US BOA Tab 31 at 1669.

52 Abrams Report, BOE, vol 6, Tab 20 at p 18; *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (internal citations omitted), US BOA Tab 25.

53 Abrams Report, BOE, vol 6, Tab 20 at p 18; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), US BOA Tab 30.

(a) Corporate affiliation between the Canadian and US corporations, or even Canadian corporate ownership of the shares in a US entity, are not sufficient to ground personal jurisdiction over the foreign affiliate.[54]

(b) The provision of payroll services by the Canadian entity to the US entity was not sufficient to ground personal jurisdiction over the foreign affiliate.[55]

(c) The negotiation of a loan agreement by the Canadian parent on behalf of the US employer was not sufficient to ground personal jurisdiction over the foreign affiliate. Personal jurisdiction was not established even though the Canadian parent's negotiation allegedly resulted in the US employer's withdrawal from the pension plan.[56] These connections to the US were "too attenuated" and did not "'directly' relate" to the subsidiaries' withdrawal and could not ground jurisdiction.

95. If these contacts with the US are not sufficient to meet the minimum threshold for personal jurisdiction, the logical conclusion is that these US contacts would also not have sufficient force to characterize the conduct as domestic, displacing the presumption against extraterritoriality.

(ii) ERISA's Application to Walter Canada Group Would Not Be a Domestic Application

96. Based on both the law on personal jurisdiction and the test to establish the domestic application of ERISA, Walter Canada Group submits that the presumption against extraterritorial application is not displaced.

97. The "focus" of ERISA's "controlled group" liability provisions is to "prevent businesses from shirking their ERISA obligations by fractioning operations into many separate entities."[57] The legislation seeks to prevent a US parent company from using a shell company to employ American employees so that it can avoid its pension obligations to those employees. Ms. Mazo notes that "a much-cited purpose

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54 *Central States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) [*Central States*], US BOA Tab 21 at 943-45.

55 *Central States,* US BOA Tab 21 at 943-45.

56 *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009), US BOA Tab 29 at 1020-22, 1025.

57 *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods.*, LLC, 706 F.3d 874 (7th Cir. 2013), US BOA Tab 20 at 878; *Tamko Asphalt Prods., Inc. of Kan. v. Comm'r of Internal Revenue*, 658 F.2d 735, 740 (10th Cir. 1981), US BOA Tab 44; *NYSA-ILA Pension Trust Fund v. Lykes Bros., Inc.*, 1997 WL 458777, at *6 (S.D.N.Y. Aug. 11, 1997) (same), US BOA Tab 34; *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986) (same), US BOA Tab 41 at 648; *U.S. v. Vogel Fertilizer*, 455 US 16 (1982), US BOA Tab 45 at 26-27 ("Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation – large corporations subdividing into smaller corporations and receiving unintended tax benefits . . . ."); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. El Paso CGP Co.*, 525 F.3d 591 (7th Cir. 2008), US BOA Tab 23 at 595-596 (affirming ERISA liability against US members of withdrawing employer's "controlled group" and stating that "the controlled group provision allows a plan to deal exclusively with the defaulting employer known to the fund, while at the same time assuring itself that legal remedies can be maintained against all related entities in the controlled group") (internal quotations omitted).

of the controlled group rule is to prevent companies from devising corporate structures in ways that could complicate a pension plan's recovery of withdrawal liability."[58]

98. In this case, Mr. Abrams explains that the conduct relevant to ERISA's focus would be:

(a) The circumstances and transaction(s) leading to the foreign entity coming under the common control of the group parent;

(b) Transactions between the foreign entity and the contributing employer or other group entities;

(c) Contributions or other connections between the foreign entity and the pension plan or its members; and

(d) Any acts or omissions of the foreign entity relating to withdrawal of the contributing employer.[59]

99. Based on the uncontested facts, the relevant conduct occurred outside the US:

(a) Western Coal Corp. and its subsidiaries existed and operated in Canada before the Western Acquisition (SUF para 22); it is not possible to argue that they were incorporated to fractionalize the group or shield assets from US pension liabilities. The Western Acquisition was consummated in Canada and was approved by the BC Supreme Court on March 10, 2011 (SUF para 23). The 1974 Plan did not file any objection to the plan of arrangement at that time (SUF para 32), despite the fact that the transaction was disclosed in Walter Energy's news releases and public fillings numerous times starting in November 2010 (SUF paras 25-31).

(b) Subsidiaries or assets of Walter Canada were transferred to the US entities in connection with the internal restructuring following the Western Acquisition, thereby providing additional resources for the US pension liabilities. No subsidiaries or assets of the US entities were transferred to Walter Canada (SUF paras 22, 43, 73).

(c) Walter Canada Group does not have any assets or carry on any business in the US (SUF para 73). Walter Canada Group did not employ any persons who were members of the 1974 Plan and were not contributing employers to the 1974 Plan (SUF paras 78-79).

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58 Mazo Report at para 60.

59 Abrams Report, BOE, vol 6, Tab 20 at para 20-21.

(d) There is no allegation that Walter Canada Group made any decisions or engaged in any conduct leading to Walter Resources' withdrawal from the 1974 Plan.

Each of these factors points to the application of ERISA to Walter Canada Group being an extraterritorial application of the Act.

100. Mr. Abrams also points out that two factors may point to domestic conduct: the receipt of certain essential management services (the "Shared Services") pursuant to certain management agreements and other intercompany agreements with the Walter US Group (SUF para 63) and the existence of an unfunded liability at the time of the Western Acquisition (SUF para 35).[60] Mr. Abrams does not comment on the ultimate issue of whether the application of ERISA to Walter Canada Group is domestic or extraterritorial.

101. These two factors do not overcome the factors pointing to the application of ERISA to Walter Canada Group being an extraterritorial application of the Act. If the focus of ERISA is to prevent companies from shirking their obligations, it is hard to characterize the provision of Shared Services as such an attempt when Walter Canada Group was required to pay approximately $1 million per month to the Walter US Group for these Shared Services (SUF para 64).

102. In any event, a US court considered the situation in which the foreign parent provided payroll services to the US subsidiary (*i.e.* compensation was flowing from the US employer out of the country to the Canadian parent). The US court found that this type of "standard administrative service" was insufficient to justify the exercise of jurisdiction over the Canadian parent.[61] As is set out above, if the US court cannot take personal jurisdiction over the conduct, that conduct is not sufficient to support the conclusion that ERISA's application is domestic.

103. Similarly, the Western Acquisition was highly publicized over a period of months and was subject to BC Court approval in a hearing where the 1974 Plan made no submissions. The 1974 Plan now objects to the Western Acquisition on the basis that it drained funds out of the US. It had notice of the BC hearing to approve the Western Acquisition and ought not to be permitted question that Acquisition now with a hindsight appreciation of collapsing coal prices and the resulting insolvencies.

104. The 1974 Plan and Ms. Mazo suggest that the only facts relevant to determine whether or not ERISA's application to Walter Canada Group is domestic are the fact that the Plan was underfunded and the employer's withdrawal from the plan.[62] The 1974 Plan is resident in the US (SUF para 9). All of its participating employers are resident in the US (SUF para 12). As a result, under the 1974 Plan's

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60 Abrams Report, BOE, vol 6, Tab 20 at p 22.

61 *Central States*, US BOA Tab 21 at 946.

62 Mazo Report at para 54.

approach, *every* application of the controlled group provisions is automatically a domestic application of ERISA. Under the 1974 Plan's approach, it does not matter where the affiliate is incorporated and it does not matter whether that entity engaged in any conduct or had any contacts related to or giving rise to the claim for withdrawal liability. Such an approach eviscerates the presumption against extraterritoriality.

105. The 1974 Plan approach also cannot be reconciled with the US courts' routine refusal to take personal jurisdiction over foreign defendants where claims for withdrawal liability under ERISA are advanced against them.[63] It does not make sense to conclude that the application of ERISA to foreign entities is automatically domestic even where there are not sufficient minimal contacts to ground personal jurisdiction over these entities.

106. In contrast, Mr. Abrams takes a more nuanced view, recognizing that ERISA's controlled group provisions could apply domestically to a foreign entity, but ***only if*** sufficient conduct relevant to ERISA's controlled group provisions occurred in the US. For example, if there was an allegation that the foreign entity not only owned the shares of but also forced the contributing employer to withdraw from the plan, there may be sufficient conduct relevant to the focus of ERISA's controlled group provisions to rebut the presumption of extraterritoriality. As the US Court has explained, that control cannot be "attenuated" or only indirectly related to the withdrawal.[64] There is no allegation that Walter Canada Group made any decisions or engaged in any conduct leading to Walter Resources' withdrawal from the 1974 Plan.

(d) Comity Militates Against Extending ERISA Outside of the US

107. Finally, as Judge Gropper explains, US Courts would refuse to extend ERISA's common control group provisions to Walter Canada Group due to the overarching principle of comity. Under US law, the principle of comity among nations "may have a strong bearing on whether application of US law should go forward."[65] Judge Gropper notes that comity is "a canon of construction [that] might shorten the reach of a statute".

108. US Courts have relied on comity in refusing to apply long-arm American statutes to the transactions of insolvent foreign entities. For example, in the recent *Picard* decision,[66] the US Court declined to extend the application of US bankruptcy laws to foreign transactions because of, among other things, considerations of comity. In that case, several foreign investment funds acted as "feeder funds" investing most of their assets with Bernard L. Madoff. These feeder funds went into liquidation in their

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63 Mazo Report at para 56.

64 *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018 (7th Cir. 2009), US BOA Tab 29 at 1020-22, 1025.

65 Gropper Report at p 6.

66 Gropper Report at p 5; *Picard, Trustee for the Liquidation of Bernard L. Madoff Inv. Sec. LLC v. Bureau of Labor Insurance*, Adv. No. 11-02732 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016), *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) Walter Canada Group's US Book of Authorities RE: Gropper Report served December 1, 2016, Tab 7.

domestic jurisdictions after the Madoff Ponzi scheme was revealed. The trustee of the Madoff estate in the US attempted to recover property redeemed from the feeder funds by the feeder funds' customers, on the theory that all redemptions had originated as transfers from Madoff. The trustee relied on §550(a)(2) of the US Bankruptcy Code that allows a plaintiff to seek recovery not only from the immediate transferee (in this case, the feeder fund) but also from a subsequent transferee (the feeder fund's customer who received the payment).

109. The US Court refused to extend the reach of US bankruptcy laws to the foreign transactions. As Judge Gropper elaborates, the Court found that even if the presumption against extraterritoriality was rebutted, the principle of comity among nations required a dismissal.[67] The US Court relied on the fact that (i) there was only an indirect relationship between the Madoff trustee and the feeder fund customers and (ii) the feeder funds were subject to their own insolvency proceedings where the liquidators had unsuccessfully sought similar relief from the same or similarly situated transferees. The Court concluded, "those foreign jurisdictions had a greater interest in the application of their own laws than the US had in the application of US law."[68]

110. Walter Canada Group submits that a US court would similarly apply the principle of comity to the 1974 Plan Claim and refuse to extend the reach of controlled group liability to Walter Canada Group, especially in light of the insolvency proceedings underway in Canada.

(e) Irrelevant Facts Alleged by 1974 Plan

111. In its Amended Notice of Civil Claim, the 1974 Plan alleges a series of facts in relation to its choice of law analysis, such as the location of officers and directors or the expectations of those officers and directors about the governing law. As is set out above, the correct approach to choice of law characterizes the claim as one of legal status and personality resulting in a choice of law rule based on domicile. The 1974 Plan's alleged facts are not relevant to questions of domicile.

112. These alleged facts are also not relevant to a US court's consideration of whether or not the application of ERISA to Walter Canada Group is domestic or extraterritorial. Indeed, none of the experts supports the conclusion that any of these alleged facts could be relevant to an assessment of whether ERISA applies to Walter Canada Group domestically.

113. Finally, these irrelevant alleged facts do not impact the outcome of this summary hearing. For example, the 1974 Plan pleads that there is an overlap between the officers and directors of Walter US Group and Walter Canada Group. If having a foreign parent is not sufficient to ground personal

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[67] Gropper Report at p 6.

[68] Gropper Report at p 6.

jurisdiction over a Canadian subsidiary,[69] the mere fact that certain officers and directors reside in or work from foreign jurisdictions is not sufficient to do so. As Judge Gropper notes, "It is a fundamental principle of American law... that each entity holds its own assets and is responsible for its own liabilities, and that creditors rely on the separateness of the entities with which they do business."[70] US cases make it clear that "respecting entity separateness is a fundamental ground rule" and the power to ignore separateness – even in the context of a Chapter 11 bankruptcy proceeding – can be used only in extreme circumstances.[71]

114. In another example, the 1974 Plan asserts that the management team and key-decision makers of the other Petitioners expected US law to govern Walter Canada Group. The 1974 Plan makes this allegation based on its reading of the *Minera* decision from this Court where the Court considered the fact that the principal actors "routinely conducted their affairs" under Canadian or Colorado law as part of its choice of law analysis.[72] In any event, the 1974 Plan will not be able to overcome the uncontested facts to establish that Walter Canada Group "routinely conducted their affairs" under US law because:

(a) Walter Canada Group's collective agreements with the Respondent Steelworkers and the Christian Labour Association of Canada were governed by the BC *Labour Relations Code* (SUF para 76).

(b) The Respondent Steelworkers have asserted claims relating to the Northern Living Allowance and certain claims related to the notice provisions under s. 54 of the BC *Labour Relations Code* in these CCAA Proceedings (SUF para 77).

(c) Walter Canada Group's operations were subject to environmental assessment under the BC. *Environmental Assessment Act* and its predecessor legislation, the *Mine Development Assessment Act* (SUF para 81).

(d) Walter Canada Group experienced some issues meeting the certain BC water quality guidelines at the Brule Mine (SUF para 86).

(e) Any significant changes to Walter Canada Group's operations or further development of its properties in BC could have triggered a federal or provincial environmental assessment or both (SUF para 82).

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69 *Central States*, US BOA Tab 21 at 943-45.

70 Gropper Report at p 3.

71 Gropper Report at p 3.

72 *Minera*, BOA Tab 10 at para 206. In *Minera*, the question was whether Argentine or Canadian/Colorado law applied. The Court characterized the claim as one of unjust enrichment and breach of confidence and concluded that the closest and most real connection choice of law rule applied to determine the governing law. In applying that test, the Court considered the fact that the principal actors "routinely conducted their affairs" under Canadian or Colorado law and were aware of the Lac Minerals case before receiving the confidential information.

(f) Each Walter Canada Group mining site was inspected by the BC Ministry of Energy and Mines in September 2014 (SUF para 83).

(g) Pursuant to the BC *Mines Act*, Walter Canada Group's operations required permits outlining the details of the work at each mine and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land and watercourses affected by the mine (SUF para 84).

(h) Walter Canada Group filed mine plans and reclamation programs for each of its operations and accrued for reclamation costs to be incurred related to the operation and eventual closure of its mines under the *Mines Act* and the *Mine Code*. Walter Canada Group submitted updated five-year mine plans for Wolverine Mine and Brule Mine in 2013 (SUF para 85).[73]

115. Furthermore, the 1974 Plan cannot establish that the management team and key-decision makers of the other Petitioners expected US law to govern their own conduct in respect of Walter Canada Group. As of December 2015, for the purpose of sizing the Directors' Charge, Walter Canada Group estimated (with the assistance of the then-Proposed Monitor) that obligations in respect of Walter Canada Group unpaid wages, unremitted source deductions, unpaid accrued vacation pay and certain taxes could amount to a total potential director liability of approximately $2.5 million (SUF para 70). These obligations arose under BC and Canadian law.

116. Finally, the 1974 Plan cannot establish that Walter Canada Group expected its relationship with Walter Resources – the contributing and withdrawing employer in the 1974 Plan – to be governed by US law. As part of the CCAA Proceedings, the Willow Creek Coal Partnership and Brule Coal Partnership planned to enter into an agreement with Walter Resources whereby Walter Resources would buy three bulldozers from the Partnerships (SUF para 94). This transaction has two telling features. First, only one of the three bulldozers was purchased because only one bulldozer met US regulatory requirements for import into the US (SUF para 95). If Walter Canada Group was operating in accordance with US law, it would not have owned the other bulldozers.

117. Second, the Bill of Sale dated December 29, 2015, pursuant to which Brule Coal Partnership sold one bulldozer to Walter Resources, was "made under and shall be governed by and construed in accordance with the law of the Province of British Columbia and the federal laws of Canada applicable in the Province of British Columbia" (SUF para 97).

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[73] If the 1974 Plan seeks to object to this list of statements as fact not proven, Walter Canada Group notes that the 1974 Plan refused to admit facts of this nature on the basis that they are "matters of mixed fact and law". If that is the case, the Court is competent to decide questions of Canadian law.

118. To summarize, if this Court concludes that ERISA applies to govern 1974 Plan's claim against Walter Canada Group, the expert evidence filed makes it clear that the presumption against extraterritoriality in US law has not been rebutted either by a clear statement of Congressional intent or by Walter Canada Group conduct touching the US "with sufficient force" to characterize the conduct as domestic, thereby displacing the presumption against extraterritorial application.

Question C: The 1974 Plan Claim Is Contrary to Public Policy and Is Unenforceable

119. Even if ERISA did apply to Walter Canada Group, the 1974 Plan Claim conflicts with Canadian public policy and is unenforceable in Canada. The public policy defence allows Canadian courts to refuse to give effect to foreign laws that are "contrary to the fundamental morality of the Canadian legal system", "inconsistent with the good order and solid interests of society", or in conflict with the essential public policy goals of Canadian legislation. [74] This exception to comity has a narrow application.

120. This Court only reaches the question of public policy if it has concluded that US law governs the 1974 Plan Claim and either Congress intended the controlled group provisions to apply to Canadian entities or the application of the controlled group provisions is domestic. From a public policy perspective, allowing another country to establish a detailed legislative scheme that has the effect of shifting the burden of its social policy onto Canadians offends the Canadian legal system's "view of basic morality". ERISA legislates minimum funding standards that participating employers must meet.[75] It was within Congress' control to change those funding standards to reduce underfunding of pension plans. It was within Congress' control to decide to "stand behind" the PBGC's obligations (which the US government refused to do).[76] To the extent that Canadian companies are asked to fill the withdrawal liability created by ERISA's funding requirements and the US government's refusal to back up the PBCG, this Court should refuse to enforce that legislation as failing to respect Canadian territorial sovereignty.

121. The importance of this policy is highlighted by the 1974 Plan's and Walter US's conduct in this case. The 1974 Plan entered into a Global Settlement with the Walter US Debtors pursuant to which the 1974 Plan may receive an equity distribution from the new purchaser of Walter US's assets. Walter Canada Group was not a party to this Global Settlement and the Canadian stakeholders had no say on the settlement terms. The US stakeholders have compromised their responsibility under ERISA. This Court should not now enforce ERISA to shift the burden of US social policy to Walter Canada Group and its Canadian stakeholders.

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74 *Beals v Saldanha*, 2003 SCC 72, BOA Tab 2 at para 72; *Wende v Victoria (County) Official Administrator* (1998), 48 BCLR (3d) 219 (SC), BOA Tab 20 at paras 34 and 37.

75 Mazo Report at para 26

76 Mazo Report at para 27.

122. Second, this Court should acknowledge that the 1974 Plan's claim arises *within a CCAA claims process*. The CCAA was designed to ensure "a broad balancing of a plurality of stakeholder interests."[77] Throughout, the supervising CCAA judge must weigh a broad range of stakeholder interests. The Supreme Court of Canada has emphasized this responsibility:

> [T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company... courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.[78]

123. Leaving aside the 1974 Plan, Walter Canada Group's stakeholders are the unsecured creditors of Walter Canada Group, which include approximately 280 former employees of Walter Canada Group who have an Allowed Claim of approximately $12 million. The stakeholders also include the Canadian and BC governments who seek payment of taxes, and businesses with pre-filing claims. Each of these stakeholders had a direct relationship with Walter Canada Group.

124. The 1974 Plan did not have a direct relationship with Walter Canada Group. In addition, as it is a multiemployer pension plan, which is funded by "more than one unrelated employer",[79] some of its beneficiaries must have worked for companies other than Walter Resources.

125. If the 1974 Plan claim succeeds, the 1974 Plan will receive the vast majority of the proceeds in Walter Canada Group's hands and the remaining stakeholders will receive nominal distributions, if anything at all. This Court should refuse to enforce ERISA in the context of the 1974 Plan Claim because it allows individuals who never had a relationship with any Walter company to benefit at the expense of Walter Canada Group employees and creditors. Enforcing the 1974 Plan Claim in this CCAA claims process would thwart a central policy goal of the CCAA: the equitable treatment of a broad balance of stakeholder interests.

PART IV - WALTER CANADA GROUP POSITION ON 1974 PLAN'S SUITABILITY APPLICATION: A SUMMARY HEARING IS SUITABLE

126. A summary hearing in this case is consistent with the principle of proportionality, the objects of the *Supreme Court Civil Rules* (the *Rules*), and the purposes of the CCAA.

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77 *Air Canada (Re)*, [2004] OJ No 842 (SCJ), BOA Tab 1 at para 27.

78 *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60, BOA Tab 18 at para 60.

79 Abrams Report, BOE, vol 6, Tab 20 at p 5.

127. This summary hearing is convened as part of the claims process pursuant to the CCAA and this Court's inherent jurisdiction. Because this is a proceeding under the CCAA – a statute with national application – the claims process can be informed by local rules and practice but need not slavishly follow them. That said, the *Rules* provide a useful guide and, Walter Canada Group submits, in this case that guidance supports determining the three questions posed in Walter Canada Group's Summary Hearing Notice of Application in a summary fashion.

128. The choice of laws and public policy questions are like a proceeding on a point of law pursuant to Rule 9-4 because the facts upon which they turn are admitted facts. The questions of ERISA's application and of public policy are akin to summary trial proceedings under Rule 9-7 in that the Court must assess conflicting expert evidence. In both cases, the Court has the evidence it requires to apply the law and discovery on collateral issues ought not change the outcome.

129. The objectives of the *Rules*, the principle of proportionality, and the objectives of the CCAA are served by a summary hearing. Rule 1-3(1) states that "The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."[80] The Supreme Court has recently emphasized that judges must "actively manage the legal process in line with the principle of proportionality."[81] This principle makes particular sense in a CCAA proceeding, where creditors are seeking to share in insufficient assets and one Judge is seized of all matters. This summary hearing is proportional, just, speedy and inexpensive because, if the Court decides *any* of the three questions in favour of Walter Canada Group, then the 1974 Plan Claim fails, and the time and expense of a full trial can be avoided.

The 9-7(11) Suitability Test

130. In addition to the CCAA principles and the broad discretion granted to a Judge managing a CCAA proceeding, the law on 9-7(11) applications supports deciding the 1974 Plan Claim in a summary fashion. When a BC Court considers an application under Rule 9-7(11), it asks two questions: should an issue be severed and is that issue suitable for summary determination. The test for severance is whether there are "extraordinary, exceptional or compelling reasons" for the issues to be severed. One compelling reason is the likelihood of a significant savings in time and expense realized by summary determination.[82]

131. Severing the issue of ERISA's enforceability may lead to savings in time and expense. If ERISA does not apply, or applies but is not enforceable, then the 1974 Plan Claim must fail. Concerns about

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80 *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

81 *Hryniak v Mauldin*, 2014 SCC 7, BOA Tab 8 at para 32.

82 *Burg Properties Ltd v Economical Mutual Insurance Co*, 2013 BCSC 209, BOA Tab 4 at para 27. This case addresses summary trial procedures under Rule 9-7, and the Walter Canada Group has drawn upon these principles in proposing a summary hearing approach.

time and expense are particularly pronounced in a CCAA proceeding. Any delay may impede the efficient resolution of this insolvent estate. If this matter can be disposed of more expeditiously, it should be.

132. The threshold issues proposed by Walter Canada Group are suitable for determination in a summary hearing. There are sufficient admitted and agreed upon facts and sufficient evidence on the question of foreign law for this Court to decide the three questions before it.

133. It is settled law that the court will grant judgment on a summary proceeding if the necessary facts are adduced and it is not unjust to do so.[83] A conflict of evidence will not entitle the parties to a full trial.[84] The onus is on the application respondents, in this case the 1974 Plan, to demonstrate that a matter is unsuitable for summary determination. Arguing that "with the aid of the discovery processes something might turn up" is insufficient to discharge this onus.[85]

134. All of the facts necessary to answer the choice of law question are admitted. The characterization of the claim is based on the claim itself as pleaded. As BC courts have emphasized, "[t]he context of the claim should not be confused with the essence of the claim."[86] The choice of law rule that characterization necessitates in this case is applied by determining Walter Canada Group's place of incorporation, which is agreed.[87]

135. All the facts relied upon to determine whether ERISA applies extraterritorially are before this Court. Both parties have filed expert reports providing this Court with a sufficient evidentiary foundation to make findings of fact about applicable U.S. law. None of the three experts indicated that further facts were required to complete that exercise. In particular, Ms. Mazo relied upon only 35 facts in drafting her report on the application of US law.[88] Fact i describes the claim; fact xviii describes the structure of Walter Canada Group; and facts xv and xvi paraphrase contents from the SUF. The remaining 31 facts are direct quotes from the SUF.

136. Finally, this Court has all the evidence required to determine whether ERISA is unenforceable against Walter Canada Group because it conflicts with public policy. The 1974 Plan Claim arises within Walter Canada Group's CCAA proceedings. Accordingly, the public policy implications of this matter must be assessed with reference to the objectives of the legislation under which the 1974 Plan brings its claim: the CCAA. The other "fact" relates to ERISA itself, which is fully described in the expert reports. As public

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83 *Rogers v Tourism British Columbia*, 2010 BCSC 1562, BOA Tab 14 at para 59.

84 *Tassone v Cardinal*, 2014 BCCA 149 [*Tassone*], BOA Tab 17 at para 39.

85 *Tassone*, BOA Tab 17 at para 38.

86 *Tezcan v Tezcan* (1990), 44 BCLR (2d) 343 (SC), BOA Tab 19 at para 24, aff'd (1992), 62 BCLR (2d) 344 (CA).

87 SUF, BOE, vol 1, Tab 1 at paras 19, 44-45, 47, 52-53, and 55-56.

88 Mazo Report at Appendix B.

policy should not be rooted in the minutiae of a particular case, this Court has what it needs to assess the public policy implications of enforcing ERISA against Walter Canada Group.

A Summary Hearing Is Just

137. In BC, when assessing summary trials, the Court considers: the complexity of the matter; any urgency and prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings; whether credibility is a critical factor in the determination of the dispute; whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and whether the application would result in litigation in slices. In the circumstances of this case, it is just to resolve the 1974 Plan Claim in a summary hearing.

138. The complexity in this matter is legal, not factual. As a result, credibility (other than potentially that of the experts, who will be cross-examined in court during the summary hearing) is not a live issue. Furthermore, contrary to the assertions of the 1974 Plan, determining these issues in a summary hearing would not be "hypothetical"; if the Court agrees with Walter Canada Group's choice of law, extraterritoriality or public policy analysis, the 1974 Plan's claim will be dismissed. Such a result would not create unnecessary complexity.

139. There is urgency to these proceedings. Walter Canada Group cannot resolve its estate or make distributions to its creditors until the 1974 Plan Claim has been addressed. Unlike the beneficiaries of the 1974 Plan, Walter Canada Group's other stakeholders and former employees will not receive any funds until the distributions are made.

140. The cost and duration of a conventional trial would deplete Walter Canada Group's already-limited estate – to the prejudice of Walter Canada Group's creditors. It is just, suitable and appropriate to determine the three issues before this court in a summary fashion.

141. The concerns about "litigation in slices" and inconsistent decisions do not arise in a CCAA claims process. The same judge is seized with all matters. As a result, even if the Court is not able to resolve the 1974 Plan Claim as Walter Canada submits is appropriate, the Court will be well positioned to narrow the scope of any discoveries that the Court believes are required to resolve the claim.

142. This is a CCAA claims process. The Court has before it sufficient agreed and admitted facts to decide the three questions before it. If the Court decides any one of those questions in favour of Walter Canada Group, the 1974 Plan Claim will be disallowed. This summary hearing is just, speedy, inexpensive, proportional and consistent with the goals of the CCAA.

PART V - ORDER REQUESTED

143. Walter Canada Group respectfully requests an Order from this Court declaring that:

(a) Under the Canadian conflict of laws rules, the 1974 Plan's claim against Walter Canada Group is governed by Canadian substantive law.

(b) In the alternative, if the 1974 Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA), as a matter of US law controlled group liability for withdrawal liability related to a multi-employer pension plan under ERISA does not extend extraterritorially.

(c) In the further alternative, if the 1974 Pension Plan's claim against Walter Canada Group is governed by US substantive law (including ERISA) and ERISA applies extraterritorially, that law is unenforceable by Canadian courts because it conflicts with Canadian public policies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of December, 2016.

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)
and
Osler, Hoskin & Harcourt LLP
(Marc Wasserman, Mary Paterson
and Patrick Riesterer)

SCHEDULE "A"

LIST OF AUTHORITIES

Canadian and UK Case Law

1 *Air Canada (Re)*, [2004] OJ No 842 (SCJ)

2 *Beals v Saldanha*, 2003 SCC 72

3 *BG Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd* (1989), 37 BCLR (2d) 258 (CA)

4 *Burg Properties Ltd v Economical Mutual Insurance Co,* 2013 BCSC 209

5 *Concept Oil Services Ltd v En-Gin Group LLP*, [2013] EWHC 1897 (QBD)

6 *Edgington v Mulek Estate*, 2008 BCCA 505

7 *Finestone v The Queen*, [1953] 2 SCR 107

8 *Hryniak v Mauldin*, 2014 SCC 7

9 *JTI-Macdonald Corp v British Columbia (Attorney General)*, 2000 BCSC 312

10 *Minera Aquiline Argentina SA v IMA Exploration Inc and Inversiones Mineras Argentinas SA*, 2006 BCSC 1102, aff'd 2007 BCCA 319

11 *National Trust Co v Ebro Irrigation and Power Co*, [1954] OR 463 (SC)

12 *Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367

13 *Radke v S(M) (Litigation Guardian of)*, 2005 BCSC 1355

14 *Rogers v Tourism British Columbia*, 2010 BCSC 1562

15 *Salomon v Salomon & Co*, [1897] AC 22 (HL)

16 *Singer Sewing Machine Co of Canada Ltd (Re)*, 2000 ABQB 116

17 *Tassone v Cardinal*, 2014 BCCA 149

18 *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60

19 *Tezcan v Tezcan* (1990), 44 BCLR (2d) 343 (SC), aff'd (1992), 62 BCLR (2d) 344 (CA)

20 *Wende v Victoria (County) Official Administrator* (1998), 48 BCLR (3d) 219 (SC)

Secondary Sources

21 A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012)

22 Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, On; LexisNexis, 2005) (loose-leaf, 6 ed)

23 Stephen G.A. Pitel and Nicholas S. Rafferty, Conflict of Laws, 2nd ed (Toronto: Irwin Law Inc, 2016)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Canadian Statutes, Regulations & By-Laws

1. *British Columbia Business Corporations Act*, SBC 2002, C-57, s 30:

> **Capacity and powers of company**
>
> **30** A company has the capacity and the rights, powers and privileges of an individual of full capacity.

2. *Supreme Court Civil Rules*, BC Reg 168/2009, 1-3.

> **Object**
>
> **1-3 (1)** The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> **Proportionality**
>
> **(2)** Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

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 A PLAN OF COMPROMISE AND ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS

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Client Matter No. 15375-00001 LZW/sd

TAB 12

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 A 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

PETITIONERS

WALTER CANADA GROUP'S REPLY SUMMARY HEARING WRITTEN SUBMISSIONS

1. Walter Canada Group provides this reply to highlight for the Court the two key differences between Walter Canada Group's and the 1974 Plan's positions. The 1974 Plan raises other issues that we submit are not material to this Court's analysis. If it becomes apparent that the Court would like to hear Walter Canada Group's response to such collateral issues, that response will be made during oral submissions. The issues covered in this reply submission are: (1) the 1974 Plan's choice of law analysis is flawed; and (2) this case is suitable for a summary hearing as the 1974 Plan's evidentiary objections are neither well-founded nor material.

PART I - 1974 PLAN'S CHOICE OF LAWS ANALYSIS IS FLAWED

2. The first key difference in the parties' positions relates to the choice of law analysis. The parties agree that this Court should apply BC choice of law principles to characterize the claim. The parties differ on how the 1974 Plan's ERISA claim should be characterized. As a result, the parties identify different connecting factors to select the proper law, which leads to difference choices of the proper law.

3. Relying on BC law (the *JTI-MacDonald* case in particular), Walter Canada Group submits that the essence of the 1974 Plan's claim is to ignore Walter Canada Group's separate corporate personalities, thereby imposing a foreign related company's withdrawal liability on Walter Canada Group. As such, Walter Canada Group views the proper choice of law as the law of corporations. In contrast, the 1974 Plan states that its withdrawal liability claim is contractual in nature, basing its argument on three UK shipping insurance cases. These UK shipping insurance cases do not assist this Court.

4. First, in each of the three cases there was a maritime catastrophe where various parties sought to recover from an insurer based on an insurance policy. Contrary to the 1974 Plan's submissions, in all of these cases a non-party was claiming against the insurer who was a party to the insurance contract. The 1974 Plan is simply wrong when it states at paragraphs 335 and 346 of its submissions that "In all three cases, the defendant was not a party to the contract" (para 346). In all three cases the insurer, who was being asked to make a payment, was a party to the contract. On this basis alone, the UK shipping insurance cases are factually distinguishable because Walter Canada Group, who is being asked to pay, has never been a party to the contract or other documents on which the 1974 Plan relies.

5. This factual distinction between the UK shipping insurance cases and the 1974 Plan's ERISA claim is material and supports distinguishing the cases. In the UK shipping insurance cases, an insurer evaluated the risk of an insurance contract, chose whether or not to accept the terms of the contract, entered into the contract, and received premiums based on that contract. That insurer was then required to deliver the insurance it contractually promised to deliver. The cases refer to and are informed by the broadly recognized principle of freedom of contract. In contrast, freedom of contract has no bearing on the 1974 Plan's ERISA claim: Walter Canada Group was not a party to anything with the 1974 Plan, did not receive any consideration from the 1974 Plan, and did not make any promises to the 1974 Plan. Walter Canada Group's employees also received nothing from the 1974 Plan. The facts of the UK shipping insurance cases and their underlying policy are not analogous to the 1974 Plan's ERISA claim.

6. Second, the legislation in each of the UK shipping insurance cases is worded and structured very differently from ERISA. In each case, a country connected with the dispute passed legislation allowing an entity that was not a party to the insurance contract to sue the insurer directly on the insurance contract. This legislation is referred to as "direct action" legislation. In particular:

(a) In *Youell*, after two ships collided, the owners of the innocent ship sued the insurer of the at-fault ship. The at-fault ship had loaded its cargo in Louisiana. The Louisiana Direct Action Statute allowed certain people to assert "a direct action against the insurer within the terms of the policy."[1]

(b) In *Through Transport*, an Indian merchant used a Finnish shipping company to move goods. The goods were lost. The Indian merchant's Indian insurer pursued a claim against the Finnish shipper's Finnish insurance directly. It relied on Finnish legislation permitting a claim "in accordance with the insurance contract direct from the insurer."[2]

(c) In *The London Steam-Ship*, an oil tanker sank near Spain causing an ecological disaster. The French and Spanish governments sued the insurer of the tanker based on the

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1 1999, UK Queen's Bench, 1974 Plan BOA, Vol 2, Tab 67 at para 52.

2 2004, UKCA, 1974 Plan BOA, Vol 2, Tab 66 at para 10.

> Spanish penal code, which provided "insurers that have underwritten the risk of monetary liabilities...shall have direct civil liability up to the limit of the legally established or contractually agreed compensation."[3]

In each case, the statutory language refers to the insurance contract in the same breath in which it allows a non-party to make a claim pursuant to that insurance contract. This express reference to the contract in the very language permitting the non-party to make a claim supports the UK courts characterizing the non-party's insurance claim as contractual in nature.

7. In contrast, the language in ERISA allegedly imposing liability on Walter Canada Group does not refer to the contract; it simply broadens the definition of employer to state that for the purposes Subchapter III of ERISA (which includes the withdrawal liability provisions) all "trades and businesses" "which are under common control" shall be treated "as a single employer".[4] Like the *Tobacco Damages Act* in BC, ERISA allegedly "imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act".[5]

8. This difference between ERISA and the legislation in the UK shipping insurance cases – one deeming a non-party to be liable based on corporate affiliation, the other entitling a party to make a claim under the insurance contract – has two important consequences. In the shipping insurance context, non-party claimants are bound to all of the terms of the insurance policy, the helpful and the inconvenient alike. For example, in both *The London Steamship* and *Through Transport*, the Court held that the non-party claimant was bound by the arbitration agreement in the insurance contract and therefore could not sue in their chosen court. In contrast, because ERISA does not refer to the contract but simply deems the non-party to be liable, Walter Canada Group does not get the benefit or burden of other provisions in the collective bargaining agreement or other 1974 Plan documents.

9. The second consequence is that in the UK shipping insurance cases, the insurer was able to contest the claims against it on the merits. However, under the deeming approach taken by ERISA, Walter Canada Group is not granted the ability to contest the withdrawal liability claim on its merits. As the expert evidence makes clear, Walter Canada Group is not entitled to notice that a withdrawal liability claim is being advanced against an affiliate. According to the 1974 Plan, it can get a default judgment against an affiliate without notice to Walter Canada Group, and then seek to enforce that judgment against any member of the controlled group, depriving those members of the ability to advance any substantive defences.

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3 2013, UKCA, 1974 Plan BOA, Vol 2 Tab 63 at 17.

4 Abrams BOA Tab 9.

5 *JTI*, 2000 BCSC 312, Walter Written Submissions BOA Tab 9 at para 233.

10. These two differences, flowing from the different legislative language, explain why the claims in the UK shipping insurance cases were properly characterized as "contractual" in nature. They also explain why ERISA withdrawal liability is not a contractual claim against Walter Canada Group. In the UK shipping insurance claims, the insurers: had freedom of contract; were liable based on a contract they signed; the legislation expressly grounded their liability in the contract they signed; and they had the opportunity to contest the claim using all of the contractual defences.

11. None of these statements are true for Walter Canada Group. The Walter Canada Group is not a signatory to any 1974 Plan document. Liability is only extended to Walter Canada Group by ERISA's statutory controlled group provision allegedly deeming Walter Canada Group to be "a single employer" with the actual contracting party. A withdrawal liability claim against Walter Canada Group is only "contractual" if we accept that ERISA applies to Walter Canada Group. This is begging the choice of law question.[6]

12. Deeming Walter Canada Group to be a single employer with Walter Resources legislatively "[denies] the right to any separate corporate existence", like the legislation considered by the BC Court in *JTI*.[7] Although the 1974 Plan concedes that one possible characterization of a claim in the choice of law analysis is the "law of corporations", it does not give the "law of corporations" the liberal interpretation it urges this Court to give its contract theory. Rather, the 1974 Plan narrowly restricts the "law of corporations" category to the corporation's existence, capacity and governance.[8] This restriction is not supported by the authorities, which make it clear that the law of corporations also includes whether a corporation possesses the attributes of legal personality, including limited liability.[9]

13. The 1974 Plan's own authorities support the conclusion that the law of corporations includes questions of separate legal personality and the limited liability that flows from that personality. For example, in the paragraphs of Castel & Walker immediately following those cited by the 1974 Plan, the authors observe: "While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, ***this does not mean that proceedings may be taken in that jurisdiction to affect its***

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6 Canadian courts have observed that it is a "basic rule that a corporation can enter into a contract that benefits its affiliate, but not one that binds its affiliate without the affiliate's consent." *SemCanada Crude Company (Re)*, 2009 ABQB 715 at para 17. Since no member of the Walter Canada Group is party to any contract with the 1974 Plan, the terms of the contract, the governing law of the contract, the language and subject matter of that contract and the transactions that were completed in relation to that contract have no bearing on the liability of Walter Canada Group. For this reason, the "non-exhaustive list of factors" the 1974 Plan suggests should be considered at para 350 does not help assess Walter *Canada* Group's connection to the claim. As an aside, this list of factors seem to be drawn from cases on unjust enrichment. See Castel & Walker, 1974 Plan BOA, Vol 3 Tab 111, ch. 32 at 32-1.

7 *JTI*, Walter Written Submissions BOA Tab 9 at para 218.

8 1974 Plan Submissions at para 365.

9 See 1974 Plan Submissions at para 368, quoting Castel & Walker.

status as a corporation." The authors continue: "There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. ***Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced***."[10]

14. Under BC law (as opposed to UK shipping insurance cases), when the only basis for imposing liability on a party is to deny its separate existence, it is appropriate to characterize the 1974 Plan's ERISA claim as one concerning the status and legal personality of corporations. The 1974 Plan attempts to distinguish the *JTI* decision on the basis that the claims were being characterized as part of a federal divisions of powers analysis rather than an international choice of laws analysis. Both consider the essential nature of the claim, its pith and substance. As the only BC case considering how to characterize a claim under a statute that imposes liability on a non-acting affiliate, *JTI* provides better guidance than the UK shipping insurance cases when this Court considers how to characterize the 1974 Plan's ERISA claim.

PART II - SUITABILITY & THE EVIDENCE

15. The second key difference between Walter Canada Group and the 1974 Plan relates to the parties' approaches to evidence and, as a result, the suitability of this hearing. In this proceeding, Walter Canada Group sought to abide by the goals of the CCAA and the BC Rules, aiming to achieve a "just, speedy and inexpensive determination" of disputes.[11] For this reason, as one of its first steps, Walter Canada Group prepared the Statement of Uncontested Facts (the "SUF") to identify facts that one or more of the parties might wish to rely on in making their various legal arguments. This SUF included facts that Walter Canada Group viewed as irrelevant but that other parties pleaded.

16. The 1974 Plan did not accept any part of the SUF. Instead, it raised a plethora of evidentiary objections to buttress its argument that this hearing is not suitable. The 1974 Plan's evidentiary objections (a) do not raise material issues, (b) ignore the fact that this hearing is convened within a CCAA proceeding, (c) have no merit, and (d) should be viewed with skepticism given the 1974 Plan's role in creating the very deficiencies about which they now complain.

17. The 1974 Plan's evidentiary objections do not raise material issues for two reasons. First, as is set out elsewhere, many of the purportedly contested facts are not relevant to the choice of law, foreign law or public policy questions before this Court. Evidentiary objections related to those facts are irrelevant.

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[10] 1974 Plan BOA, Vol 3, Tab 111, ch. 3 at 3-1 (emphasis added).

[11] *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

18. Second, regardless of relevance, evidentiary objections should not be an academic exercise; they must raise a material concern. The standard of proof in any civil trial is balance of probabilities. For an evidentiary objection to matter, there must be a plausible potential for that fact to be disputed in a way that impacts the outcome of the trial. In the case of almost all of the 1974 Plan's evidentiary objections, the 1974 Plan does not allege that the fact sought to be proven is not true.

19. Three examples of facts that the 1974 Plan says cannot be accepted by this Court are that "Walter Energy Inc. is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama" (SUF, para 1); "Walter Energy did business in West Virginia and Alabama" (SUF, para 2); and "Walter Energy's board of directors and its management team operated out of Birmingham, Alabama" (SUF, para 3). The 1974 Plan does not suggest, in any serious way, that anyone could adduce evidence to disprove these facts that the 1974 Plan pleaded, that Walter Canada Group proposes to admit for the purposes of this hearing, and that have been accepted by Walter US and the US Court in the Chapter 11 proceeding. Such evidentiary objections are purely academic.

20. The 1974 Plan's evidentiary objections also ignore the fact that this hearing is convened within a CCAA proceeding. This is not a traditional trial where the first time the Court hears evidence is during the trial itself. The CCAA judge is seized of all aspects of the CCAA proceeding. It is inefficient, contrary to common sense, and contrary to the Supreme Court of Canada's description of a CCAA proceeding as a "single proceeding model"[12] to suggest that the CCAA Court and the parties to this hearing must ignore all evidence previously filed or facts found in this case, particularly when the 1974 Plan has participated in this CCAA proceeding almost from its inception.

21. The 1974 Plan's evidentiary objections have no merit. For example, the 1974 Plan refused to accept admissions of facts made by Walter Canada Group in SUF for the purposes of this hearing. All of these facts are facts that 1974 Plan pleaded that Walter Canada Group proposes to admit for the purposes of this hearing. The 1974 Plan refuses to accept Walter Canada Group's admissions for two reasons, both of which are flawed:

(a) First, the 1974 Plan suggests that the court can only proceed if both USW and the Walter Canada Group give the admissions.

(i) As a matter of fact, Walter Canada Group does admit, for the purposes of this hearing, all of the statements in the SUF. In its submissions, the USW states: "The Steelworkers agree with the facts set out in the Statement of Uncontested Facts" (para 15). The 1974 Plan's objection is unfounded in fact.

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[12] *Ted Leroy Trucking [Century Services] Ltd (Re)*, 2010 SCC 60, Walter Written Submissions BOA Tab 18 at para 22.

(ii) It is also unfounded in law. The 1974 Plan bases its submission that both parties' admissions are required on cases about co-defendants.[13] Walter Canada Group and USW are not co-defendants; USW is a respondent to both to the 1974 Plan Claim and to the Walter Canada Group's summary hearing application. We have not identified any material factual disputes between the Walter Canada Group and USW; this is not a situation where the 1974 Plan is faced with competing factual narratives. This Court can proceed based on admissions in the SUF.

(b) Second, the 1974 Plan argues that it is inappropriate for this court to proceed based on conditional admissions. However, BC Courts have affirmed that courts can make final determinations based on assumed facts.[14] For instance, parties made admissions only for the purpose of the summary proceeding in the cases of *Rizzuto v Fernie (City)*, *Jacobsen v Nike Canada Ltd*, and *Williamson v Ewachniuk*.[15] In all of these cases the court made a final determination of an issue based in part on facts that one party had assumed for the purposes of that hearing only. The 1974 Plan's authorities to the contrary are distinguishable. There are no issues of credibility (other than the expert evidence, where cross-examination will occur). Finally, as part of its choice of law argument, the 1974 Plan relies upon a UK Court of Appeal case in which the parties accepted, for the purposes of the appeal only, the facts as found by the court below, leaving open the possibility of appealing from those findings of fact once the proper legal test was clarified.[16]

22. The 1974 Plan's next evidentiary objection also has no merit. It objects to Walter Canada Group relying on findings previously made by this Court, arguing that ""facts stated in this Court's previous decisions are entitled to no weight."[17] First, Walter Canada Group notes that 1974 Plan objects to facts previously found by this Court that the 1974 Plan then relies on in its submissions, such as:

(a) SUF para 13: "Only one of the Walter US entities, Walter Resources, is a party to a collective bargaining agreement with the 1974 Plan". And see the 1974 Plan Submissions, para 25: "One of the employers that promised to contribute to the 1974 Plan is [Walter Resources]".

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13 1974 Plan submissions at para 172.

14 *Steyns v Manitoba Public Insurance Corp*, 1995 CarswellBC 282 (BCCA), Walter Reply BOA Tab 12 at para 46.

15 2012 BCPC 74, Walter Reply BOA Tab 10 at para 10; 1992 CarswellBC 2454 (BCSC), Walter Reply BOA Tab 5 at paras 8 and 28; and 1993 CarswellBC 3843 (BCSC), Walter Reply BOA Tab 14 at para 6.

16 *MacMillan Inc v Bishopsgate Investment Trust (No 3)*, [1995] EWCA Civ 55, [1996] 1 WLR 387, 1974 Plan BOA Tab 64.

17 1974 Plan Submissions at para 153.

(b) SUF para 15: "No member of the Walter Canada Group is or ever has been party to the CBA". And see 1974 Plan Submissions, para 336: "What ERISA grants to the 1974 Plan 'is essentially a right to enforce' against Walter Canada Group the contractual obligations to the 1974 Plan of Walter Resources".

23. The 1974 Plan also objects to findings of fact that no one reasonably expects could be displaced, such as SUF para 71: "The Canadian operations principally included the Brule and Willow Creek coal mines, located near Chetwynd, BC, and the Wolverine coal mine, near Tumbler Ridge, BC". These facts are not controversial. In the context of a CCAA proceeding, there is no possible benefit to this Court or the creditors to countenance evidentiary objections in respect of such facts.

24. Finally, jurisprudence firmly establishes that this Court is entitled to take judicial notice of its own decisions. As the Supreme Court of Canada has written in *Malik*, "The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties."[18]

25. In *Malik*, the Supreme Court of Canada endorsed the decision of a chambers judge to accept a prior related decision into evidence and treat factual findings in that case as prima facie proof of their content. In doing so, the Supreme Court overturned the Court of Appeal's decision that such findings were not admissible to prove the truth of their contents.[19] In the words of the Supreme Court, the trial judge was "*not* required to proceed as if [the prior decisions] are of merely historical interest and of no probative value."[20] The Supreme Court also confirms that prior decisions may be used by a court making final determinations.[21] It is up to this Court to determine what weight should be placed on its own prior findings.[22]

26. The reasoning in *Malik* is particular apt in CCAA proceedings. In essence, the 1974 Plan argues that the debtor company is not entitled to rely on findings about that company made by a judge in the same CCAA proceeding. If this position is accepted, it would require a debtor company to file evidence to re-prove basic facts about itself in every successive hearing. This result runs contrary to the goals of fairness and efficiency that underlie the BC Civil Rules, as well as the CCAA.

27. The 1974 Plan's third main evidentiary objection, that statements in the SUF are based on inadmissible hearsay, also has no merit. In particular, the Harvey Affidavit is not hearsay. It is sworn evidence based on Mr. Harvey's personal knowledge, except for such statements as are expressly

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18 *British Columbia (Attorney General) v Malik* (2011 SCC 18) [*Malik*], 1974 Plan BOA Tab 10 at para 37.

19 *Malik* at paras 6-7 and 39

20 *Malik* at para 29; emphasis in original.

21 *Malik* at paras 46-47.

22 *Malik* at paras 42 and 47.

identified as being based on information and belief. Only two statements in the Harvey Affidavit are based on information and belief.[23] For both of these, the source is identified. Only one of these statements appears in the SUF ("In certain circumstances, directors and officers of the Walter Canada Group can be held liable for certain obligations owing to employees and government entities"[24]). The rest of the information in the Harvey Affidavit is personal knowledge obtained by virtue of Mr. Harvey's position as Executive Vice President of the Walter Canada Group.

28. A corporation can only speak through its authorized representatives. A deponent who is an executive of a corporation is entitled to rely on information provided by the employees, business documents, and systems of the corporation as falling within his personal knowledge.[25] This is so in respect of events that took place before the executive joined the corporation.[26] Courts have recognized that to hold otherwise would be wholly impractical.[27]

29. Nonetheless, the 1974 Plan suggests that Mr. Harvey's personal knowledge is not sufficiently personal for the purposes of this summary hearing. The 1974 Plan's formalistic understanding of personal knowledge has been repeatedly rejected by courts. For instance, in *Alberta Treasury Branches v Leahy*, the defendant unsuccessfully argued that the affidavit of a senior employee at Alberta Treasury Branches (ATB) was hearsay because she did not specify the source of each fact and described events that occurred before she joined ATB. Relying on a long line of similar cases, the court disagreed, holding that the deponent's position and access to ATB's records were sufficient to indicate the source of her information, and the material the deponent reviewed in ATB's records constituted personal knowledge.[28]

30. Similarly, as the Federal Court wrote in 1972, when rejecting the argument put forward by the 1974 Plan:

> some latitude must be allowed in interpreting what constitutes "personal knowledge" of the affiant, and consideration must be given to the position held by the affiant and the nature of the facts to be proved... To give too restrictive an interpretation to what constitutes the affiant's own

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23 Harvey Affidavit at paras 155 and 160.

24 Statement of Uncontested Facts at para 70; Harvey Affidavit at para 155.

25 *Metal World Inc v Pennecon Energy Ltd et al*, 2015 NLCA 12, Walter Reply BOA Tab 7 at paras 21-24. See also *Vapor Canada Ltd v MacDonald*, 1972 CarswellNat 526 (FCTD) [*Vapor Canada*] (aff'd 1972 CarswellNat 66 (FCA), rev'd on other grounds [1977] 2 SCR 134), Walter Reply BOA Tab 13 at para 10; *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155, Walter Reply Book of Authorities Tab 1 at para 10.

26 *Alberta Treasury Branches v Leahy*, 1999 ABQB 185 [*Alberta Treasury*], Walter Reply BOA Tab 2; *Re Indian Residential Schools*, 2002 ABQB 667 [*Residential Schools*] Walter Reply BOA Tab 4.

27 *Alberta Treasury*, Walter Reply BOA Tab 2 at para 58.

28 *Alberta Treasury*, Walter Reply BOA Tab 2 at paras 50-53. See also *Residential Schools*, Walter Reply BOA Tab 4 at paras 27 and 35, where the court accepted affidavits based on personal knowledge from senior persons within the Catholic Church about matters in which they had no firsthand involvement, and for which they relied on the Church's historical documents.

> knowledge and require him to go into great detail in his affidavit as to how he acquired this knowledge in connection with each and every statement he makes would defeat the whole purpose of Rule 332(1).[29]

31. The literalistic view of "personal knowledge" urged by the 1974 Plan risks hamstringing corporate parties' ability to access to summary proceedings. The rule that affidavit evidence on final motions must be within the deponent's personal knowledge, "if read literally, could prevent an application for summary judgment in some types of case. For example, in large organizations there is often no one person who has sufficient knowledge of all the facts to swear an affidavit in support of summary judgment based on personal knowledge. In some cases a multitude of affidavits from different representatives of the organization would be required. In some cases even this would not suffice, because it is necessary to extract the required information from the business records of the organization."[30] Denying corporate parties access to summary proceedings would run counter to the "just, speedy and inexpensive determination of every proceeding on its merits" that is the object of the Rules.[31]

32. In this same vein, the 1974 Plan objects to the admissibility of Form 8-K's filed by the Walter Canada Group with the US Securities and Exchange Commission, and attached as exhibits to the Sherwood Affidavit. This evidence is not inadmissible hearsay; Walter Canada Group is not proposing to rely on the exhibits for the truth of their contents – only for the fact that the statements were made. Furthermore, if the 1974 Plan's position with respect to the Sherwood Affidavit is correct, then much of its own evidence is inadmissible. The 1974 Plan puts before the Court in this hearing two affidavits of a legal assistant working at its Canadian law firm attaching copies of emails that she neither sent nor received (the 6th Dominguez Affidavit) and a copy of the Joint Proposal filed by KPMG in its capacity as trustee in bankruptcy of the Walter Canada Group (the 7th Dominguez Affidavit). Neither of the Dominguez affidavits identifies the source of her information and belief as to the identity of the documents.

33. In respect of this objection, Walter Canada Group notes that both the Harvey Affidavit and the Sherwood Affidavit have increased indicia of reliability. The Harvey Affidavit was sworn in support of an *ex parte* order in a CCAA proceeding, which attracts the heightened obligation to make full and frank disclosure of all material facts. The facts in the Harvey Affidavit have been subject to public scrutiny as well as ongoing oversight by a court-appointed Monitor. The exhibits filed with the Sherwood Affidavit are filings made by Walter US with the US SEC, and remain publicly available on the SEC's online EDGAR

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29 *Vapor Canada,* Walter Reply BOA Tab 13 at para 10. This passage has been approvingly cited by subsequent courts and tribunals.

30 *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 (rev'd on other grounds 2006 ABCA 392), Walter Reply BOA Tab 8 at para 60.

31 *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 1-3.

system. In this context, the 1974 Plan cannot simply object to the facts; it must also suggest that there is a realistic possibility that the facts could be disproven on a balance of probabilities. It has not done so.[32]

34. Walter Canada Group's last point on 1974 Plan's evidentiary objections is this: the 1974 Plan's objections should be viewed with skepticism given the 1974 Plan's role in creating the very deficiencies about which they now complain. In particular:

(a) The 1974 Plan refused to admit the authenticity of affidavits and documents it previously filed with the CCAA Court. See Walter Canada Group's notice to admit the authenticity of the documents in Walter Canada Group's Book of Evidence and the 1974 Plan's response.

(b) The 1974 Plan refused to accept Walter Canada Group's admissions of the facts that 1974 Plan pleaded. See above.

(c) The 1974 Plan refused to admit uncontentious facts found by the Court in this CCAA proceeding even though the 1974 Plan participated in this proceeding from the near-beginning and has never previously objected to the veracity of the facts found by the Court. See above.

(d) The 1974 Plan raises objections to evidence that would equally apply to its own evidence.

(e) The 1974 Plan raises objections to facts that it does not intend to disprove. As one final example, the 1974 Plan objects to the statement that Walter US's acquisition was publicly disclosed. Nowhere does the 1974 Plan state that it had no knowledge of that acquisition.

35. Because the 1974 Plan's evidentiary objections are not material or supportable, they ought to be disregarded by this Court. As a result, there is no basis on which to conclude that this summary hearing is not a suitable way to determine the questions before the Court, particularly if the Court agrees with the Walter Canada Group's choice of law analysis. If the Court agrees with Walter Canada Group's analysis, the expense and time of the broad-ranging discovery requested by the 1974 Plan can be entirely avoided as unnecessary to this Court's determination. This summary hearing furthers the objects of the Civil Rules and respects the CCAA context in which this hearing arises. It is suitable.

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[32] Significantly, if the 1974 Plan relies upon admissions contained in the Harvey Affidavit at trial, then the entire Harvey Affidavit is admissible. The whole of a statement that is alleged to be an admission must be put into evidence, including parts thereof that are favourable to the maker of the statement. As the BCCA has endorsed, "The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission." – *R v Tyhurst*, 1996 CarswellBC 240 (BCCA), Walter Reply BOA Tab 9 at para 45, citing *Capital Trust Co v Fowler* (1921 CarswellOnt 274 (ONCA)). See also Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada Inc., 2014), Walter Reply BOA Tab 16 at §6.412.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2017.

DLA Piper (Canada) LLP
(Mary I.A. Buttery and H. Lance Williams)
and
Osler, Hoskin & Harcourt LLP
(Marc Wasserman, Mary Paterson
and Patrick Riesterer)

SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

1 *603262 B.C. Ltd. v Eiyom Properties Ltd.*, 2014 BCSC 1155

2 *Alberta Treasury Branches v Leahy*, 1999 ABQB 185

3 *British Columbia (Attorney General) v Malik*, 2011 SCC 18

4 *Indian Residential Schools, Re,* 2002 ABQB 667

5 *Jacobsen v Nike Canada Ltd.,* 1992 CarswellBC 2454 (BCSC)

6 *JTI-MacDonald Corp. v British Columbia (Attorney General),* 2000 BCSC 312

7 *Metal World Inc. v Pennecon Energy Ltd.*, 2015 NLCA 12

8 *Papaschase Indian Band No. 136 v Canada (Attorney General),* 2004 ABQB 655

9 *R v Tyhurst,* 1996 CarswellBC 240 (BCCA)

10 *Rizzuto v Fernie (City),* 2012 BCPC 74

11 *SemCanada Crude Co., Re,* 2009 ABQB 715

12 *Steyns v Manitoba Public Insurance Corp,* 1995 Carswell BC 282 (BCCA)

13 *Vapor Canada Ltd v MacDonald,* 1972 CarswellNat 526 (FCTD)

14 *Williamson v Ewachniuk,* 1993 CarswellBC 3843 (BCSC)

Secondary Sources

15 Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, 6th ed (Toronto, On; LexisNexis, 2005)

16 Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 4th ed (Markham: LexisNexis Canada Inc., 2014) at §6.412

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 A 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

PETITIONERS

WALTER CANADA GROUP'S REPLY
SUMMARY HEARING WRITTEN SUBMISSIONS

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TAB 13

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 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

PETITIONERS

REPLY SUBMISSIONS OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST (THE "1974 PLAN") ON RULE 9-7(11) APPLICATION

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Craig P. Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the 1974 Plan

1. In relation to suitability, the Walter Canada Group misstates the test for admissibility. It is not the 1974 Plan's burden to show that evidence proffered by the Walter Canada Group that does not meet the legal pre-conditions to admissibility "could be disproven on a balance of probabilities".[i] When a party seeks to adduce evidence and another party objects to its admissibility, the question is not "are the facts alleged by this evidence true?" The question is "is this evidence admissible?"

2. The Walter Canada Group's statements on the purpose of the Statement of Uncontested Facts are inconsistent with the document itself.[ii] The document purported to be a list of "facts the Court can accept as true based on admissions in the pleadings or that are otherwise uncontested and supported by documents that this Court can consider without additional formal proof". Creating a curated list of facts the Walter Canada Group is willing to admit for this application does not make those facts admissible and it does not make them "uncontested".

3. The cases cited by the Walter Canada Group at paragraphs 27-31 of its reply do not support the proposition that everything in the Harvey Affidavit was within Mr. Harvey's personal knowledge by virtue of his position as CFO.[iii] Where a corporate representative lacks personal knowledge, he or she may rely on direct evidence exhibited to the affidavit or otherwise before the Court. Such direct evidence must be admissible pursuant to common law rules of evidence.[iv]

4. The cases cited by the Walter Canada Group at paragraph 33 of its reply make clear that the statement containing the admission is only admissible to the extent it "is necessary to the understanding and appreciation of the meaning and extent of the admission".[v]

5. It is incorrect that the 1974 Plan refused to accept the Walter Canada Group's admissions of the facts that the 1974 Plan pleaded.[vi] As set out in Schedule "B" to its written submissions, the 1974 Plan accepts that the facts that it has pleaded and that have been admitted by all parties can and should be accepted as true for all purposes. The issue is that there are different material factual disputes between the 1974 Plan and the Walter Canada Group and between the 1974 Plan and the Steelworkers.[vii]

6. The 6th affidavit of Miriam Dominguez is adduced and is admissible solely for the 1974 Plan's 9-7(11) application.[viii] It does not stand on the same footing as the Sherwood Affidavit.

All of which is respectfully submitted this 6th day of January, 2017.

DENTONS CANADA LLP

Per: _____

Craig Dennis, Q.C.
John R. Sandrelli
Owen James
Tevia Jeffries
Counsel for the United Mine Workers of America 1974 Pension Plan and Trust

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[i] Walter Canada Group Reply Submissions ("**RS**"), para. 33.
[ii] RS, para. 15.
[iii] See *Metal World Inc. v. Pennecon Energy Ltd.,* 2015 NLCA 12, Walter Reply BOA, Tab 7 at paras. 21-24; *Vapor Canada Ltd. V. MacDonald*, 1972 CarswellNat 526, Walter Reply BOA, Tab 3 at paras. 10-11 (F.C.T.D.), aff'd on other grounds 1972 CarswellNat 66 (F.C.A.), rev'd on other grounds [1977] 2 S.C.R. 134; *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155, Walter Reply BOA, Tab 13 at para. 10; *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185, Walter Reply BOA, Tab 2 at para. 57-58 and 72-76; *Indian Residential Schools, Re,* 2002 ABQB 667, Walter Reply BOA, Tab 4 at paras. 25-36; *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655, Walter Reply BOA, Tab 8 at paras. 60-63 and 72 rev'd on other grounds 2006 ABCA 392, rev'd 2008 SCC 14.
[iv] *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120, 1974 Plan BOA, Tab 1 at paras. 87-88, aff'd 2015 ABCA 406.
[v] *R. v. Tyhurst*, 1996 CarswellBC 240 at para. 45 (C.A.), Walter Reply BOA Tab 9.
[vi] RS, paras. 21, 34.
[vii] See *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, 974-5 (plaintiff should not be driven from the judgement seat at this very early stage unless it is quite plain that alleged cause of action has no chance of success).
[viii] *Calder v. King* (1994), 91 B.C.L.R. (2d) 336 at para. 6 (S.C.), 1974 Plan BOA, Tab 2.

LIST OF AUTHORITIES

1 *603262 B.C. Ltd. v. Eiyom Properties Ltd.*, 2014 BCSC 1155

2 *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185

3 *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120

4 *Calder v. King (1994)*, 91 B.C.L.R. (2d) 336 (S.C.).

5 *Indian Residential Schools (Re)*, 2002 ABQB 667

6 *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959

7 *Metal World Inc. v. Pennecon Energy Ltd.*, 2015 NLCA 12

8 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655, rev'd on other grounds 2006 ABCA 392, rev'd 2008 SCC 14

9 *R. v. Tyhurst*, 1996 CarswellBC 240

10 *Vapor Canada Ltd. V. MacDonald*, 1972 CarswellNat 526 (F.C.T.D.), aff'd on other grounds 1972 CarswellNat 66 (F.C.A.), rev'd on other grounds [1977] 2 S.C.R. 134

TAB 14

File 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 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

PETITIONERS

TENTH REPORT OF THE MONITOR, KPMG INC.

May 24, 2017

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INTRODUCTION AND SUMMARY OF PROCEEDINGS

1. KPMG Inc. ("**KPMG**" or the "**Monitor**") was appointed as Monitor pursuant to the order (the "**Initial Order**") issued by this Honourable Court on December 7, 2015 (the "**Filing Date**") in respect of the motion (the "**Application**") filed by Walter Energy Canada Holdings, Inc. ("**WECH**"), Walter Canadian Coal ULC, Wolverine Coal ULC, Brule Coal ULC, Cambrian Energybuild Holdings ULC, Willow Creek Coal ULC, Pine Valley Coal Ltd. and 0541237 B.C. Ltd. (collectively, the "**Original Petitioners**") under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36, as amended (the "**CCAA**") granting, *inter alia*, a stay of proceedings (the "**Stay**") until January 6, 2016. The proceedings brought by the Original Petitioners under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. Pursuant to the Initial Order, the Stay and certain other relief was extended to certain of the Original Petitioners' partnerships (collectively with the Original Petitioners, "**Old Walter Canada**"):

   i) Walter Canadian Coal Partnership ("**WCCP**");

   ii) Wolverine Coal Partnership;

   iii) Brule Coal Partnership; and

   iv) Willow Creek Coal Partnership.

3. On December 7, 2016, this Honourable Court heard Old Walter Canada's application for approval of a transaction in respect of the sale of and investment in Old Walter Canada (the "**Remaining Assets Transaction**") and this Honourable Court granted an order (the "**New Walter Group Procedure Order**") approving, among other things, the Remaining Assets Transaction and authorizing Old Walter Canada to initiate proceedings under the *Bankruptcy and Insolvency Act* (the "**BIA**") to complete the Remaining Assets Transaction.

4. The Walter Group Procedure Order also authorized the formation of the following entities, which were formed on December 8, 2016 (collectively, the "**New Walter Group**") and became petitioners in the CCAA Proceedings as at that date pursuant to the New Walter Group Procedure Order:

i) New Walter Energy Canada Holdings, Inc. ("**New WECH**");

ii) New Walter Canadian Coal Corp. ("**New WCCC**");

iii) New Brule Coal Corp.;

iv) New Willow Creek Coal Corp.; and

v) New Wolverine Coal Corp.

5. In accordance with the terms of the Remaining Assets Transaction and BIA proceedings, the CCAA Proceedings in respect of all of the Old Walter Canada entities, except for Cambrian Energybuild Holdings ULC ("**Cambrian**"), were terminated effective on December 28, 2016, pursuant to an order pronounced by this Honourable Court on December 21, 2016 (the "**CCAA Continuity & Vesting Order**") that also, among other things, provided that the CCAA Proceedings shall continue with respect to every member of the New Walter Group and Cambrian and transferred WCCP's 50% interest (the "**Belcourt Interest**") in Belcourt Saxon Coal Ltd. ("**BSCL**") and Belcourt Saxon Coal Limited Partnership ("**BSCLP**") to New WCCC.

6. Accordingly, after December 28, 2016, the CCAA Proceedings are in respect only of each of the five members of the New Walter Group and Cambrian (together, "**Walter Canada**") and the Stay and other relief granted pursuant to the Initial Order applies to Walter Canada. The limited stay of proceedings provided for in paragraph 20 of the Initial Order with respect to BSCL and BSCLP remains in place.

Summary of Proceedings

7. On December 7, 2015, KPMG filed the Pre-Filing Report of the Proposed Monitor (the "**Pre-Filing Report**"), which, amongst other things, described certain of Walter Canada's background information, its cash flow forecast and the current status of its operations.

8. This is the tenth report of the Monitor (the "**Tenth Report**") since the Initial Order was granted. The nine previous reports are referred to herein, collectively, as the "**Previous Reports**". Terms not specifically defined herein shall have the meanings as defined in the Previous Reports or the Claims Process Order, which was granted by this Honourable Court on August 16, 2016.

9. The Monitor maintains a website at www.kpmg.com/ca/walterenergycanada (the "**Monitor's Website**") on which copies of the Previous Reports as well as additional information regarding these CCAA Proceedings can be found.

10. Readers are directed to the Eighth Report of the Monitor dated January 12, 2017 (the "**Eighth Report**") for a comprehensive summary of the CCAA Proceedings up to the date of that report. An update on the status of the CCAA Proceedings since the date of the Eighth Report is provided below.

11. On January 16, 2017, this Honourable Court granted an order extending the Stay up to and including May 31, 2017.

12. On March 10, 2017, KPMG filed the Ninth Report of the Monitor (the "**Ninth Report**") which was a special purpose report with respect to the planned distribution of certain funds (the "**Fund Distribution**") which were held in trust by Victory Square Law Office LLP, counsel for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424 ("**USW**"), in the amount of $780,660.61 as at January 18, 2017 (the "**Fund**").

13. On March 13, 2017, this Honourable Court granted an order that authorized and directed the Monitor to receive the Fund from counsel for the USW and to distribute it, and any additional interest accruing thereon after January 18, 2017, to those members of the USW who were entitled to receive a *pro rata* share of the Fund (the "**Fund Distribution Order**").

PURPOSE OF THE MONITOR'S REPORT

14. The purpose of this Tenth Report is to provide this Honourable Court with information regarding the following:

    a) An update regarding the Claims Process and the status of certain unresolved Claims;

    b) An update in respect of the Fund Distribution;

    c) A discussion of matters pertaining to Walter Canada's remaining assets, including efforts to realize on them and Walter Canada's request for authorization from this Honourable Court to advance additional funds to Walter UK;

d) Walter Canada's actual cash flow results for the 19-week period ended May 13, 2017 as compared to the 22-week forecast for the period ending June 3, 2017 (the "**Previous CCAA Cash Flow Forecast**");

e) Walter Canada's updated cash flow forecast for the 20-week period ending September 30, 2017 (the "**Updated CCAA Cash Flow Forecast**");

f) An update in respect of certain additional matters; and

g) The Monitor's observations and recommendations in respect of Walter Canada's motion returnable May 30, 2017 seeking an extension of the Stay to September 29, 2017 (the "**Extended Stay Period**") and certain other relief.

REPORT RESTRICTIONS AND SCOPE LIMITATIONS

15. In preparing this report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records and financial information prepared by Walter Canada and/or certain of its affiliates, discussions with management of Walter Canada ("**Management**") and information from other public third-party sources (collectively, the "**Information**"). Except as described in this report in respect of the Previous CCAA Cash Flow Forecast and the Updated CCAA Cash Flow Forecast:

    a) The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance in respect of the Information; and

    b) Some of the information referred to in this report consists of forecasts and projections. An examination or review of the financial forecasts and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

16. Future oriented financial information referred to in this report was prepared based on Management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be material.

17. The information contained in this report is not intended to be relied upon by any prospective purchaser or investor in any transaction with Walter Canada.

18. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

CLAIMS PROCESS UPDATE

1974 Pension Plan Claim

19. Arguments in respect of the US$904 million disputed Claim of the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Pension Plan**") were heard by this Honourable Court over nine days during January 2017.

20. On May 1, 2017, this Honourable Court delivered its judgment in respect of the 1974 Pension Plan Claim in the form of the written Reasons for Judgment of the Honourable Madam Justice Fitzpatrick (the "**Reasons**", a copy of which is attached hereto as Schedule "A").

21. Pursuant to the Reasons, this Honourable Court considered three issues in respect of which Walter Canada (and the USW) was seeking declaratory relief:

    a) That the 1974 Pension Plan Claim as against Walter Canada is governed by Canadian substantive law and not U.S. substantive law including the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. 1001, as amended ("**ERISA**"), the U.S. legislation upon which the 1974 Pension Plan Claim is based;

    b) That, if the 1974 Pension Plan Claim is governed by U.S substantive law, then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under ERISA does not extend extraterritorially; and

    c) That, if the 1974 Pension Plan Claim is governed by U.S substantive law and ERISA applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

22. Walter Canada only needed to succeed on any one of the above three arguments for the 1974 Pension Plan's Claim to be found invalid as against the estate.

23. In the Reasons, the Honourable Madam Justice Fitzpatrick granted a declaration that, under Canadian conflict of law rules, the 1974 Pension Plan's Claim as against Walter Canada is governed by Canadian substantive law and not U.S. law (including ERISA) and therefore

dismissed the 1974 Pension Plan's Claim as against the estate for that reason (the "**Judgment**"). In the circumstances, Madam Justice Fitzpatrick determined that she did not have to make a decision on the other two issues so that these CCAA Proceedings would not be further delayed.

24. The 1974 Pension Plan had 21 days from the date of the release of the Reasons in which to seek leave to appeal the Judgment.

25. On May 4, 2017, counsel for the 1974 Pension Plan notified Walter Canada's counsel, the Monitor and its counsel, and the USW's counsel that it had been instructed to seek leave to appeal the Judgment and further expressed that it believed it reasonable to request that the recipient parties consent to leave being granted.

26. On May 19, 2017, counsel for the 1974 Pension Plan filed a Notice of Application for Leave to Appeal with the Court of Appeal for British Columbia, in which the grounds of appeal are that the Honourable Madam Justice Fitzpatrick erred in law: (i) in holding that the 1974 Pension Plan's Claim is governed by Canadian substantive law and not U.S. substantive law; and (ii) in making an order as to costs in the CCAA Proceedings. Counsel for the 1974 Pension Plan served its Notice of Application for Leave to Appeal on May 23, 2017.

27. As at the date of this report, neither Walter Canada nor the USW has consented to the requested leave to appeal being granted, and the 1974 Pension Plan's application is scheduled to be heard on June 9, 2017.

28. The Monitor, without taking a position on the merits of the 1974 Pension Plan's application for leave to appeal the Judgment, wishes to highlight for this Honourable Court that such an appeal, if commenced, may significantly delay any potential distribution to Walter Canada's 314 Claimants, the majority of which are former employees, due to the uncertainty as to the timing for the hearing of an appeal if leave to appeal is granted.

Recently Resolved Claims

29. Two Claims which had been unresolved as at the date of the Eighth Report have now been resolved, of which one is now considered an Allowed Claim and has increased the total amount of Allowed Claims to $13.4 million.

30. The first recently resolved Claim is that of Mr. Joseph Strong in the amount of approximately $51,000 relating to outstanding contractual severance, group termination and 60 days' pay in lieu of notice related to s. 54(1) of the *Labour Relations Code*. In response to the Notice of Revision or Disallowance ("**NORD**") which the Monitor sent to Mr. Strong on December 21, 2016, Mr. Strong submitted a sworn affidavit to the Monitor on February 1, 2017 and the USW's counsel also provided additional evidence concerning the date of Mr. Strong's layoff. Based on its review of this new evidence, the Monitor, in consultation with Walter Canada, accepted Mr. Strong's Claim as an Allowed Claim on February 22, 2017.

31. The second Claim which has been resolved since the date of the Eight Report is that of the West Moberly First Nation ("**West Moberly**"). The Monitor disallowed the Claim of West Moberly in a NORD on the basis that: (i) the Claim was premature as Walter Canada had not disclaimed the agreements with West Moberly, and in any event, it is the responsibility of Conuma Coal Resources Limited ("**Conuma**"), the purchaser of substantially all of the assets of Old Walter Canada, to assume the contracts with West Moberly; and (ii) there were no amounts owing by Walter Canada to West Moberly. Pursuant to the Claims Process Order, West Moberly had twenty business days from the December 19, 2016 date of issuance of the NORD by the Monitor to submit a Notice of Dispute. The Monitor did not receive a Notice of Dispute from West Moberly.

Update on Unresolved Claims

32. An update in respect of the remaining seven unresolved Claims is provided below and summarized in the following table:

Summary of Unresolved Claims as at the Date of this Report		
(CAD $000)	**Claim Type**	**Amount**
James, Kevin	Restructuring	6,747
USW	Employee	293
USW	Pre-Commencement	12
Warrior Met Coal LLC	Pre-Commencement	9,892
Mitsui Matsushima Co. Ltd.	Restructuring	810
Pelly Construction Ltd.	Pre-Commencement	1,323
1974 Pension Plan Claim	UMWA 1974 Pension Plan	1,220,896
Total Unresolved Claims		**1,239,973**

a) On March 28, 2017, the Monitor issued notices to each of Mr. Kevin James, the USW, Warrior Met Coal LLC ("**Warrior**") and Mitsui Matsushima Co. Ltd. ("**Mitsui**") extending the date by which a disputing party must bring a motion before this Honourable Court to resolve their disputed Claim to the date that is thirty days following the date on which this Honourable Court issued the Judgment. Since the May 1, 2017 issuance of the Judgment, the Monitor has issued notices to each of Mr. James, the USW and Warrior to further extend the date by which a disputing party must bring a motion to the date that is thirty days from the date that the Monitor notifies the party to bring such a motion.

   In respect of the Claim from Mitsui, the Monitor, in consultation with Walter Canada, continues to have dialogue with Mitsui with the aim of moving their Claim forward in the Claims Process. As the Mitsui disputed Claim arises from a disclaimer of a contract, it falls within the timelines for Restructuring Claims in the Claims Process Order. As of the date of this report, the date by which Mitsui must deliver its Notice of Dispute in respect of its disputed Claim has yet to be extended.

b) The $1.3 million disputed portion of the Claim of Pelly Construction Ltd. ("**Pelly**"), which was discussed in the Eighth Report, remains unresolved as at the date of this report because Pelly has until July 31, 2017 to complete the camp demobilization process, failing which the $1.3 million disputed portion of Pelly's Claim will be disallowed.

c) Although the 1974 Pension Plan Claim was dismissed pursuant to the Judgment, it is listed in the table above as an unresolved Claim because of the 1974 Pension Plan's previously discussed pending application for leave to appeal the Judgment.

Update on Other Claim Matters

33. Further to discussion in the Fifth Report and the Eighth Report in respect of a potential Claim from Canada Revenue Agency ("**CRA**") relating to 2014 and 2015 payroll source deductions, CRA concluded its trust examination in late January 2017 and determined that it did not have a Claim and that instead Walter Canada was owed a refund in the amount of approximately $107,000, which was collected by the Monitor in February 2017.

34. As noted in the Eighth Report, two claims totaling approximately $4,000 were filed with the Bankruptcy/Proposal Trustee. Both of these claims appear to be valid and have now been admitted and will be dealt with in the same manner as the other Allowed Claims in the CCAA proceedings pursuant to the Claims Process Order.

35. The Monitor is still assessing whether a claim in respect of the Deemed Interest Amount (as defined in the Proposal) against New WECH in relation to the US$2.0 billion hybrid debt transaction is valid and whether proceeds will be available to satisfy such claim.

36. As the assignment of certain contracts to Conuma has not been completed, additional Claims may be received in due course.

STATUS OF THE FUND DISTRIBUTION

37. Pursuant to the Fund Distribution Order, and as more thoroughly discussed in the Ninth Report, this Honourable Court directed the Monitor to collect the Fund from counsel for the USW and to disburse it to the members of the USW entitled to receive a *pro rata* share of the Fund (each a "**Subject Employee**").

38. The Monitor received the Fund plus some additional interest (for a total amount of $781,719.32) from counsel for the USW on March 15, 2017. As noted in the Ninth Report, the distribution of the Fund will result in a partial payment of each Subject Employee's Claim related to section 54 of the B.C. *Labour Relations Code* and each Subject Employee's Claim will be reduced accordingly.

39. Given that the Fund that is to be distributed to the Subject Employees relates to payment of arrears of wages and earnings, s. 46 of the *Employment Insurance Act* requires that the Monitor ascertain from Service Canada whether any Employment Insurance benefit overpayment amounts for the Subject Employees are repayable to the Receiver General prior to completing the Fund Distribution.

40. The Monitor submitted the requisite information to Service Canada on March 16, 2017 to enable it to perform its review for possible Employment Insurance benefit overpayments. The Monitor has had weekly correspondence with a representative of Service Canada to monitor the progress of the review. As at the date of this report, Service Canada has estimated that it may complete its review by mid-June 2017, following which it will deliver a letter to the Monitor setting out any required benefit repayments (the "**Determination Letter**"). The Monitor shall complete the Fund Distribution, including making the requisite deduction and remittance of any Employment Insurance overpayment amounts, as quickly as reasonably possible following receipt of the Determination Letter.

STATUS OF WALTER CANADA'S REMAINING ASSETS

Update on Efforts to Realize on Belcourt Interest

41. Included in the asset purchase agreement entered into between Old Walter Canada and Conuma (the "**APA**") on August 8, 2016 and approved by this Honourable Court on August 16, 2016, was an offer from Conuma to acquire the Belcourt Interest from WCCP. The Monitor continues to hold a portion of the Conuma Transaction proceeds as a deposit in relation to the sale of the Belcourt Interest.

42. On April 24, 2017, Conuma submitted an Offer to Purchase Ownership Interest (the "**Third Party Offer**") to New WCCC (the current holder of the Belcourt Interest) that included a significantly higher offer price for the Belcourt Interest than had been included in the APA. New WCCC delivered its Indication of Willingness to Accept Third Party Offer to Conuma on April 27, 2017.

43. The other party to the Belcourt Saxon joint venture, Peace River Coal Inc. ("**PRC**"), has the right of first refusal (the "**ROFR**") and certain tag along rights pursuant to the Belcourt Saxon Coal Limited Partnership Agreement between Western Canadian Coal Corp. (the predecessor-in-interest to WCCP and New WCCC) and NEMI Northern Energy & Mining Inc. (the predecessor-in-interest to PRC) dated March 2, 2005 (the "**BelSax LPA**").

44. As such, on May 2, 2017, New WCCC sent a Notice of Third Party Offer to PRC detailing the Third Party Offer, an offer to sell the Belcourt Interest to PRC on substantially the same terms, as required by the BelSax LPA, and a request that PRC waive the ROFR. PRC has 45 days following receipt of that notice in which to notify Walter Canada of its decision to permit the sale of the Belcourt Interest or exercise its ROFR.

45. Walter Canada anticipates that it may be seeking approval from this Honourable Court to enter into a transaction in respect of the Belcourt Interest by as early as the latter part of June 2017; however, the timeline is uncertain as it depends to a large part on PRC's decisions about how it will respond to the Notice of Third Party Offer it received from New WCCC. The Monitor will report to this Honourable Court regarding this matter either at the time of any application made by Walter Canada for approval of a transaction or at such other time as there are significant developments.

Walter UK

Update on Realization Process

46. Walter Canada is continuing its efforts to realize on Walter UK. The primary asset of Walter UK is Energybuild Ltd. ("**Energybuild**") which owns the anthracite coal mine in South Wales that is currently in care and maintenance.

47. An interested party in respect of the sale of Walter UK has been identified and discussions are ongoing. However, the interested party has requested the resolution of certain conditions, including relating to claims that may be made against Energybuild and its subsidiaries, prior to the finalization of any potential sale. Walter Canada has reached out to the parties involved and is working to resolve these conditions in a timely manner.

48. The Monitor shall provide this Honourable Court with updates regarding any potential sale in respect of Walter UK as it deems necessary.

Additional Funding Requirements

49. This Honourable Court, pursuant to the CCAA Continuity & Vesting Order, authorized Cambrian to loan up to £250,000 to Energybuild on a secured basis and, to date, the full amount of those authorized loans has been advanced to Energybuild.

50. Walter UK's latest updated cash flow forecast indicates that it has insufficient liquidity to meet its obligations as they come due after approximately June 23, 2017. As a result, Walter Canada is seeking authorization from this Honourable Court for Cambrian to advance up to an additional £350,000 (approximately $620,000 based on the exchange rates in effect as at the date of this report), on a secured basis, to Energybuild which should provide Energybuild with sufficient liquidity until approximately the middle of October 2017. Funding requirements are expected to be lower if a sale can be concluded by an earlier date.

51. The Monitor is of the view that it would be reasonable for this Honourable Court to authorize Cambrian to loan the requested additional advance, on a secured basis, to Energybuild to provide additional time for its directors, as well as the Chief Restructuring Officer ("**CRO**") and Walter Canada, to either conclude a sale or determine a plan for disposing of Walter UK.

ACTUAL RECEIPTS AND DISBURSEMENTS COMPARED TO FORECAST

52. Walter Canada's actual cash receipts and disbursements for the 19-week period ended May 13, 2017 (the "**Reporting Period**"), as compared with the Previous CCAA Cash Flow Forecast, are summarized in the table below:

Walter Canada Summary of Actual versus Forecast Cash Flow For the 19-Week Period Ended May 13, 2017[1] Prepared on a Consolidated Basis Unaudited (CAD $000)	**Actual**	**Forecast**	**Variance**
Cash Inflow			
Other Receipts	932	40	892
Total Cash Inflow	**932**	**40**	**892**
Cash Outflow - Operating Disbursements			
Director's Fees	(56)	(60)	4
Consulting	(87)	(100)	13
Insurance	(20)	-	(20)
Professional Fees	(14)	(40)	26
Maintenance and Supplies	(62)	(63)	1
Information Technology	(43)	(45)	2
Total Cash Outflows - Operating Disbursements	**(282)**	**(308)**	**26**
Cash Outflow - Non-Operating Disbursements			
CRO and Restructuring Advisor Fees	(4,043)	(4,155)	112
Success Fees	(1,485)	(1,750)	265
Transfer of GIC's	(200)	(200)	-
Belcourt Saxon J.V. Funding	(153)	-	(153)
Walter U.K. Funding	(412)	(180)	(232)
Total Cash Outflows - Non-Operating Disbursements	**(6,293)**	**(6,285)**	**(8)**
Net Cash Flow	**(5,643)**	**(6,553)**	**910**
Cash, beginning of period (January 1, 2017)	**70,114**	**70,114**	**-**
Effect of Foreign Exchange translation	**82**	**-**	**82**
Cash, end of period (May 13, 2017)[2]	**64,553**	**63,561**	**992**

Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.

Note 2: The cash position noted above excludes approximately US$270K that was received upon closing of Walter Canada's previous account network at the Bank of Nova Scotia. This amount is excluded as discussions as to whether these funds belong to Walter Canada or Warrior are ongoing.

53. The following is a summary of the more significant variances in respect of the $992,000 aggregate net favourable cash flow variance during the Reporting Period:

a) The majority of the aggregate net favourable variance relates to the Monitor's collection of the Fund, in the amount of approximately $782,000, from counsel for the USW, as previously discussed herein. This cash receipt represents a permanent favourable difference as it was not contemplated in the Previous CCAA Cash Flow Forecast and the Monitor notes that it will be paid out in full once the Monitor completes the Fund Distribution after it receives the Determination Letter from Service Canada.

Also as previously discussed herein, Walter Canada received a refund from CRA in the amount of approximately $107,000 related to the trust examination of certain payroll accounts which was performed by the CRA in early January. This cash receipt was not included in the Previous CCAA Cash Flow Forecast as the outcome of the trust examination was unknown at the time it was prepared; accordingly, this represents a permanent favourable difference;

b) The $112,000 favourable variance for CRO and Restructuring Advisor Fees during the Reporting Period was the result of actual costs having been lower than forecast due to lower levels of activity in the month of March 2017 than had been anticipated;

c) Certain success fees related to the transaction that was completed in December 2016 have yet to be paid and are not expected to be paid until the completion of all remaining transactions;

d) The $153,000 negative variance for Belcourt Saxon J.V. funding was the result of Walter Canada being required to fund an unexpected cash call on March 6, 2017, relating to the renewal of certain coal licenses and permits; and

e) Pursuant to the CCAA Continuity & Vesting Order, Cambrian was authorized to loan Energybuild up to £250,000 on a secured basis. Advances of £110,000 and £140,000 were made on February 6 and April 13, 2017, respectively, to fund working capital needs while the negotiation of the sale of certain Walter UK entities continues. The two funding payments translated to approximately $412,000 and resulted in a permanent unfavourable difference of $232,000 as only £110,000 of funding was contemplated in the Previous CCAA Cash Flow Forecast.

f) The amount held by Walter Canada as a deposit in relation to the Conuma Transaction and the potential sale of the Belcourt Interest has been segregated in a separate bank account and is not included in the analysis above for confidentiality reasons.

UPDATED CCAA CASH FLOW FORECAST

54. The Updated CCAA Cash Flow Forecast has been prepared by Walter Canada, with the assistance of the Monitor, on a consolidated basis for the 20-week period ending September 30, 2017 (the "**Updated Cash Flow Period**") to correspond with the Extended Stay Period being sought by Walter Canada, and reflects certain updated assumptions of Management based on developments to date during the course of these CCAA Proceedings. A copy of the Updated CCAA Cash Flow Forecast is attached hereto as Schedule "B" and is summarized in the table below:

Walter Canada Summary of the Updated CCAA Cash Flow Forecast For the 20-Week Period from May 14, 2017 to September 30, 2017 [1] **Prepared on a Consolidated Basis Unaudited (CAD $000)**	
Cash Inflow	
Other Receipts	25
Total Cash Inflow	**25**
Cash Outflow - Operating Disbursements	
Director's Fees	(60)
Consulting	(122)
Insurance	(25)
Information Technology	(5)
Total Cash Outflows - Operating Disbursements	**(212)**
Cash Outflow - Non-Operating Disbursements	
CRO and Restructuring Advisor Fees	(1,527)
Walter U.K. Funding	(620)
Belcourt-Saxon J.V. Funding	(425)
Distribution of Trust Funds	(782)
Total Cash Outflows - Non-Operating Disbursements	**(3,354)**
Net Cash Flow	**(3,541)**
Cash, beginning of period (May 14, 2017)	**64,553**
Cash, end of period (September 30, 2017)	**61,012**
Note 1: Readers are cautioned to read the "Report Restrictions and Scope Limitations" section of this report.	

55. Net cash outflows during the Updated Cash Flow Period are expected to total approximately $3.5 million, which Walter Canada will fund from its current cash resources on hand. On September 30, 2017, at the end of the Updated Cash Flow Period, Walter Canada expects to have approximately $61 million of combined cash resources remaining.

56. The following is a summary of the more significant components of the Updated CCAA Cash Flow Forecast:

a) Interest income of $25,000 is expected to be earned on Walter Canada's cash holdings during the Updated Cash Flow Period and has been categorized under Other Receipts;

b) Director's fees totaling $60,000 relate to Walter Canada's sole director who receives a payment on a monthly basis;

c) Consulting fees totaling $122,000 relate to an external consultant hired by Walter Canada to manage the operations of Walter UK while the sale process is ongoing;

d) A payment of $25,000 is forecast for the renewal of Director and Officer insurance premiums upon the expiry of Walter Canada's current coverage on June 30, 2017;

e) The CRO's monthly fees and Restructuring Advisor Fees are forecast at approximately $1.5 million during the Updated Cash Flow Period for payments to Walter Canada's counsel, the Monitor and its counsel, and the CRO. In the short term, professional fee costs are expected to be higher as a result of the ongoing sale activity for the Belcourt Interest and Walter UK as well as dealing with the upcoming hearings in respect of the 1974 Pension Plan's appeal of the Judgment;

f) As previously noted, Walter Canada has budgeted up to £350,000 (approximately $620,000) to fund the Walter UK operations over the course of the Updated Cash Flow Period while the sale process is ongoing, subject to obtaining authorization from this Honourable Court to make such additional advances;

g) Pursuant to the BelSax LPA, Walter Canada is required to fund 50% of the costs associated with its Belcourt Interest. As such, payments for coal licenses are funded on a quarterly basis. The next payment is expected to be in June 2017, in the amount

of approximately $200,000, with another renewal of approximately $225,000 anticipated to occur in September 2017. In the event the Belcourt Interest is sold, such disbursements will not be funded;

h) As discussed above, the Monitor is anticipating that it may receive the Determination Letter from Service Canada by mid-June, following receipt of which it will make the required deductions and remittances and issue the Fund Distribution as quickly as reasonably possible; and

i) As discussed in the Eighth Report, approximately US$270,000 has been excluded from the Updated CCAA Cash Flow Forecast in relation to the amount received by Walter Canada from BNS when Walter Canada's account network was closed. Discussions with BNS regarding the ownership of these funds, as to whether it belongs to Warrior or Walter Canada, is ongoing and the Monitor will provide an update to this Honourable Court once those discussions are completed and the appropriate disposition of these funds is determined.

57. The Updated CCAA Cash Flow Forecast indicates that Walter Canada has the necessary liquidity to fund its expected cash requirements to the end of the Updated Cash Flow Period.

OTHER MATTERS

58. The Monitor has continued to facilitate the transition of certain financial records to Amacon from Walter Canada, including the preparation of draft financial statements as a result of the Remaining Assets Transaction and the transfer of certain assets from Old Walter Canada to Walter Canada. The Monitor expects to continue to field queries from Amacon over the coming weeks.

59. WCCP was party to two agreements (the "**Twin Sisters Agreements**") in respect of the Twin Sisters Native Plants Nursery Limited Partnership ("**Twin Sisters LP**"). The Twin Sisters LP involved the Saulteau First Nation and the West Moberly First Nation and related to a gift of land near Chetwynd, B.C. from WCCP that was to be used as a plant nursery to aid in remediation efforts for Walter Canada's mines. WCCP retained an option to repurchase the land in certain circumstances and sold this option to Conuma as part of

the transaction in September 2016. However, WCCP's rights regarding the Twin Sisters LP remained with WCCP and were eventually transferred to New WCCC.

60. As a result of the Conuma Transaction, New WCCC had no further reason to be party to the Twin Sisters Agreements and was asked by counsel to the Twin Sisters Native Plants Nursery General Partner Inc. to terminate its interests. With the authorization of both the CRO and Walter Canada's sole director, the Twin Sisters Agreements were terminated effective February 2, 2017, and mutual releases were provided to each of the parties to the Twin Sisters Agreements.

THE MONITOR'S OBSERVATIONS AND RECOMMENDATIONS

61. In the Monitor's opinion, Walter Canada is continuing to act in good faith and with due diligence in furthering its restructuring efforts, including seeking to conclude one or more transactions with respect to the Belcourt Interest and/or Walter UK in an effort to generate additional sale proceeds for the benefit of Walter Canada's creditors and other stakeholders.

62. As a result of the 1974 Pension Plan's recently filed application for leave to appeal the Judgment, the Monitor is not in a position at this time to perform a distribution and any such distribution will likely be delayed until the 1974 Pension Plan's Claim is resolved. Accordingly, the Monitor recommends to this Honourable Court that it grant Walter Canada's request for an extension of the Stay to September 29, 2017 and for authorization for Cambrian to loan up to an additional £350,000, on a secured basis, to Energybuild.

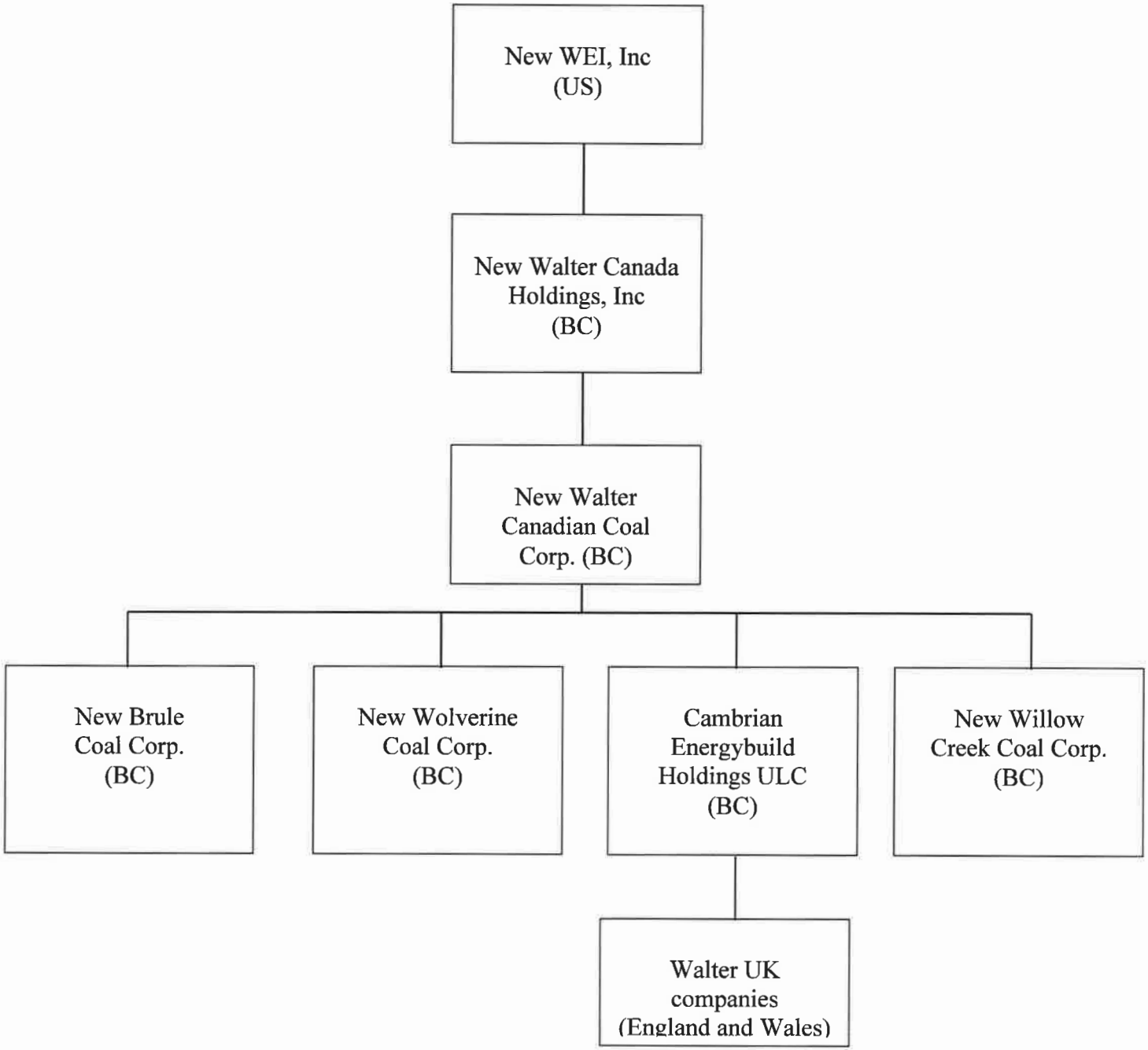
All of which is respectfully submitted this 24th day of May, 2017.

KPMG INC., in its sole capacity as
Monitor of New Walter Energy Canada Holdings, Inc. et al

Per: Anthony Tillman
Senior Vice President

TAB 15

New Walter Canada Group – Structure Chart



TAB 16

COURT OF APPEAL FILE NO. CA44448

COURT OF APPEAL

ON APPEAL FROM the order of Madame Justice Fitzpatrick of the British Columbia Supreme Court pronounced on the 1st of May, 2017

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 A 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

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

MEMORANDUM OF ARGUMENT OF THE RESPONDENTS, WALTER CANADA GROUP

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PART 1 – OVERVIEW AND STATEMENT OF FACTS

1. The 1974 Plan's application for leave to appeal from Fitzpatrick J.'s order in the Walter Canada Group CCAA claims process should not be granted.

2. Fitzpatrick J. decided the narrow preliminary question of what law governs the 1974 Plan's claim. If, as Fitzpatrick J. held, Canadian law governs, then the 1974 Plan's claim is not valid. If US law governs, then the 1974 Plan's claim still might not be valid, depending on the outcome of outstanding issues, such as the interpretation of US law.[1] Even if the 1974 Plan's appeal had merit, its claim might fail.

3. The 1974 Plan's proposed appeal is not *prima facie* meritorious. The parties agree that Fitzpatrick J. applied the correct conflict of laws test: first she characterized the claim, then she identified and applied the appropriate connecting factor.[2] However, the 1974 Plan submits Fitzpatrick J. should have characterized its claim as contractual. Fitzpatrick J. correctly rejected this submission, in part because no member of Walter Canada Group was party to any contract with the 1974 Plan.

4. Instead, Fitzpatrick J. correctly held that the 1974 Plan's claim involves the status and legal personality of corporations and partnerships. The 1974 Plan's claim rests solely on the controlled-group provisions of a US statute entitled the *Employee Retirement and Income Security Act* ("ERISA"). These provisions impose the liability of one entity on all other entities in the controlled group, regardless of their status or personality. As ERISA overrides the status of affiliated entities, a controlled-group claim is properly characterized as one implicating status and legal personality.

5. Fitzpatrick J.'s decision was correct. The 1974 Plan's application for leave to appeal does not raise any arguable errors of law. Entertaining an appeal would unduly hinder the progress of the ongoing Walter Canada Group CCAA proceeding. Until the 1974 Plan's claim is finally resolved, Walter Canada Group cannot make a distribution to its creditors – including former employees, who have gone unpaid for over a year and a half. It is not in the interests of justice for this Court to grant leave.

PART 2 - ISSUES ON APPEAL

6. Walter Canada Group submits that the test for leave to appeal has not been met:

   a. The 1974 Plan's application for leave to appeal is not *prima facie* meritorious; and

   b. An appeal would unduly hinder the progress of the CCAA proceedings.

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[1] For instance, the other two issues before Fitzpatrick J. were: (i) whether, as a matter of US law, controlled group liability under ERISA extends extraterritorially; and (ii) whether ERISA is unenforceable due to Canadian public policy. Walter Canada Group submitted that the 1974 Plan's claim fails on both of grounds. Fitzpatrick J. declined to decide these issues to avoid further delay.

[2] *Minera Aquiline Argentina SA v. IMA Exploration Inc. and Inversiones Mineras Argentinas*, 2006 BCSC 1102 at para. 182 (Respondent's BOA, Tab 2)

PART 3 - ARGUMENT

1. LEAVE TO APPEAL SHOULD NOT BE GRANTED

7. As this Court recently reaffirmed, leave to appeal the decision of a CCAA judge is granted only if it is in the interests of justice.[3] Canadian courts consider four factors to assess whether it is in the interests of justice to grant leave: (1) the point on appeal is of significance to the practice; (2) the matter is of significance to the action; (3) the appeal is *prima facie* meritorious; and (4) the appeal will not unduly hinder the progress of the action. These factors are not analysed mechanically.

8. Walter Canada Group agrees that Fitzpatrick J.'s decision is significant to both the practice and the action. However, the 1974 Plan's appeal is not *prima facie* meritorious and the proposed appeal will delay the progress of the CCAA proceeding. It is not in the interests of justice to grant leave to appeal.

A. The Proposed Appeal is not *Prima facie* Meritorious

9. The CCAA requires parties to seek leave to appeal, regardless of whether the decision was discretionary.[4] Particularly in a CCAA proceeding, leave to appeal is not an opportunity to resurrect unsuccessful arguments; as this Court recently stated:

> It is well established that a review application is not a re-argument or re-assessment of the issues decided by the chambers judge. Rather, the issues on a review application are whether the chambers judge was wrong in law or principle, or misconceived the facts [...] Only if the court identifies such errors can it proceed to consider whether a variation of the order is appropriate.[5]

10. To meet the *prima facie* meritorious standard, the 1974 Plan must make an argument "sufficiently cogent to found a meritorious (or 'arguable') case".[6] The 1974 Plan cannot discharge its burden by rearguing submissions Fitzpatrick J. considered and rejected.

(a) Fitzpatrick J. Correctly Characterized the 1974 Plan Claim

11. The 1974 Plan's claim relies solely on the controlled group provisions of ERISA to attach liability to Walter Canada Group. The ERISA controlled group test is a mathematical, bright-line 80% ownership test. If this test is met, ERISA disregards the status and personality of entities within the controlled group and imposes liability on them all. Based on all parties' experts' testimony, Fitzpatrick J. explained: "ERISA's 'controlled group' provisions impose liability by ignoring separate corporate personalities and effectively amalgamating, consolidating or collapsing 'common controlled' entities into a single 'employer' liable for any withdrawal liability of any other entity in that group."[7]

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[3] *North American Tungsten Corporation v. Global Tungsten and Powders Corp*, 2015 BCCA 426 ("*Tungsten*") at paras. 22-23 (Respondent's BOA, Tab 3); see also *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17 (Appellant's BOA, Tab 3)
[4] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, section 13
[5] *Tungsten* at para. 19 (Respondent's BOA, Tab 3)
[6] *Tungsten* at para. 29 (Respondent's BOA, Tab 3); see also *Menzies Lawyers Professional Corporation v. Morton*, 2015 ONCA 553 at para. 41 (Respondent's BOA, Tab 1)
[7] Reasons for Judgment at para. 137 (Appellant's Appeal Book, Tab 1)

12. Fitzpatrick J. was faced with competing characterizations of this claim: Walter Canada Group submitted that an ERISA controlled-group claim implicated legal personality; the 1974 Plan submitted that it was a contractual claim. In characterizing the 1974 Plan claim as implicating legal personality, Fitzpatrick J. drew an analogy to a recent BC case considering a similar legislative scheme. In *JTI-Macdonald Corp v. British Columbia (Attorney General)*, the Court considered the constitutionality of the BC *Tobacco Damages Act*.[8] Like ERISA, the *Tobacco Damages Act* "imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act."[9] The Court held that such legislation "had the effect of abolishing the separate corporate personalities" of federal corporations, and hence, its "pith and substance" implicated the status and legal personality of these corporations.[10]

13. Fitzpatrick J. acknowledged that *JTI* was a constitutional, not conflicts of laws, case. She found that the Court's descriptions of the *Tobacco Damages Act* "strike a similar chord" to ERISA. She concluded that *JTI* was a more useful starting point than the distinguishable UK cases cited by the 1974 Plan.[11]

14. Fitzpatrick J. properly rejected the 1974 Plan's suggestion that its claim was contractual. The 1974 Plan has no contractual rights against Walter Canada Group and ERISA does not make Walter Canada Group a party to the contract.[12] Liability can only extend to Walter Canada Group through the controlled group provisions of ERISA. In other words, the 1974 Plan's argument is circular: US law applies if the claim exists and is characterized as contractual, but the claim against Walter Canada Group only exists if US law applies. Fitzpatrick J. was correct to reject this submission.

15. In addition, there is no domestic or foreign authority that characterizes a claim like the 1974 Plan's claim as contractual. The 1974 Plan points only to three UK shipping insurance cases. These cases were analysed in detail by Fitzpatrick J., who correctly held that they were distinguishable.[13] The shipping insurance cases consider statutes very different from ERISA. They stand for the proposition that a statute can extend an insurer's liability under its insurance policy to specified non-insureds. Fitzpatrick J. correctly distinguished the cases as they do not stand for the proposition that contractual liability can be imposed on a stranger to the contract.

16. Finally, Fitzpatrick J. correctly interpreted the secondary sources before her, including quoting Castel and Walker and other authorities with care.[14] The 1974 Plan cites part of a passage from Castel and Walker and suggests Fitzpatrick J. misunderstood the passage.[15] That passage addresses a

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[8] The *Tobacco Damages and Health Care Costs Recovery Act* (the "*Tobacco Damages Act*")
[9] *JTI-Macdonald Corp v. British Columbia (Attorney General)*, 2000 BCSC 312 ("*JTI*") at para. 233 (Appellant's BOA, Tab 5)
[10] *JTI* at para. 173 (Appellant's BOA, Tab 5)
[11] Reasons for Judgment at para. 142 (Appellant's Appeal Book, Tab 1)
[12] Reasons for Judgment at para. 120 (Appellant's Appeal Book, Tab 1)
[13] Reasons for Judgment at paras. 116-120 (Appellant's Appeal Book, Tab 1)
[14] See, for example, Reasons for Judgment at para. 96-103 (Appellant's Appeal Book, Tab 1)
[15] Appellant's Leave to Appeal Memorandum at para. 34 (Appellant's Appeal Book, Tab 15)

contractual (or tortious) dispute with a foreign subsidiary: Castel and Walker say *where a dispute has already been characterized* as a contract or tort claim, an ancillary issue veil-piercing issue may "arguably" be governed by the same law as that of the contract or tort. This passage does not speak to characterizing a claim, nor does it conclude that the same governing law applies.

17. Similarly, Fitzpatrick J. did not err by considering how ERISA imposes liability on strangers to a contract. The 1974 Plan contends that Fitzpatrick J. "contradict[ed] a core principle of the characterization analysis" by considering how ERISA works as well as its purpose.[16] However, the source cited does not explain how to characterize a claim; it is a general statement supporting the Canadian approach to conflict of laws, namely, by characterizing the claim and using predetermined connecting factors to avoid a results-oriented analysis:

> One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied. An Ontario court could use the rule in the example above to identify Texas law as the applicable law *to a tort claim* without first knowing anything about that law. In that sense the choice of law process operates at one step removed from the resolution to the underlying dispute.[17]

The 1974 Plan's exclusive focus on purpose encourages the very results-oriented reasoning Canadian law avoids.[18] Contrary to the 1974 Plan, a Court must understand how liability attaches to a defendant to characterize the claim. Fitzpatrick J. was correct to consider the operation of ERISA in characterizing the 1974 Plan's claim, because the claim only exists through the operation of ERISA.

(b) Fitzpatrick J. Identified the Appropriate Choice of Law Rule

18. The 1974 Plan raises for the first time on appeal the issue of distinctions between entities with limited liability and entities that do not have limited liability.[19] Fitzpatrick J. correctly considered this issue and concluded any distinction is ultimately not relevant to the choice of law question. She did not conflate the legal characteristics of partnerships and ULCs with corporations, but assessed these entities independently. Moreover, she placed no meaningful reliance on the claims bar date.

19. The 1974 Plan's claim against the partnerships and ULCs fails for the same reason that its claim against the other petitioners fails: "The simple answer is that the same analysis set out above in relation to corporations applies equally to partnerships, as was noted in Dicey at 1532-33, quoted above, which refers to the law of the country in which an 'entity' was formed."[20]

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[16] Appellant's Leave to Appeal Memorandum at para. 38 (Appellant's Appeal Book, Tab 15)
[17] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed., (Toronto: Irwin Law, 2016) at 221 (Appellant's BOA, Tab 15)
[18] Consistent with this approach, Fitzpatrick J. held that the eventual outcome under each governing law was "substantially irrelevant" to her characterization analysis. Reasons for Judgment at para. 83 (Appellant's Appeal Book, Tab 1)
[19] Reasons for Judgment at para. 158: "During its submissions, the 1974 Plan did not draw any particular distinction between its claims against the corporations within the Walter Canada Group (who are the only CCAA petitioners) and the partnerships, who are not petitioners." (Appellant's Appeal Book, Tab 1)
[20] Reasons for Judgment at para. 159 (Appellant's Appeal Book, Tab 1)

20. While in some circumstances, liability for the debts of a partnership or a ULC can be imputed upward to the equityholders of that entity, the 1974 Plan does not have a direct claim against the partnerships or ULCs unless the controlled group provisions of ERISA apply.[21]

(c) Fitzpatrick J. Applied the Correct Connecting Factor

21. The 1974 Plan argues, without support, that "the corporation whose veil was pierced was more accurately Walter Resources" (the employer), and thus the claim should still be governed by US law. A naked assertion does not constitute "arguable grounds of appeal".[22] Moreover, the assertion is incorrect. If ERISA merely pierced Walter Resources' corporate veil, then only its direct shareholder, Walter Energy, Inc. ("WEI"),[23] would be liable to the 1974 Plan. But ERISA also purports to impose liability on WEI's Canadian direct and indirect subsidiaries, who are not shareholders of Walter Resources. ERISA does not simply pierce the corporate veil of Walter Resources; rather, it erases the distinctions between multiple US and Canadian entities.

(d) Fitzpatrick J. Did Not Err in Considering US Law

22. In its Notice of Application, the 1974 Plan asserted that Fitzpatrick J. erred by considering US law that was not put in evidence through an expert witness. The 1974 Plan did not pursue this ground in its Memorandum. Fitzpatrick J. did not err in her approach to US law: all conclusions were grounded in the evidence of the experts. In any event, the 1974 Plan should not be granted leave to appeal on this ground because the 1974 Plan cited almost twenty US cases in its written argument that were not referred to by any experts (and cites one such case to this Court).[24] If Fitzpatrick J. erred (which she did not), the 1974 Plan created the problem on which it seeks to rely.[25]

(e) Fitzpatrick J. Properly Ordered Costs

23. The 1974 Plan has applied to Fitzpatrick J. asking her to vary the costs award. It is premature to grant leave to appeal a decision that has not yet been made.

24. In any event, Fitzpatrick J. did not err when she exercised her discretion to make a qualified costs order; rather, she gave effect to the powerful general presumption in the BC Supreme Court Civil Rules endorsed by this Court that a successful party is presumptively entitled to costs.[26]

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[21] *Partnerships Act*, R.S.B.C. 1996, Ch. 348, sections 26 and 42; *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, section 142

[22] Appellant's Leave to Appeal Memorandum at para. 44 (Appellant's Appeal Book, Tab 15)

[23] WEI changed its name to New WEI, Inc. during the pendency of its Chapter 11 proceedings.

[24] Appellant's Leave to Appeal Memorandum at para. 38, footnote 53 cites the case of *Connolly v. P.B.G.C.* (475 U.S. 211, 214 (1986)). This US case was not introduced by any expert. (Appellant's Appeal Book, Tab 15)

[25] See 1974 Plan Trial Submissions at paras. 378-406 (Respondent's Appeal Book, Tab 10)

[26] That presumption was endorsed by this court in *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at para. 26 (Respondent's BOA, Tab 4). Rule 14-1(9) of the BC *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that "[s]ubject to subrule (12), costs of a proceeding must be awarded to the successful party unless this Court orders otherwise."

B. The Proposed Appeal will Unduly Hinder the Progress of the Action

25. The proposed appeal will unduly delay both the progress of this CCAA proceeding and also a distribution to Walter Canada Group's creditors. Even if the appeal is successful, the 1974 Plan has multiple hurdles before it can establish a valid claim, including: (i) whether ERISA has extraterritorial effect under US law; and (ii) whether ERISA conflicts with Canadian public policy. If ERISA does not have extraterritorial effect under US law, or if the claim conflicts with Canadian public policy, the claim fails.[27] Fitzpatrick J. declined to decide these issues to avoid further delaying the CCAA proceedings, saying: "A timely resolution is in the interests of justice and furthers the purposes of the CCAA."[28]

26. Even a successful appeal will not establish the validity of the 1974 Plan's claim, but granting leave will start a process substantially delaying distributions to vulnerable creditors, like the approximately 300 miners owed termination pay by Walter Canada Group. Contrary to the 1974 Plan's submission, none of these former employees have received any money in the CCAA proceeding.[29] In these circumstances, it is not in the interests of justice to allow leave to appeal.

2. A STAY PENDING APPEAL IS REDUNDANT

27. The 1974 Plan's application for a stay of proceedings or execution is unnecessary. Walter Canada Group is prohibited under the Initial Order from making a distribution without a court order. The Service List, including the 1974 Plan, would receive notice of an application (if any) for a distribution order. There is no basis for two courts to be seized of the distribution question.

PART 4 - NATURE OF ORDER SOUGHT

28. Walter Canada Group seeks an Order dismissing the 1974 Plan's application for leave to appeal, and costs of this application in any event of the appeal.

29. Alternatively, if leave is granted, the Walter Canada Group joins in the Appellant's request for an expedited appeal to reduce the impact of the delay.

All of which is respectfully submitted.

Dated at the City of Toronto, Province of Ontario, this 1st day of June 2017.

Mary Paterson

Solicitor for the Respondent

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[27] The 1974 Plan is incorrect when it asserts that "to the extent U.S. law applies to the 1974 Plan Claim, the 1974 Plan Claim is valid against each of the entities in the Walter Canada Group": Appellant's Leave to Appeal Memorandum at para. 11 (Appellant's Appeal Book, Tab 15)

[28] Reasons for Judgment at para. 181 (Appellant's Appeal Book, Tab 1)

[29] Monitor's 10th Report at paras. 39 to 40 (Respondent's Appeal Book, Tab 14)

Bankruptcy and Insolvency Act

R.S.C. 1985, c. B-3

Partners and separate properties

142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Surplus of separate properties

(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus of joint properties

(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective separate properties in proportion to the right and interest of each partner in the joint property.

Different properties

(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Costs out of joint and separate properties

(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if the inspectors withhold or refuse their consent, with the approval of the court.

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Partnerships Act

R.S.B.C. 1996, Ch. 348

Execution against partnership property

26 (1) A writ of execution must not issue against partnership property except on a judgment against the firm.

(2) The Supreme Court within its territorial jurisdiction, may,

(a) on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest on it, and

(b) by the same or a subsequent order appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money that may be coming to him or her in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions that might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or that the circumstances of the case may require.

(3) The other partner or partners is or are at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase it.

Application of assets on dissolution

42 (1) On the dissolution of a partnership, every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners,

(a) to have the property of the partnership applied in payment of the debts and liabilities of the firm, and

(b) to have the surplus assets after the payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm.

(2) For the purposes of subsection (1), any partner or the partner's representatives may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm.

Supreme Court Civil Rules

B.C. Reg 168/2009

Costs to Follow Event

Rule 14-1

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[...]

Costs of Applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

LIST OF AUTHORITIES

Jurisprudence

Secondary Sources

Court of Appeal File No CA44448

COURT OF APPEAL

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 A 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

PETITIONERS
(RESPONDENTS)

AND

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

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