



This is the 3<sup>rd</sup> affidavit of  
Miriam Domínguez in this case  
and was made on 23/November /2016

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**

**AFFIDAVIT**

I, MIRIAM DOMINGUEZ, legal assistant, of 20th Floor – 250 Howe Street, in the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:

1. I am a legal assistant at Dentons Canada LLP, Canadian solicitors for the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Pension Plan**"), a claimant in this proceeding, and as such I have personal knowledge of the facts and matters deposed to in this Affidavit except where I depose to a matter based on the information from an informant I identify, in which case, I believe that both the information from the informant and the resulting statement are true.
2. Attached hereto and marked as **Exhibit "A"** is a copy an e-mail dated October 4, 2016 from Craig Dennis, Q.C, Canadian counsel for 1974 Pension Plan to counsel for the Petitioners and the Monitor.
3. Attached hereto and marked as **Exhibit "B"** is a copy of the transcript of the proceedings in chambers in this Action held on October 26, 2016 (the "**Transcript**").

4. Attached hereto and marked as **Exhibit "C"** is a copy of the transcript of the Oral Reasons for Judgment in this Action rendered on October 26, 2016.

5. Attached hereto and marked as **Exhibit "D"** is a copy of an e-mail referenced on page 14 of the Transcript and dated October 3, 2016 from Craig Dennis, Q.C, Canadian counsel for 1974 Pension Plan to counsel for the Petitioners and the Monitor.

6. Attached hereto and marked as **Exhibit "E"** is a copy of a letter dated November 15, 2016 from Tevia Jeffries, Canadian counsel for 1974 Pension Plan, to counsel for the Petitioners and the Monitor.


7. Attached hereto and marked as **Exhibit "F"** is a copy of a string of emails between Rachel Jaffe Mauceri, US counsel for 1974 Pension Plan, and Jay Bender and Cathleen Moore, US counsel for New WEI, Inc.

8. Attached hereto and marked as **Exhibit "G"** is a copy of an Order entered November 15, 2016, Authorizing Abandonment, Disposal and/or Destruction of Certain Books and Records filed in the United States Bankruptcy Court for the Northern District of Alabama Southern Division in the Chapter 11 Action, *New WEI, Inc., et al.*, Case No. 15-02741-TOM11.

9. Attached hereto and marked as **Exhibit "H"** is a copy of a letter dated November 22, 2016 from Craig Dennis, Q.C, Canadian counsel for 1974 Pension Plan to counsel for the Petitioners and the Monitor.

10. I make this affidavit in support of the Notice of Application of the 1974 Pension Plan to be filed.

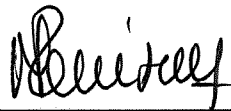
AFFIRMED BEFORE ME at Vancouver, BC,  
on 23 / November / 2016.



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A Commissioner for taking Affidavits within  
British Columbia

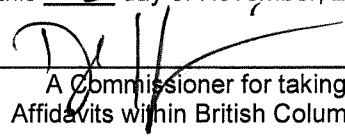
TEVIA JEFFRIES  
*Barrister & Solicitor*  
DENTONS CANADA LLP  
20th Floor, 250 Howe Street  
Vancouver, B.C. V6C 3R8  
Telephone (604) 687-4466



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MIRIAM DOMINGUEZ

This is **Exhibit "A"** referred to in the Affidavit of **Miriam Domínguez** sworn before me at Vancouver this 23 day of November, 2016.



A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a series of loops and a long horizontal stroke extending to the right.

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A Commissioner for taking  
Affidavits within British Columbia

**Dominguez, Miriam**

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**Subject:** FW: Scheduling for 1974 Plan Claim**From:** Dennis, Craig**Sent:** 4-Oct-16 11:24 AM**To:** Peter Reardon; Sandrelli, John; Wasserman, Marc; Buttery, Mary; Riesterer, Patrick; Paterson, Mary; Williams, Lance; [baziz@bluetreadvisors.com](mailto:baziz@bluetreadvisors.com); Jeffries, Tevia; Wael Rostom; Anthony Tillman; [pjreynolds@kpmg.ca](mailto:pjreynolds@kpmg.ca); Caitlin Fell**Subject:** RE: Scheduling for 1974 Plan Claim

All,

As to the exact timing of pre-hearing steps, we are waiting for a response to my email yesterday in order to help shape that.

In the interim, we wish to share some preliminary thinking we have done on a process leading up to a summary trial. We have included the possibility that we may be able to proceed with a summary trial during the week of January 9. But we also have considered a slightly longer timeline which would see the summary trial occur in February (subject to availability). You will see that the process differs slightly between the two scenarios. But both are contingent on the length of time required for discovery, which remains to be determined.

**Our Proposal #1: Hearing during week of Feb. 20**

- Discovery
  - Document production in response to targeted discovery requests
  - Examination for discovery – to be completed within 21 days after document production.
- Affidavits
  - Plan's affidavits –
  - Respondent's –
  - Plan reply –
- Expert evidence – expert reports –
- Cross-examination on affidavits -
- Written submissions
  - Plan –
  - Respondents –
  - Reply (if any) –
- Hearing
  - Week of February 20 (contingent on timing of steps above)

**Our Proposal #2: Hearing during week of January 9**

- Discovery
  - Document production in response to targeted discovery requests –
  - Examination for discovery – to be completed within 21 days after document production.
  
- Affidavits
  - Plan's affidavits –
  - Respondent's –
  - Plan reply –
  
- Expert evidence – expert reports – timing?
  
- Statement of legal points and list of authorities
  - Plan and Respondents – Dec 16 (contingent on timing of steps above, but this likely is latest date that would make Jan 9 hearing possible);
  
- Hearing
  - Week of January 9 (contingent on timing of steps above)
  
- Cross-examination on affidavits
  - Week of January 9 (during summary trial, as authorized by Rule 9-7(12)(b))



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Bio | Website

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大成 Salans FMC SNR Denton McKenna Long

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This is Exhibit "B" referred to in the Affidavit of  
Miriam Domínguez sworn before me at Vancouver  
this 23 day of November, 2016.

  
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A Commissioner for taking  
Affidavits within British Columbia

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Colloquy

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October 26, 2016  
Vancouver, BC

(CHAMBERS COMMENCED AT 9:06 A.M.)

THE CLERK: In the Supreme Court of British Columbia at Vancouver, this 26th day of October, 2016, calling the matter of Walter Energy Canada Holdings Inc., My Lady.

THE COURT: Yes.

MR. REARDON: My Lady, Peter Reardon, attorney for the monitor. It is at least notionally my application.

THE COURT: Yes. All right. Thank you, Mr. Reardon. Who's next? Ms. Buttery?

MS. BUTTERY: Good morning, My Lady. Mary Buttery, counsel for the Walter entities, and on the phone is Mary Paterson of the Osler firm in Toronto. I'm not sure if Mr. Riesterer is on the phone as well.

MS. PATERSON: Yes, My Lady, both Mary Paterson and Pat Riesterer are here.

THE COURT: Okay.

MS. PATERSON: And if we could please request that counsel speak close to a microphone that would be great -- or closer to the phone, that would be helpful. Thank you.

THE COURT: All right. Thank you. So that's Ms. Paterson. Just let me -- not Mr. Wasserman, he's not on it.

MS. BUTTERY: No.

THE COURT: Okay.

MS. BUTTERY: And Mr. Riesterer.

THE COURT: Mr. Riesterer. Yeah. Okay.

MR. BAVIS: Good morning, Craig Bavis, counsel for the respondent United Steel Workers.

THE COURT: All right. Thank you.

MR. DENNIS: And, My Lady, surname is Dennis, D-e-n-n-i-s, initial C. With me is John Sandrelli, and we're here for the UMWA Pension Plan.

THE COURT: All right. All right. Now, Mr. Reardon, it is your application, I believe.

MR. REARDON: It is, My Lady. And let me say first that in the material we have included the monitor's fifth report --

THE COURT: Yes.

MR. REARDON: -- which reports on a number of matters that we're not going to be discussing today unless

2  
Submissions for the monitor by Mr. Reardon

1           Your Ladyship wants to. But it reports on the  
2           closing of the sale on September 9th --  
3   THE COURT: M'mm-hmm.  
4   MR. REARDON: -- and it includes a report -- a brief  
5           report on the claims process. The claims' bar  
6           date expired on October 5th --  
7   THE COURT: Right.  
8   MR. REARDON: -- and a few other matters.

9  
10   **SUBMISSIONS FOR THE MONITOR BY MR REARDON:**

11  
12           But the reason that we are here today --  
13   THE COURT: M'mm-hmm.  
14   MR. REARDON: -- is that the claims process order  
15           dealing with the 1974 pension plan claim,  
16           paragraph 31, says -- and this is in the monitor's  
17           report but:

18  
19           Promptly upon completion of the various other  
20           matters --

21  
22           Which is the filing of the claims, which has been  
23           done.

24  
25           -- the monitor shall, in consultation with  
26           counsel for UMWA 1974 Pension Plan, seek a  
27           scheduling appointment before the court on  
28           notice to the service list to seek further  
29           directions concerning procedure for  
30           adjudicating the pension plan claim.

31  
32           So that's what we're here for.

33   THE COURT: M'mm-hmm.  
34   MR. REARDON: As disclosed briefly in the monitor's  
35           report, the parties have had a number of  
36           discussions about the scheduling and the  
37           procedures to be followed. We haven't been able  
38           to reach any agreement. The discussions of course  
39           are always subject to Your Ladyship's directions,  
40           but if I can -- I'm going to leave it to the --  
41           these people to kind of duke it out, although it's  
42           not a duking out situation, but see where we can  
43           get to. But if I can say --

44   THE COURT: Well, it's easy -- the pleadings are. I  
45           see that --

46   MR. REARDON: The pleadings are done.

47   THE COURT: -- those are all complete.



3

Submissions for the monitor by Mr. Reardon

1 MR. REARDON: They are.  
2 THE COURT: Yes.  
3 MR. REARDON: And so we had tentatively booked a date  
4 before Your Ladyship for the week starting  
5 January 9th. And so the schedules that had been  
6 proposed were geared towards getting things done  
7 by that date. On the one hand, I suppose the  
8 simplest procedure that has been proposed -- and  
9 it is certainly not as simple as I'm going to  
10 state it is, and I also want to caution, I will  
11 use certain phrases or contents from the rules of  
12 court, but it has been my position all along that  
13 we're not necessarily bound by the strict  
14 compliance with the rules of court. We -- in a  
15 way we'll get to make up some of our own rules  
16 here subject to Your Ladyship's direction, but --  
17 so on the one hand is determination of a point of  
18 law. And without stating what it is because we  
19 haven't arrived at that, is there some point that  
20 could be determined that would put to rest the  
21 claim. So for instance the application of ERISA  
22 in Canada, that's simply stated. And there have  
23 been some proposed questions, but they probably  
24 all involve some findings of fact which means they  
25 don't fit strictly into the rule 9-4, whatever it  
26 is --  
27 THE COURT: The special case.  
28 MR. REARDON: -- determination on --  
29 THE COURT: Special case or something like that.  
30 MR. REARDON: -- a point of law or --  
31 THE COURT: Yeah.  
32 MR. REARDON: -- whatever. On the other hand, the  
33 other end of the spectrum is a full blown -- not  
34 full blown trial, nobody is suggesting that yet  
35 but a summary trial. And as in Your Ladyship's  
36 reasons for judgment back in August, you suggested  
37 that perhaps a summary trial -- and I think we  
38 could probably talk about those terms.  
39 THE COURT: I suggested maybe a hybrid trial, or it  
40 might be a combination of affidavit evidence and  
41 live evidence, I think.  
42 MR. REARDON: Yes.  
43 THE COURT: Something like what they did --  
44 MR. REARDON: Right.  
45 THE COURT: -- in Nortel. Frankly, with --  
46 MR. REARDON: And that's what we --  
47 THE COURT: Yeah.

4

Submissions for the monitor by Mr. Reardon

1 MR. REARDON: -- have been discussing.  
2 THE COURT: M'mm-hmm.  
3 MR. REARDON: But we haven't gotten there in part  
4 because we've -- we're trying to get to the  
5 January 9th date, and if we have full blown  
6 discoveries for instance, that's not going to  
7 happen. So we have kind of gotten bogged down on  
8 that. The January 9th date is -- there's no magic  
9 to it other than Your Ladyship's availability, but  
10 certainly the monitor and I think all the parties  
11 want to get this done. It's a big matter, and  
12 there are likely to be appeals, so before a  
13 distribution can be made to creditors, this issue  
14 has to be determined.  
15 THE COURT: M'mm-hmm.  
16 MR. REARDON: So that's where we are. There, as I say,  
17 have been very fruitful discussions about how we  
18 would go about this. All -- I said both sides.  
19 All parties involved in those discussions have  
20 tried to give and take, and we just haven't got  
21 there. So given the provision in the claims  
22 process order, the monitor decided, well, we  
23 better get before Your Ladyship just to talk it  
24 out a little bit and see if Your Ladyship has any  
25 thoughts of directions that you can send us away  
26 with, and we will get back to trying to figure out  
27 how we can best determine this or have adjudicated  
28 the claim.  
29 THE COURT: Okay.  
30 MR. REARDON: So that's the monitor's role here.  
31 THE COURT: M'mm-hmm.  
32 MR. REARDON: Unless Your Ladyship has any other role  
33 for the monitor to take. We're setting up calls  
34 and kind of trying to get the parties together, so  
35 far without success.  
36 THE COURT: Well, let's just park that for the moment,  
37 Mr. Reardon, until I hear from the parties.  
38 MR. REARDON: Yes.  
39 THE COURT: I mean, I'll -- I mean, I'm somewhat --  
40 well, I don't know about imposing procedures that  
41 may not work from the parties' point of view  
42 particularly those that bear the onus.  
43 MR. REARDON: Yes.  
44 THE COURT: So that's certainly an issue. So I think  
45 what I'll do is I'll hear from you at the end of  
46 it. But I'll hear from Mr. Bavis and  
47 Mr. Sandrelli first because the onus will clearly

5  
Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 rest on the plan.

2 MR. REARDON: Mr. Dennis?

3 THE COURT: Or Dennis. Sorry, Mr. Dennis to prove the  
4 case against the estate.  
5 Mr. Dennis.

6 MR. REARDON: Thank you, My Lady.

7 MR. DENNIS: Yes. Thank you, My Lady. I just -- it  
8 will streamline things rather than lengthen things  
9 if I can refer to a booklet that I prepared. I  
10 provided it to my friends this morning.  
11 Ms. BATTERY quite clearly pointed out it would  
12 have been nice for her to have had it earlier than  
13 this morning. It doesn't have a lot of substance.  
14 I would have got it to her sooner, but it only  
15 reached my hands at 7:30 last night. But  
16 certainly in future I'll endeavour to get her that  
17 more quickly.  
18

19 **SUBMISSIONS FOR THE UMWA 1974 PENSION PLAN BY MR. DENNIS:**  
20

21 Mr. Reardon, I think, has very fairly  
22 captured the position that, as I understand it  
23 when the parties were before Your Ladyship in  
24 August a summary trial was discussed as a possible  
25 way of proceeding. That continues to be the  
26 position of the '74 plan that this case is  
27 suitable for disposition by summary trial, and we  
28 have consistently expressed that view.

29 So let me just walk through the points in  
30 this brief. But before I do that maybe to  
31 encapsulate why we haven't just got on with it if  
32 that's where we're at. The -- really the point, I  
33 think, that has proved to be a sticking point is  
34 the notion of some pre-summary trial discovery.

35 From our perspective as is customary with this --  
36 THE COURT: Examination for discovery or document  
37 discovery?

38 MR. DENNIS: Well, in the first instance document  
39 discovery, potentially some examination for  
40 discovery. And I'll say more about our position  
41 because reflecting the desire to move this forward  
42 expeditiously we've proposed a modification to the  
43 usual discovery rules. We've said we're quite  
44 content to proceed with just targeted discovery in  
45 discrete subject areas that we've identified for  
46 the company. And we've sent to them three and a  
47 half weeks ago, October 3rd, a list of the

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Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 discrete subjects on which we would like to have  
2 discovery and invited the company to tell us what  
3 the timeline would be for responding to that  
4 discovery request.

5 The company is looking for ways to do this  
6 without having to embark on any -- even that  
7 targeted limited discovery. They would prefer to  
8 have it presented as a question of law which they  
9 say would obviate the need for any pre-hearing  
10 discovery, documents or otherwise. The difficulty  
11 coming to it that we have with that is that  
12 they're -- so far nobody's been able to identify a  
13 discrete question of law that isn't fact dependent  
14 and indeed isn't dependent on what facts that are  
15 in dispute on the pleadings. That's the  
16 difficulty.

17 So let me just move through this very quickly  
18 to give Your Ladyship a sense of where we are. At  
19 point A I've simply -- on the first page of this  
20 booklet, so under the very -- not tab but just  
21 letter A on the left-hand side, which is just a  
22 reference, I've just repeated the passage from  
23 Your Ladyship's reasons for judgment last month  
24 that addressed this claim. And I note in  
25 paragraph 87 there, four lines from the bottom  
26 Your Ladyship wrote:

27  
28 The present thinking is that the issues are  
29 likely suitable for disposition by summary  
30 trial, although that remains to be seen.

31  
32 As I say that continues to be our objective and  
33 belief that we can do it.

34 I know that -- I wasn't here of course in  
35 August -- that Your Ladyship characterized the  
36 pension plan's claim as a unique claim. And I  
37 might just take a moment on that from two  
38 perspectives because it does feed into what we're  
39 doing by way of process. And I appreciate that  
40 comment would reflect the submissions that counsel  
41 made at the time. But I wanted to look at that  
42 from two perspectives, that is the description of  
43 it as a unique claim.

44 First, at tab 1 -- and it's not particularly  
45 critical, but at tab 1 is an order approving a  
46 settlement in a CCAA matter that was brought in  
47 Ontario. And it's interesting because this --

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Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1           although procedurally the footing was slightly  
2           different because the US Pension Benefit Guaranty  
3           Corporation was directly involved in the case, but  
4           substantively the idea of an ERISA claim in a  
5           Canadian CCAA proceeding was in play. And if I  
6           can ask Your Ladyship just to turn four pages in  
7           under the tab. This is the final -- four pages in  
8           would be the final page of the minutes of  
9           settlement --

10          THE COURT: Yes.

11          MR. DENNIS: -- and there should be a paragraph 8 --

12          THE COURT: M'mm-hmm.

13          MR. DENNIS: -- at the top.

14          THE COURT: Yeah.

15          MR. DENNIS: What happened is that this case was  
16               settled without the court determining the issue.  
17               And so paragraph 8 says PBGC, the Pension Benefit  
18               Guaranty Corporation, and the applicants agree and  
19               confirm that the issue of whether PBGC claims  
20               under the provisions of ERISA are enforceable in  
21               Canada was not determined. So the claim was  
22               brought, but the settlement obviated the need for  
23               a determination of the point.

24          THE COURT: I think that's why I called it unique  
25               because it was -- there's been no determination of  
26               this type of claim on the merits.

27          MR. DENNIS: Absolutely. Absolutely.

28          THE COURT: I was aware that there had been some  
29               Ontario cases.

30          MR. DENNIS: Correct. So at least in that case the  
31               claim was potentially before but not determined.  
32               This would, as far as I'm aware, be the first  
33               occasion when the court would have to determine  
34               the point.

35               But the other aspect of it that I wanted to  
36               raise -- and this is really at letter B. Back to  
37               the first page under the booklet. In a sense,  
38               My Lady, the claim by the '74 Plan really is no  
39               different from the claim of any other claimants  
40               save and except that the '74 Plan's claim we say  
41               is governed by US law on a proper choice of law  
42               analysis, whereas the claims of the employees and  
43               Mr. Bavis' clients is governed by BC law. Save --  
44               and apart from that there's no difference between  
45               the two claims, and that's the point of that  
46               letter B in my booklet. This is just a passage  
47               from Halsbury's that says:

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Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1  
2 A creditor may prove for any debt due to him  
3 from the bankrupt no matter whether the debt  
4 is governed by English law or foreign law.  
5 Of course it may be necessary to refer to  
6 foreign law in order to discover whether a  
7 debt governed by a foreign proper law is  
8 valid by that law. But subject to this a  
9 foreigner proving for a foreign debt stands  
10 in the same position as an English creditor  
11 proving for an English debt.  
12

13 And so, My Lady, that in my respectful submission  
14 is exactly the situation here. The '74 Plan's  
15 claim is conceptually like any other claim. The  
16 only difference is we say it arises under foreign  
17 law, and Your Ladyship will have to determine on a  
18 proper choice of law analysis whether the claim is  
19 governed indeed by US law as we submit or it's not  
20 governed by US law as others submit. And I'll say  
21 for today's purposes, My Lady, if the proper law  
22 governing this claim is British Columbia law then  
23 it's unlikely our claim can succeed. Conversely,  
24 if the proper law as we say it -- the *lex causae*,  
25 to use the lexicon of conflicts of law, if the  
26 *lex causae* is US law then in my respectful  
27 submission it's unlikely the claim would fail.  
28 That is the key differentiating point in relation  
29 to this claim.

30 So that leads us then procedurally into what  
31 we face and --

32 THE COURT: Well, but that's -- isn't that just sort of  
33 one part of the analysis, though. I mean, it  
34 seems to -- I have -- and again, I haven't looked  
35 at this in any detail, but I thought that one of  
36 the issues was whether under US law this was a  
37 claim or not including issues of  
38 extraterritoriality and all of that. But that  
39 secondarily I thought that one of the issues being  
40 raised by Walter Energy and perhaps the union --  
41 the Canadian union, is whether in fact that -- if  
42 it is a valid claim, whether as a matter of  
43 committee or public policy it should even be  
44 acknowledged by this court as a proper debt.

45 MR. DENNIS: Yes, but --

46 THE COURT: So it seems to me that the -- I thought  
47 that was kind of the analysis, the decision tree,

9

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 if I can put it that way.  
2 MR. DENNIS: I think that's fair, My Lady, but the  
3 first issue is the choice of law analysis as  
4 between US law and Canadian law.  
5 THE COURT: M'mm-hmm.  
6 MR. DENNIS: There are a series of questions that fall  
7 under that analysis. There are a series of  
8 questions and, as Your Ladyship says, a decision  
9 tree that you'll have to go through --  
10 THE COURT: M'mm-hmm.  
11 MR. DENNIS: -- the first of which is, which country  
12 has the closest and most real connection to the  
13 claim. But if we pass that first point then  
14 public policy type committee questions can arise.  
15 THE COURT: M'mm-hmm.  
16 MR. DENNIS: On Your Ladyship's comment about  
17 extritoriality, I would say that it really isn't  
18 an issue of extritoriality because it's not the  
19 US that decides whether US law applies here. It's  
20 Your Ladyship and Canadian domestic law that  
21 decides on a proper choice of law analysis whether  
22 the governing proper law is US law.  
23 THE COURT: Well, I don't want to wade into all  
24 these --  
25 MR. DENNIS: Yeah.  
26 THE COURT: -- very complicated issues, but I -- you  
27 know, I think you and I are on the same page in  
28 the sense that there are some US issues, but then  
29 assuming you get over all those hurdles, there are  
30 some Canadian issues --  
31 MR. DENNIS: Right. But those Canadian issues of  
32 course arise within a defined construct as  
33 established by previous case law. So it's not a  
34 free-ranging inquiry as described by case law.  
35 THE COURT: Well, I'm not suggesting that --  
36 MR. DENNIS: Yeah. So --  
37 THE COURT: -- I know the whole landscape here,  
38 Mr. Dennis.  
39 MR. DENNIS: Yeah. So complicated, though, My Lady, is  
40 the operative word. And that's why at letter C  
41 I've referred to the recent decision from the  
42 chief justice in the *Douez* case. And Chief  
43 Justice Bauman said this:  
44  
45 More importantly, it will often not be  
46 possible at the early stage of a stay  
47 application to decide which law applies to

10

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 the merits. It is not always clear which  
2 choice of law rule applies. Even when it is,  
3 some rules are quite fact dependent. In  
4 short, choice of law is complicated.  
5

6 And that, My Lady, is really why we have taken the  
7 position that proceeding on a point of law isn't  
8 viable in this particular situation, why a summary  
9 trial which allows the court to engage with  
10 evidence and make findings as necessary is really  
11 the only streamlined procedure that works in the  
12 circumstances of this case.

13 At letter D I simply refer to the *Alcan* case,  
14 and I shared this with my friends previously as  
15 part of our discussions. These are -- it's now  
16 rule 9-4. It used to be 34. But these are the  
17 preconditions to being able to proceed under the  
18 rules on a question of law. And 3 -- of course  
19 the rule is appropriate only to cases where  
20 assuming allegations in a pleading of an opposite  
21 party are true, a question arises as to whether  
22 they raise the supported claim. And 3, the facts  
23 relating to the point of law must not be in  
24 dispute, and the point of law must be capable of  
25 being resolved without hearing evidence.

26 And on that, My Lady, if I could just turn to  
27 tab 2 of the booklet.

28 THE COURT: M'mm-hmm.

29 MR. DENNIS: I have reproduced the notice of civil  
30 claim, but I've added an annotation to indicate  
31 the position in the response of the United Steel  
32 Workers and Walter Canada [sic]. So a legend is  
33 there at the top left-hand side. An X suggests  
34 that the point has been denied. And so just by  
35 way of example, My Lady, if I could ask you to  
36 turn to page 5 of the pleading, paragraph 26. We  
37 pleaded Walter Energy and its affiliates,  
38 et cetera, comprise an integrated enterprise  
39 group. And that has been denied in the response,  
40 which is entirely fair for them to do so. But we  
41 don't have agreement on the facts. Over the page  
42 to paragraph 34, at all material times Walter  
43 Energy directed and controlled the affairs of the  
44 petitioner centrally from its headquarters in  
45 Alabama, and that fact has been denied. Likewise,  
46 continuing over to page 8 -- page 8, paragraph 53,  
47 the western acquisition and hybrid piling



11

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 [indiscernible] drained funds from Walter Energy.  
2 And paragraph 57, by reason of the western  
3 acquisition, Walter Energy impaired its ability to  
4 satisfy obligations of the '74 Plan. And again,  
5 those are facts that have been denied, which is  
6 entirely fair and legitimate position for the  
7 company to take. But --

8 THE COURT: Well, I suppose what I saw from that,  
9 though, is that you were painting a factual  
10 picture if I can call it that. When I looked at  
11 your pleadings about, you know, the fact that the  
12 American pension plan deserves some sympathy  
13 because all these funds were shipped up to Canada  
14 and therefore the -- in other words, I'm getting  
15 [indiscernible] question here which says -- like,  
16 are those facts truly necessary for you to prove  
17 your claim?

18 MR. DENNIS: In our submission they are. And harkening  
19 back to the chief justice's comment that I  
20 referred to a moment ago, the choice of law  
21 analysis is quite fact dependent, and it's  
22 necessary to understand how this enterprise, we  
23 say an integrated enterprise, operated. How are  
24 persons in positions of authority, decision making  
25 responsibility put in place? How are decisions  
26 made? All of those facts play into the very  
27 contextual choice of law analysis that's involved.  
28 Again, it's which country has the closest and most  
29 real connection to the claim. And there's a  
30 constellation of factors that the court can and  
31 should consider in our submission in arriving at  
32 that determination.

33 THE COURT: M'mm-hmm.

34 MR. DENNIS: And fundamentally, My Lady, what we're  
35 faced with as the pension plan is the difference  
36 between sufficient knowledge to plead and  
37 admissible evidence to prove. We have enough  
38 basis to plead the facts we've pleaded, but absent  
39 discovery it's going to be more difficult for us  
40 to have admissible evidence to prove of those  
41 claims. And this is at tab 3 of the booklet.  
42 Just by way of illustration, this is an excerpt  
43 from the Harvey affidavit that Your Ladyship would  
44 have seen earlier in the proceeding. This is the  
45 file -- there was an affidavit from Mr. Harvey in  
46 this proceeding from December, which exhibited an  
47 affidavit or a declaration that he swore in the US

12

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 proceeding. This is, just to keep it simple, an  
2 extract from that US declaration, which was  
3 exhibit B to that affidavit. And at paragraph 47  
4 on the first page Mr. Harvey declared that:

5  
6 Walter Energy Canada is a direct subsidiary  
7 of Walter Energy, the Canadian holding  
8 company of the debtor's Canadian operations.  
9

10 Then over the page to paragraph 66 under the  
11 heading "Centralized Management."

12  
13 Walter Energy manages its global operations  
14 centrally from its headquarters in  
15 Birmingham, Alabama.  
16

17 And then over the page to 75, fourth line down in  
18 the paragraph:

19  
20 Among other things, the Walter Energy sales  
21 and marketing personnel manage and oversee  
22 the integration of sales and marketing  
23 policies for the debtors, including  
24 monitoring sales contracts, et cetera.  
25

26 So we have some knowledge from Mr. Harvey himself  
27 and other sources that enable us to plead, but  
28 there's a difference between pleadings, Your  
29 Ladyship appreciates, and having admissible proof  
30 of facts. That's where discovery comes in. So if  
31 I come back to the front of my booklet -- and I'm  
32 just about done, on the second page there, I have  
33 some pretty uncontroversial and trite comments  
34 about the significance of discovery to a litigant.  
35 At letter G, for example, and from Justice  
36 La Forest in the *Hunt* case:  
37

38 Discovery is a very important tool of civil  
39 litigation. The ultimate plaintiff must have  
40 a tool to access the internal documents  
41 especially of large corporate monoliths.  
42

43 That was said in the context of a product  
44 liability case but in my submission applies here.  
45 And letter H, the *Mayer* case from our court of  
46 appeal:  
47

13

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis

1 Litigants do not always have access to all of  
2 the relevant evidence bearing on the issues  
3 raised. Often relevant documents are in the  
4 sole possession or control of their  
5 opponents. Document discovery requires the  
6 deponents to disclose such documents, and it  
7 enables the litigants to use them in support  
8 of their case. Also oral discovery offers  
9 the opportunity to learn of relevant evidence  
10 otherwise not known to the examining party to  
11 obtain and to helpful admissions ...  
12

13 Et cetera. The D2 case -- and I won't read the  
14 extract at letter I, but it's simply making the  
15 point that it's no different for summary trial as  
16 Your Ladyship appreciates. We will have the onus  
17 of coming forward with admissible evidence to  
18 prove our case. So that's really been where we've  
19 been stuck. We have -- recognizing the necessity  
20 of moving quickly and the ability in this  
21 proceeding to not be handcuffed by the formality  
22 of the rules, we've said let's work within the  
23 summary trial process, but we'll -- we're content  
24 to have a more targeted, streamlined discovery  
25 process as I said earlier. We've identified half  
26 a dozen -- six to eight discrete subject areas  
27 where we would like discovery on those points.  
28 We've invited the company to give us a time  
29 estimate as to what the timing will be for  
30 responding to that discovery request. We haven't  
31 had a response to that because instead we've been  
32 exploring whether a point of law type approach  
33 would work. And we've, unfortunately, not been  
34 able to identify a discrete question of law that  
35 isn't tied to disputed facts and that would  
36 meaningfully advance the case. And given the  
37 posture we're in, it doesn't appear to us that  
38 rule 9-4 is -- the conditions of rule 9-4 are  
39 satisfied. And it's not just that they're not  
40 satisfied, it's rather what the experience and  
41 wisdom of working with those kinds of cases. Why  
42 rule 9-4 doesn't work in situations where parties  
43 have to lead evidence, and there are disputed  
44 facts. If we embark on that process, I fear we're  
45 going to end up causing more delay than progress.  
46 THE COURT: M'mm-hmm. So you've asked for, I think you  
47 said, six areas of document discovery.

14

Submissions for the UMWA 1974 Pension Plan by Mr. Dennis  
Submissions for the petitioners by Ms. Buttery

1 MR. DENNIS: Eight, sorry.  
2 THE COURT: Eight, sorry.  
3 MR. DENNIS: My -- I have it -- there's an October 3  
4 emails to my friends --  
5 THE COURT: Yeah. No. That's fine. And then what  
6 about discovery? After you get the documents you  
7 want to examine who --  
8 MR. DENNIS: We would anticipate wanting to do a short  
9 examination of Mr. Harvey.  
10 THE COURT: Just Mr. Harvey?  
11 MR. DENNIS: Yes.  
12 THE COURT: Mr. Harvey's the US citizen, I believe? Is  
13 he in Alabama still?  
14 MR. DENNIS: I believe that's correct. But he of  
15 course swore the affidavit in this proceeding.  
16 THE COURT: M'mm-hmm. All right.  
17 MR. DENNIS: And we would be anticipating it --  
18 presumably that, you know, the usual seven hours  
19 or less.  
20 THE COURT: Okay.  
21 MR. DENNIS: Thank you, My Lady.  
22 THE COURT: Thank you, Mr. Dennis.  
23 Ms. Buttery.

24  
25 **SUBMISSIONS FOR THE PETITIONERS BY MS. BUTTERY:**

26  
27 My Lady, I don't need to tell you that this  
28 claim obviously will swamp -- well, has the  
29 possibility of swamping any other claim.  
30 THE COURT: M'mm-hmm.  
31 MS. BUTTERY: And our claims process is in many ways  
32 complete except for this claim. And it's  
33 incredibly important to get it moving forward.  
34 We've been in discussions with the 1974 Plan  
35 claims since -- for over a month. And this is my  
36 concern generally about leading into sure  
37 litigation on this matter because there has to be  
38 an expedited process, and there has to be a  
39 recognition that this claim needs to be determined  
40 quickly and summarily. And Your Ladyship and  
41 Mr. Sandrelli and Mr. Reardon are all familiar  
42 with very complicated points of law and facts that  
43 are determined on an expedited basis. And,  
44 unfortunately, we've lost a month already because  
45 we frankly can't agree on how to proceed in this  
46 matter. So I -- unfortunately, I do think we're  
47 going to need Your Ladyship's direction in setting

15

Submissions for the petitioners by Ms. Buttery

1 this down because I don't frankly see a complete  
2 common ground.  
3 We have suggested that there be essentially a  
4 two stage analysis of this issue. And the first  
5 perceives -- I don't agree that it should be --  
6 frankly, that we should compress it by the rules  
7 because we can agree upon a process that works for  
8 all the parties and having regard to the interest.  
9 And I think it's artificial to have a claims  
10 process all of a sudden required to fit within the  
11 four corners of a rule in a BC court. And so in  
12 our submission the basic issue is whether this  
13 US law or the plan claimed against the Walter  
14 entities applies to corporations existing solely  
15 outside the territory of the US. And we propose  
16 that we proceed by way of expert evidence and that  
17 the basic facts --  
18 THE COURT: Expert evidence on what issue?  
19 MS. BUTTERY: Whether the US -- which law applies. As  
20 a matter of US law does ERISA apply to  
21 corporations existing solely outside the territory  
22 of the US?  
23 THE COURT: Is that that extraterritoriality issue? Or  
24 is it some other issue?  
25 MS. BUTTERY: It really is whether -- the issue, I  
26 believe, is common control, and can common control  
27 exist for corporations incorporated outside of  
28 the US? And frankly for the -- when we told my  
29 friend this for prepared -- for the purposes of  
30 stage 1 --  
31 THE COURT: Sorry, is common control a phrase under  
32 ERISA? Is that --  
33 MS. BUTTERY: I believe it is. Yes.  
34 THE COURT: Okay.  
35 MS. BUTTERY: So we told my friends that for the  
36 purposes of stage 1 only and without prejudice to  
37 stage 2, which is if we actually have to get into  
38 full blown litigation. Essentially we need to  
39 know if ERISA applies before we even get into the  
40 legitimacy of the claim. And so what we told our  
41 friends is we're prepared for the purposes of  
42 stage 1 only to admit that the Walter Energy --  
43 Walter entities were under common control under  
44 ERISA with the caveat that if an expert says no,  
45 common control can only apply if the companies are  
46 incorporated in the US then that would be decided.  
47 There can't be common control if there is -- there

16

Submissions for the petitioners by Ms. Buttery

1 are companies incorporated in Canada. And I think  
2 that's an issue that would be determined by the  
3 expert evidence based on the material already  
4 provided or facts that we can agree upon.  
5 THE COURT: Sorry, I've -- you've lost me there.  
6 You're saying that you would concede the common  
7 control issue, so the issue is only where the  
8 place of incorporation is?  
9 MS. BUTTERY: No. So we would concede common  
10 control --  
11 THE COURT: Yeah.  
12 MS. BUTTERY: -- with the caveat that we don't think US  
13 law provides that common control includes  
14 corporations incorporated outside of the US.  
15 THE COURT: And so that's a --  
16 MS. BUTTERY: So that --  
17 THE COURT: That's a US -- that's a US law issue.  
18 MS. BUTTERY: That's a US law issue that will need to  
19 be determined by the experts. And so we proposed  
20 and exchanged expert evidence. We put forward a  
21 timetable and an exchange of material such that we  
22 can have a threshold issue in essence determined  
23 before we needed to get into the conflicting  
24 facts. Part of the problem of course is that the  
25 Walter Energy -- Walter entities have been sold,  
26 both in the US and in Canada, and it's -- these  
27 aren't people who are necessarily readily  
28 available or extremely concerned about the timing  
29 and the delay. And, for example, Mr. Harvey's  
30 affidavit that my friend just pointed to, just to  
31 be clear, that was an affidavit sworn in the US  
32 proceedings, and of course debtors doesn't include  
33 the Canadian entities in the US proceeding, just  
34 by way of example. Mr. Harvey may or may not be  
35 prepared to provide that information. He did  
36 swear an affidavit and attached it, his own  
37 affidavit. But in that case just simply the  
38 reference to debtors, for example, were the US  
39 debtors not the Canadian debtors. And I apologize  
40 I've just had a quick look through that. I did  
41 receive it at 8:55. I'm a little bit frustrated  
42 at not having a chance to review it at length, but  
43 I think that is illustrative of the fact that I  
44 don't think we're going to come to an agreement as  
45 to procedure. We were offered dates in November,  
46 December, January and February when we inquired in  
47 mid September. And now we're at the end of

17

Submissions for the petitioners by Ms. BATTERY

1           October. The November and probably December dates  
2           are long gone. We're hopeful that we could  
3           proceed to January. And if not, I believe Your  
4           Ladyship might have some time in February. But  
5           presumably given that this is an important issue  
6           of law, there will -- there's a high probability  
7           of appeal on either side, I would think. I don't  
8           know. But I would think that even a determination  
9           by Your Ladyship, which is going to be extremely  
10          complicated and presumably take Your Ladyship some  
11          time after your hear the submissions, we're  
12          looking at months and months and months before the  
13          Walter entities can make any distribution to the  
14          creditors.

15        THE COURT: Let's go back to the discovery that  
16          Mr. Dennis is looking for. Are you saying that --  
17          is that just going to take too long? Or it's  
18          you're not too -- it's not readily available or  
19          what's the --

20        MS. BUTTERY: Two points. Two points, My Lady.

21        THE COURT: Yeah.

22        MS. BUTTERY: And my friend Ms. Paterson may speak up  
23          because I know she's spoken with Mr. Aziz about  
24          this.

25        THE COURT: M'mm-hmm.

26        MS. BUTTERY: But my submission on that is twofold.  
27          The first is they described the areas that they  
28          wanted to explore as discrete. And of course as  
29          litigants do we don't agree that they are discrete  
30          areas, and we think they're extremely broad and  
31          not necessarily required for what we would urge  
32          upon this court as a threshold issue. In addition  
33          there is the difficulty of the fact that this is a  
34          company -- companies that have been restructured  
35          both and sold south of the border and here. And  
36          so the availability of witnesses and documents is  
37          uncertain. And we're afraid that if we proceed by  
38          way of what my friends will urge upon you, which  
39          is -- it seems to me a fairly significant  
40          discovery process, that we could be months down  
41          the road before we even get to setting a hearing  
42          date.

43                So that -- those are my two concerns about  
44          their documentary request, and I don't know,  
45          Ms. Paterson, if you had any other comments about  
46          that.

47        MS. PATERSON: Thank you, My Lady. Ms. BATTERY has

18

Submissions for the petitioners by Ms. Paterson

1 articulated our position very eloquently. I would  
2 add only two points. The first point, and if --  
3 can I confirm can you hear me all right?

4 THE COURT: Yes.

5 MS. PATERSON: Thank you.

6

7

**SUBMISSIONS FOR THE PETITIONERS BY MS. PATERSON:**

8

9

10 The first point is that some of the documents  
11 that our friends have requested are not in the  
12 control of the Canadian entities, and it's not, as  
13 you pointed out, a simple proposition to get US  
14 citizens or US entities to cough up material when  
15 they are not even really in the proceeding any  
16 more themselves. The second point is that the  
17 process that has been proposed by Walter we think  
18 will work, but we recognize that our friends  
19 disagree, and they may have concerns. Given that  
20 this is an insolvency proceeding, we have great  
21 faith that we'll be able to work out those  
22 potential bumps in the road as we go through it.  
23 And if it turns out at the end of the day that  
24 there are no facts that My Lady requires then  
25 we'll be done. But if My Lady indicates that some  
26 facts are required then we will have much more  
27 specific guidance around what evidence we are --  
28 what evidence the court needs to make the  
29 decision.

29 THE COURT: Well, Ms. Paterson --

30 MS. PATERSON: So we are urging upon the court a  
31 flexible approach --

32 THE COURT: Ms. Paterson --

33 MS. PATERSON: -- that doesn't attempt to anticipate  
34 all eventualities up front.

35 THE COURT: Ms. Paterson --

36 MS. PATERSON: Let's just get this going, and we'll  
37 deal with problems when they arise.

38 THE COURT: Ms. Paterson. Ms. Paterson.

39 MS. PATERSON: Yes.

40 THE COURT: Mr. Dennis has pointed me to his claim and  
41 his client's claim and pointed to some factual  
42 denials by the Walter Energy group. Are -- and I  
43 should have asked Ms. Buttery the same question.  
44 Are those matters -- are you prepared to concede  
45 those factual allegations for the purpose of  
46 proceeding in this two stage analysis that you're  
47 talking about?



19

Submissions for the petitioners by Ms. Paterson

1 MS. PATERSON: My Lady, we thought long and hard about  
2 that when we drafted the pleading ourselves. And  
3 we looked at the provisions in ERISA to see what  
4 are the facts that a court attempting to apply  
5 ERISA would need, and those facts come out of the  
6 definition of common control as Ms. Buttery  
7 alluded to. That definition does not include any  
8 of the language that was pointed to by my friend,  
9 and so it was our view that not only do we -- you  
10 know, there may be a dispute about those facts,  
11 but it's not relevant or not necessary for the  
12 court to determine that because it is not even  
13 part of the definition of common control under  
14 ERISA.

15 THE COURT: So is the question -- answer to my question  
16 that if you could concede simply for the purpose  
17 of proceeding this preliminary point, that you  
18 could concede that? Is that the answer to my  
19 question?

20 MS. PATERSON: My Lady, some of the language that was  
21 pointed to is quite pejorative, and so I don't  
22 know that I would want to concede in this  
23 proceeding language that is pejorative  
24 particularly when it's not necessary to do so on  
25 the questions that the court's being asked to  
26 consider. If that is something that would  
27 facilitate this process, we would absolutely take  
28 it back and look at it and think about it. We  
29 have asked our friends to provide us with a list  
30 of the facts that they think are necessary to  
31 determine the specific questions in stage 1. And  
32 we don't have an answer on that yet because  
33 there's been a lot, I think, for both sides to  
34 think about. And so in answer to your question,  
35 My Lady, I don't know that I can give you that  
36 concession today, but we're absolutely prepared to  
37 consider whatever is necessary to move this  
38 forward.

39 THE COURT: All right.

40 MS. BUTTERY: In short, My Lady, we propose -- as  
41 you've heard my friend Ms. Paterson say, we don't  
42 agree that there are any necessary facts that are  
43 not in the pleadings and readily available and  
44 that there are -- it is really a legal issue as  
45 between the choice of law as a threshold issue  
46 that can be determined through the use of experts.  
47 I can't advise the court that we have an expert.

20

Submissions for the petitioners by Ms. Paterson

1 I've asked my friend point blank if they have an  
2 expert. He declined to answer that question. And  
3 so I don't know whether they do. I would assume  
4 that they do. They probably have had one for the  
5 purposes of preparing their claim, quite frankly.  
6 We proposed a schedule -- a couple schedules that  
7 got us through to the January 9th hearing date.  
8 In fairness my friend has tried to work with those  
9 dates but wants larger discovery. And it's just  
10 something that A, we don't think is necessary, and  
11 B, we think it will necessarily draw -- drag the  
12 process down. It just can't be completed in that  
13 time frame.

14 I believe that even though we proposed the  
15 schedule probably two weeks ago now, that if we  
16 were to push it back by two weeks, we could still  
17 achieve the January 9th date, but I'm afraid that  
18 my friends and I and Ms. Paterson are so far apart  
19 as to how we should proceed that that is really  
20 why we're in front of Your Ladyship for some  
21 direction. Because I think we're all in  
22 agreement -- and Mr. Bavis will speak in a moment  
23 and probably is chomping at the bit to do so, it's  
24 his clients who obviously are so affected by this  
25 and its delay. And we urge upon Your Ladyship to  
26 help us get to a January 9th hearing date in the  
27 most expeditious manner possible.

28 I do have to speak to Your Ladyship about --  
29 I'm just flagging this, so I don't forget. After  
30 we're done this, just about another short hearing  
31 regarding an assignment of contract. But  
32 that's -- I'm just raising that, so I don't  
33 forget.

34 THE COURT: Yeah. Okay. Well, let's -- I'll hear from  
35 Mr. Bavis now.

36 MR. BAVIS: Thank you, My Lady. I'm in a difficult  
37 position here because quite frankly, a lot of  
38 what's been discussed today in terms of scheduling  
39 and evidence in phase 1 and phase 2, I'm hearing  
40 for the first time today. For whatever reason  
41 despite the fact that my clients have a  
42 \$12 million claim and have filed a response,  
43 neither the monitor, the Walter Energy Group nor  
44 the mine worker's pension plan have been including  
45 us in any of the correspondence. So I haven't  
46 seen any of these schedules.

47 THE COURT: Well, is it your intention to participate

21

Submissions for the United Steel Workers by Mr. Bavis

1 in this hearing --

2 MR. BAVIS: Oh. Absolutely.

3 THE COURT: -- in a substantive manner, Mr. Bavis?

4 MR. BAVIS: Absolutely. That's why we filed a  
5 response.

6 THE COURT: Okay.

7

8 **SUBMISSIONS FOR THE UNITED STEEL WORKERS BY MR. BAVIS:**

9

10 In particular, I don't think my clients are  
11 prepared to agree that Walter -- the Walter Energy  
12 Group meets the test of a controlled group. Part  
13 of the --

14 THE COURT: Well, I know. I'm assuming you disagree  
15 with everything.

16 MR. BAVIS: Well, a lot of things we're not taking a  
17 position on; right?

18 THE COURT: Oh, I see.

19 MR. BAVIS: Simply because we don't have knowledge  
20 of -- but certainly the way the operations of  
21 Walter Energy as it relates to one mine  
22 underground certainly points to Canadian control  
23 not national control. If you can appreciate I'm  
24 speaking without instructions on this because I  
25 wasn't aware of some of the issues. In my view  
26 there is an important legal threshold issue to be  
27 determined, and that's the extraterritorial  
28 applicability of ERISA and whether or not the  
29 claim out of Alabama was intended to have  
30 extraterritorial effect. For my view it would make  
31 sense to have a process whereby we would deal with  
32 that legal threshold issue. Whether or not that  
33 particular statute has extraterritorial effect  
34 before we move to the factual issues looking --  
35 including the controlled group. So if it's going  
36 to be a -- you know, certainly we -- you had  
37 advised the court -- the parties that you had the  
38 first week of January free. We were expecting you  
39 were keeping that free. Certainly unless there's  
40 some requirement for expert evidence, we even  
41 canvassed, we [indiscernible] looking at expert  
42 evidence, but certainly we could probably deal  
43 with that legal issue -- that threshold issue and  
44 then deal with an issue later on.

45 Obviously it's a significant claim for us.  
46 We want to move along, but maybe it is appropriate  
47 then to seek direction from the court that keep

22

Submissions for the United Steel Workers by Mr. Bavis  
Reply for the monitor by Mr. Reardon

1 the filed responses in this matter included in the  
2 scheduling discussions. It's -- unfortunately, I  
3 don't know if it was an oversight on the part of  
4 the parties or an assumption that we wouldn't be  
5 taking a role, but you can understand this is a  
6 huge monetary claim, 300 miners at the Wolverine  
7 Mine, \$12 million. Obviously my client wants to  
8 have a role in it. So --

9 THE COURT: M'mm-hmm.

10 MR. BAVIS: -- in my view we deal with the legal issue  
11 threshold first and might not need to get to the  
12 other factual issues.

13 THE COURT: All right. Thank you, Mr. Bavis.

14 MS. BUTTERY: My Lady, I can advise, and I believe  
15 speaking for Mr. Dennis too it was inadvertent to  
16 not include Mr. Bavis, and we will endeavour to  
17 include him. My sincere apologies and we will  
18 include him going forward. We obviously recognize  
19 his client's significant claim.

20 THE COURT: All right. Good.

21 Now, Mr. Reardon, do you have anything to add  
22 to all of that?

23

24 **REPLY FOR THE MONITOR BY MR. REARDON:**

25

26 My Lady, my friends have given -- thought  
27 about this in more detail than I have, but I must  
28 say that I agree, I think, with what Mr. Bavis  
29 said that this threshold issue I would have  
30 thought could be dealt with without the necessity  
31 of the fact finding that Mr. Dennis is talking  
32 about. There's no question there will be -- it's  
33 not a strict question of law because the expert  
34 evidence of US law will be taken as fact. So it  
35 probably doesn't -- having thought about this, it  
36 probably doesn't fit into rule 9-4, but I would  
37 say, so what?

38 THE COURT: It would be a summary trial application.

39 MR. REARDON: Well, it would be, I guess. I don't know  
40 what we would call it, but it would be a  
41 determination of --

42 THE COURT: Well, it would be a summary trial type of  
43 process --

44 MR. REARDON: Yes.

45 THE COURT: -- where there would be some evidence.

46 MR. REARDON: Evidence on affidavit or expert report.

47 THE COURT: And necessary -- necessarily fact finding

23

Reply for the monitor by Mr. Reardon

1 by the court and the legal issue.  
2 MR. REARDON: Right. And if Your Ladyship on that  
3 hearing felt that there were actual facts in  
4 dispute as opposed to foreign law issues then it  
5 may not work.  
6 THE COURT: M'mm-hmm.  
7 MR. REARDON: But right now I don't know what those  
8 actual fact issues would be on that discrete  
9 question. So my view has been that that question  
10 might work. And if it's determined one way, it  
11 may be the end of the matter. If it's determined  
12 the other way then we continue on with a more -- a  
13 larger scale process. But I haven't attempted  
14 really to phrase the question, and I certainly  
15 haven't looked at what actual facts might have to  
16 be proven. I've left that up to the actual  
17 disputants. I must say I also apologize to  
18 Mr. Bavis. I set up the calls. The order said --  
19 and this isn't why we excluded him, the order said  
20 that we would schedule on consultation with  
21 the 1974 Plan --  
22 THE COURT: Okay. Well, I don't want to spend time on  
23 that. Everybody's acknowledged the problem, and  
24 Mr. Bavis will be included in all discussions in  
25 the future.  
26 MR. REARDON: So my view, My Lady, is that it is quite  
27 possible that we could proceed on what Ms. Buttery  
28 has called stage 1 with a question that may not  
29 involve actual factual dispute. But if it does  
30 then it may not work that way, and we have to  
31 embark on a larger process with some discovery.  
32 And I'll also say, though, that the list of  
33 classes of documents that my friends have  
34 suggested would be required would -- it may be  
35 discrete issues, but in looking at the those lists  
36 of eight classes, it's some heavy work, and they  
37 may not be available as my friend has said,  
38 Ms. Paterson, I think. Those documents may not be  
39 in control at all.  
40 THE COURT: Well, if that's the case then they're not  
41 discoverable, in any event, from Walter Energy.  
42 They'll have to be obtained --  
43 MR. REARDON: Some other process.  
44 THE COURT: -- if they can be at all, through other  
45 means.  
46 MR. REARDON: Right. But I only point that out because  
47 it -- embarking on that process is maybe even

24

Reply for the UMWA 1974 Pension Plan by Mr. Dennis

1 longer than the schedule that we have been talking  
2 about.

3 THE COURT: M'mm-hmm. All right. Thank you.

4 Mr. Dennis, a short reply?

5 MR. DENNIS: Thank you, My Lady.

6

7

**REPLY FOR THE UMWA 1974 PENSION PLAN BY MR. DENNIS:**

8

9

10 First, the legal issue that Mr. Bavis has  
11 proposed, in my submission, the difficulty is it's  
12 not a threshold issue. The answer to that  
13 question isn't going to determine things. It may  
14 be a question downstream in the analysis that the  
15 court will take into account in assessing the  
16 expectations of the parties, but a decision on  
17 that issue isn't going to resolve matters.  
18 Because as I said earlier, fundamentally it's not  
19 a question of what was intended by the US. It's  
20 not a question of whether congress intended  
21 extritorial effect. Congress doesn't dictate  
22 what law applies in this court. It's a  
23 determination made by Your Ladyship under domestic  
24 law. And that is the fact of an inquiry. The  
25 other point, I guess -- major point, My Lady, is  
26 that again, we're prepared to work with the rules  
27 of court flexibly as we've identified with a more  
28 targeted discovery process, but the rules are a  
29 useful guide. They reflect experience. They  
30 reflect wisdom. We have process. We have rules.  
31 Where a party comes forward and says we don't  
32 think the facts that are pleaded by the claimant  
33 matter to our legal position, we can have a legal  
34 point determined. The *quid pro quo* in that is the  
35 party coming forward and making that argument  
36 says, I will accept everything pleaded as true,  
37 and on that footing I'm going to argue that in law  
38 the claim can't succeed. That's not what's being  
39 presented to Your Ladyship. It's a heads I win,  
40 tails you lose proposal where we want just some  
41 facts, just the facts that we on our side think  
42 are important but not the facts that the other  
43 side is saying to the court are important. And  
44 finally, My Lady, discovery is not a vice to be  
45 avoided. It is a necessary indispensable tool,  
46 standard in civil litigation.

46

THE COURT: Well, this isn't civil litigation,

47

Mr. Dennis. I appreciate you're not in the --

25

Reasons for judgment

Discussion re scheduling and procedure

1 practicing in the insolvency area, but this isn't  
2 civil litigation. This is a claims process.  
3 MR. DENNIS: Absolutely fair, My Lady. And that's why  
4 we have tried to come up with a more streamlined  
5 fashion. But ultimately the court is still going  
6 to make a very, very significant determination  
7 that is tied to facts and is tied to law. And in  
8 my respectful submission it would be a greater  
9 cost for the court to embark on an analysis of  
10 this important legal question without the benefit  
11 of all of the facts that are necessary to that  
12 determination, than simply to move ahead with a  
13 process that the parties can't identify or root in  
14 any previous procedure. That's the difficulty,  
15 My Lady.

16  
17 **(REASONS FOR JUDGMENT UNDER SEPARATE TRANSCRIPT)**  
18

19 MS. BUTTERY: Thank you, My Lady, and are you or  
20 Mr. Reardon -- maybe you're aware if the  
21 January 9th date is still available? I believe  
22 you did reserve it, but I don't know for sure that  
23 that was --  
24 THE COURT: Well, I -- I'm not -- that's -- now, how  
25 many days are we talking about here? Because I  
26 think we talked about there were going to be many  
27 days.  
28 MS. BUTTERY: I think we thought five.  
29 THE COURT: So five. For the week, then.  
30 MS. BUTTERY: For the week of January 9th is what we --  
31 THE COURT: Mr. Dennis, do you have any thoughts on  
32 timing? Or time estimate?  
33 MR. DENNIS: Well, we certainly identified those as  
34 available dates, but we haven't identified what  
35 we're going to be doing on those days. So it's  
36 difficult to assess timing without knowing what's  
37 going to be going forward --  
38 THE COURT: Well, assuming that Ms. Buttery is correct  
39 and assuming you're going to make your argument  
40 somewhat such -- somewhat along the lines of what  
41 you just said this morning --  
42 MR. DENNIS: Right.  
43 THE COURT: -- how many days would you think?  
44 MR. DENNIS: For summary trial of --  
45 THE COURT: Well, a determination of the claims process  
46 on somewhat of a summary trial type process.  
47 MR. DENNIS: Yeah. Well, it wouldn't be less than five

26

Discussion re scheduling and procedure

1 days. There may be -- I think if we're faced with  
2 a summary trial application, we would be bringing  
3 an application ahead of that for document  
4 production. And our position at the hearing  
5 itself would obviously be influenced by the  
6 determination of that preliminary application for  
7 document disclosure. So --

8 THE COURT: Well, I thought that was the whole idea of  
9 having this application here now. I'm saying that  
10 I'm not going to order document production. I'm  
11 going to allow this application to proceed on the  
12 basis that Ms. Buttery might be right in terms of  
13 a threshold issue. If she's wrong and you jump up  
14 in court on January 9th and say this is  
15 inappropriate just as, frankly, a lot of summary  
16 trial go, you know, there's usually a  
17 corresponding application for a determination  
18 that's not appropriate. The usual practice or at  
19 least my usual practice is to say I'm going to  
20 hear them all at the same time, and then I'll  
21 decide.

22 MR. DENNIS: Right.

23 THE COURT: So the first issue, is it appropriate for  
24 summary trial? If the answer to that is yes then  
25 here's the decision on the summary trial.

26 MR. DENNIS: Right. Fair enough, My Lady. I hadn't  
27 appreciated that it was intended to be that strict  
28 a direction. I would -- our preference would be  
29 to actually be in a position to have the summary  
30 trial determined on the merits whether in January  
31 or February or whatever the earliest possibility  
32 is rather than, you know, have to go through the  
33 preliminary of whether it's suitable. If we were  
34 able to be in a position to be ready to proceed on  
35 the merits, that would be the preference. But I  
36 take Your Ladyship's comment. It's difficult in a  
37 situation when you're dealing with suitability and  
38 merits, but it wouldn't be less than five days.

39 THE COURT: Now, that's the way it usually works on  
40 these summary trial applications.

41 MR. DENNIS: It does, but that's in a situation where  
42 both parties have had an opportunity to put  
43 forward all of the evidence they would want to.  
44 In this particular instance we necessarily won't  
45 have all of the evidence that we would need to  
46 rely on at a summary trial.

47 THE COURT: Well, I -- that's usually how it goes. The



27

Discussion re scheduling and procedure

1 other party says, I've only discovered Joe Bloggs  
2 for a day; I need more time with him, or I haven't  
3 got these documents, so I can't proceed. I mean,  
4 that's the way it goes. So --

5 MR. DENNIS: Yeah. That is one --

6 THE COURT: -- you can put forward what evidence you  
7 have or what evidence you might be able to get  
8 from these other parties that have the documents.  
9 that Walter Energy does not have. So if you're  
10 going to make an argument that I don't have  
11 documents and Walter Energy doesn't have the  
12 documents, you might think about what response is  
13 going to be made to that argument in the sense of,  
14 well, have you gone and asked whoever has them?  
15 In other words, that wouldn't be a discovery  
16 issue, in any event, vis-à-vis Walter Energy.

17 MR. DENNIS: No. Quite right. This is the first we've  
18 heard from them today that they don't have some of  
19 the documents. But again, then that makes it  
20 easy, they don't have to produce what they don't  
21 have.

22 THE COURT: Exactly.

23 MR. DENNIS: Yeah.

24 THE COURT: So if -- you know, if you're going to stand  
25 up and say you don't have the documents and  
26 someone else has them then you're going to have to  
27 think about that.

28 MR. DENNIS: Yeah. Fair enough.

29 THE COURT: So are we clear on my stream of  
30 consciousness decision on that?

31 MR. DENNIS: Yes.

32 MS. BUTTERY: Yes, My Lady.

33 THE COURT: All right. So now, in terms of procedure I  
34 think just the pleadings have got you all off on a  
35 good starting point in terms of framing the  
36 issues. So I'm thinking that we should continue  
37 along those lines in the sense of having proper  
38 documentation to -- just as we would a summary  
39 trial, in terms of what the issue is,  
40 Ms. Buttery --

41 MS. BUTTERY: M'mm-hmm.

42 THE COURT: -- and what evidence you intend to rely on.  
43 You know, whether it'd be the expert opinion of  
44 Suzy Q. or whoever it is and whatever affidavits  
45 you want. So I'm expecting that that will be in  
46 your case plan order in terms of delivery of all  
47 of the evidence and then responding times from the

28

Discussion re scheduling and procedure

1           1974 people.  
2       MS. BUTTERY: Yes, My Lady.  
3       THE COURT: Just as you would in a summary trial.  
4       MS. BUTTERY: Yes. Yes.  
5       THE COURT: And then if there's any cross-examination  
6           on affidavits, you know, you've -- I mean, think  
7           of it as if you're doing a summary trial. I know  
8           you're -- perhaps everybody, except Mr. Dennis who  
9           doesn't do a lot of them, but think of it along  
10          those lines in the sense of -- you know, because  
11          the last thing you want if you're right,  
12          Ms. Buttery, is you don't want any evidentiary  
13          issues because those clearly derail a summary  
14          trial and give more fodder to the argument that  
15          it's not appropriate for summary trial.  
16       MS. BUTTERY: Yes, My Lady. Thank you.  
17       MR. REARDON: My Lady, just one point. The monitor did  
18          file a form of response. We didn't take a  
19          position on the points that they raised in the  
20          pleadings. But what we did say was we're not  
21          going to take any position unless Your Ladyship  
22          wants anything of the monitor. So far I've heard  
23          nothing here today that would indicate that you  
24          would need anything from us. But if there's any  
25          role other than trying to keep the parties moving  
26          towards some agreement on facts or whatever, if  
27          there's anything else you want of the monitor, you  
28          just need ask and the monitor is available.  
29       THE COURT: Yes. Well, I mean, I don't -- unless  
30          there's something else going on that I don't know  
31          about, I don't really see any need for the monitor  
32          to spend time on the merits of the issue. You're  
33          just doubling up on legal research and preparation  
34          and all the rest of it.  
35       MR. REARDON: Yes.  
36       THE COURT: So I'm sort of -- I don't really know at  
37          this point that there's any sort of independent  
38          role in respect of this dispute, Mr. Reardon.  
39       MR. REARDON: That's fine.  
40       THE COURT: But again I'll leave you to monitor the  
41          process going forward and make sure everybody's  
42          feet to the fire -- or feet are kept to the fire,  
43          to move things along. And so I think I'll just  
44          have to leave it at that and leave it to your and  
45          Mr. Tillman's judgement in terms of what value you  
46          can add to the process.  
47       MR. REARDON: Thank you, My Lady.

29

Discussion re scheduling and procedure

1 THE COURT: Okay.  
2 MS. BUTTERY: My Lady. Sorry, this is why I made sure  
3 I raised it, so I didn't forget.  
4 THE COURT: Oh. Yes. Yes.  
5 MS. BUTTERY: So we probably have an issue -- an  
6 11-3 issue regarding the assignment of a contract,  
7 a Belcourt-Saxon contract.  
8 THE COURT: Oh.  
9 MS. BUTTERY: And we need to have that determined  
10 before November 9th. We probably need two hours.  
11 THE COURT: November the 9th.  
12 MS. BUTTERY: And I'm not sure -- we're really tight on  
13 that, and Your Ladyship may be away next week, so  
14 I'm not sure if you have some availability for  
15 that or if --  
16 THE COURT: Actually I think I'm sitting on the 8th,  
17 aren't I? No. No. That's the court conference.  
18 You know what? I think the only availability I  
19 have is the 1st. Can you get ready for the 1st?  
20 MS. BUTTERY: I -- the issue was just raised with me  
21 today. Today is only Wednesday. So next Tuesday.  
22 We may -- we don't even know if it will be  
23 contested. It may not even be that long. Let me  
24 speak to Mr. Riesterer, who's just back from  
25 holiday and get back to you. But we would -- are  
26 you available that -- you're available for two  
27 hours that day?  
28 THE COURT: Yes. I don't think I have anything booked  
29 that day. Well, I'll tell you I'm sitting all  
30 this week on another matter. Monday I'm in  
31 Victoria, although maybe you could convince  
32 Ms. Smolen to bring me back --  
33 MS. BUTTERY: Okay.  
34 THE COURT: -- for that. The 1st I don't think there's  
35 anything booked. Wednesday, I'm heading east to  
36 Bermuda.  
37 MS. BUTTERY: Yes. Yes. As many of us in the room are.  
38 THE COURT: As I'm sure some of you are. And then  
39 Monday I'm -- I have -- I think Monday is -- I'm  
40 not sitting that day, although I'm prepared to  
41 come in if it's -- if that works.  
42 MS. BUTTERY: Yes. Okay. That's the 7th, then.  
43 THE COURT: The 7th. I can cancel my day off, then.  
44 And then the 8th, 9th and 10th are the court  
45 conference.  
46 MS. BUTTERY: Okay. Okay. So we're looking at  
47 probably the 1st or the 7th. And we'll try to

30  
Discussion re scheduling and procedure

1           avoid your day off if we could.  
2       THE COURT: 1st or the 7th. Yes. I think those are  
3           the two options.  
4       MS. BUTTERY: I'm just -- okay. I will -- as soon as  
5           I -- November 8th is the deadline. Sorry, I'm  
6           just getting an email -- that's why I'm checking.  
7           I apologize -- from Mr. Riesterer. We have to do  
8           it before the 9th. So the 8th would be the  
9           deadline to be in court. So we will -- I'll see  
10          if the 1st is possible. We'll try to avoid  
11          bringing you in on your day off, if possible.  
12       THE COURT: Yes. All right. And then -- so this is  
13          that limited -- that joint venture in -- Belcourt  
14          thing that I --  
15       MS. BUTTERY: Yes.  
16       THE COURT: And so -- I thought there were discussions  
17          ongoing with the counter -- or the joint venture  
18          partner.  
19       MS. BUTTERY: I understand that there are, but we may  
20          need to actually bring an 11-3 application. So I  
21          will know more -- literally this was just raised  
22          with me just before -- literally as I was almost  
23          walking to court. So you now have as much  
24          information as I do about it.  
25       THE COURT: Oh, I see.  
26       MS. BUTTERY: But I do know that we needed some time  
27          potentially in front of Your Ladyship. So I  
28          will --  
29       THE COURT: Are there any issues with Mr. Siddall's  
30          royalty agreement too in that?  
31       MS. BUTTERY: I don't know. I don't believe that would  
32          be an issue. But I will determine what we need  
33          and when we need it by as soon as I get back to  
34          the office, and I will coordinate with Ms. Smolen  
35          this morning about it.  
36       THE COURT: Yeah.  
37       MS. BUTTERY: And then just -- sorry. Just one more  
38          thing. So we had five days reserved January 9th.  
39       THE COURT: Well --  
40       MS. BUTTERY: I didn't get a straight answer from  
41          Mr. Dennis if he needed more time.  
42       THE COURT: Well, I think -- I think we'll go with five  
43          days.  
44       MS. BUTTERY: Okay.  
45       THE COURT: I'm expecting most of this is going to be  
46          focused legal argument, in any event; is that right?  
47       MS. BUTTERY: I believe so and expert evidence. Yes.

31  
Reporter's certification

1 THE COURT: And hopefully if there can be some exchange  
2 of this information, including legal arguments  
3 ahead of time --  
4 MS. BUTTERY: Yes.  
5 THE COURT: -- then that will streamline the matter  
6 too, and people won't be taken by surprise.  
7 MS. BUTTERY: Yes.  
8 THE COURT: And so I'm expecting to see that in your  
9 case plan proposal --  
10 MS. BUTTERY: I understand.  
11 THE COURT: -- case plan order also.  
12 MS. BUTTERY: Understood, My Lady. Thank you.  
13 THE COURT: Okay. And if you can just make sure the  
14 registry knows to bring the case plan order to my  
15 attention for signature.  
16 MS. BUTTERY: Yeah. I will do. And I believe Ms. Wood  
17 sent you a binder -- an updated binder yesterday.  
18 THE COURT: Yes. I have all of that. Yes. Thank you.  
19 MS. BUTTERY: Perfect.  
20 THE COURT: Thank you.  
21 MS. BUTTERY: Thank you.  
22 THE COURT: All right. Good. We're adjourned, then.  
23 Thank you.  
24 THE CLERK: Order in chambers. Chambers is adjourned.

25  
26 (CHAMBERS ADJOURNED AT 10:12 A.M.)  
27

28 **Reporter's Certification:**

29  
30 I, Christy L. Pratt, RCR, Official Reporter  
31 in the Province of British Columbia, Canada, BCSRA  
32 No. 535, do hereby certify:  
33

34 That an excerpt from the proceedings was  
35 transcribed by me from an audio recording provided  
36 of recorded proceedings, and the same is a true  
37 and accurate and complete transcript of said  
38 recording to the best of my skill and ability.  
39

40 IN WITNESS WHEREOF, I have hereunto subscribed  
41 my name and seal this 10th day of November, 2016.  
42  
43  
44

45  
46 Christy L. Pratt, RCR  
47 Official Reporter

This is **Exhibit "C"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 23 day of November, 2016.

  
\_\_\_\_\_  
A Commissioner for taking  
Affidavits within British Columbia

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Date: 20161026  
Docket: S1510120  
Registry: Vancouver

**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"**

Before: The Honourable Madam Justice Fitzpatrick

**Oral Reasons for Judgment**

In Chambers

Counsel for the Petitioners:

M.I.A. Buttery  
P. Riesterer  
M. Paterson

Counsel for United Mine Workers of America  
1974 Pension Plan and Trust:

C. Dennis, Q.C.  
J.R. Sandrelli

Counsel for the United States Steel Workers,  
Local 1-424:

C.D. Bavis

Counsel for KPMG Inc., Monitor:

P.J. Reardon

Place and Date of Trial/Hearing:

Vancouver, B.C.  
October 26, 2016

Place and Date of Judgment:

Vancouver, B.C.  
October 26, 2016

[1] **THE COURT:** The Monitor has brought this application for directions concerning the procedure for the adjudication of the claim advanced against the petitioners ("Walter Energy") by UMWA 1974 Pension Plan (the "1974 Plan"). In support, the Monitor has filed its Fifth Report dated October 20, 2016.

[2] This further application was anticipated given the Claims Process Order which I granted on August 16, 2016. In accordance with that Order, the parties have filed pleadings. In addition, as discussed in my earlier reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86, 87), a specific process was intended to address this claim given its uniqueness.

[3] Unfortunately, Walter Energy (supported by the United States Steel Workers, Local 1-424 (the "Union")) and the 1974 Plan have been unable to reach an agreement on further procedures to be completed towards adjudicating the claim. All parties seem content to decide the issue by way of summary trial. However, the 1974 Plan seeks a level of discovery that Walter Energy says is unnecessary for the purposes of deciding certain issues which it says are determinative of the matter.

[4] Ultimately, it is up to one side or the other to bring forward what they think is a viable application. What Walter Energy is proposing is a summary trial on a discrete issue that it says will avoid what it describes as the extensive discovery sought by the 1974 Plan. It proposes proceeding on this "threshold" issue relating to whether the U.S. law relied upon by the 1974 Plan even applies to Walter Energy. In addition, Walter Energy states that the discovery sought will be difficult, if not impossible, to obtain and no doubt expensive and time-consuming to the extent that it is possible.

[5] We are all, of course, aware of the principles relating to summary trials, including the court's often concern about litigating in slices. Other issues arise in relation to whether the court can find the facts necessary to decide the issues of fact or law or whether it is unjust to decide the issues on such an application (Supreme Court Civil Rule 9-7(15)).



[6] Even so, it is ultimately up to a party to decide to bring an application or not. Of course, the opposing party is open to say that the matter is not appropriate for summary trial for various reasons, including the lack of relevant discovery, such as is being suggested here by the 1974 Plan. That position will not usually prevent a party from bringing an application; however, it remains the case that if these objections are found to be warranted, that summary trial application may not succeed.

[7] Proceeding to a determination of the issues, as proposed by Walter Energy and without agreement, poses some risk. Even so, I am simply not in a position to say who is right and who is wrong in terms of what level of discovery is warranted for the purpose of deciding this "threshold" issue or even whether a summary trial on this issue is appropriate. This is obviously a complicated matter, and counsel are, of course, more familiar with the issues and the relevant facts and law than the Court.

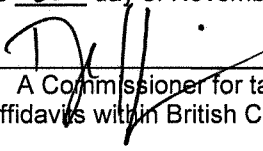
[8] Having said that, I am inclined to let Walter Energy, with the support of the Union, bring the matter forward if they think they can convince the Court that it is appropriate to determine these issues at summary trial in these circumstances. I am not in any position at this time to refuse to hear Walter Energy's application and order the extensive discovery sought by the 1974 Plan. I expect that the parties will continue to discuss the matter and perhaps reach some level of agreement as matters progress. Needless to say, if there is evidence, documentary or otherwise, available to the 1974 Plan other than from Walter Energy, then that can be pursued as the 1974 Plan deems appropriate or necessary.

[9] At the return of the application, the 1974 Plan may still take the position that the application is not appropriate and advance arguments to that effect. If so, Walter Energy and the Union still run the risk that the Court may agree with the 1974 Plan that it cannot or will not decide the issue by summary trial without the sought after disclosure (or perhaps other issues). If that occurs, the parties are not one month, but three to four months behind, in delaying a determination of the issues and hence exacerbating the delay faced by the creditors in terms of a distribution.

[10] In conclusion, I am prepared to allow Walter Energy's proposed application to go forward. I will require that the parties negotiate and agree upon a case plan order, to establish reasonable deadlines for the steps to be completed before the hearing. The hearing has been tentatively scheduled for the week commencing January 9, 2017.

"Fitzpatrick J."

This is **Exhibit "D"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 23 day of November, 2016.

  
A Commissioner for taking  
Affidavits within British Columbia

**Dominguez, Miriam**

---

**Subject:** FW: Scheduling for 1974 Plan Claim

---

**From:** Dennis, Craig

**Sent:** 3-Oct-16 10:29 AM

**To:** Peter Reardon; Sandrelli, John; Buttery, Mary; Wasserman, Marc; Riesterer, Patrick; Paterson, Mary; Williams, Lance; [baziz@bluetreadvisors.com](mailto:baziz@bluetreadvisors.com); Jeffries, Tevia; Caitlin Fell; Wael Rostom; Anthony Tillman; [pjreynolds@kpmg.ca](mailto:pjreynolds@kpmg.ca)

**Subject:** RE: Scheduling for 1974 Plan Claim

Mary et al,

We have taken a further look at the pleadings and in particular the Response to Civil Claim filed by the petitioners on September 23, 2016. The number and nature of the facts contested indicate the need for some discovery in advance of a summary trial. To expedite discovery, we are willing to consider a streamlined process for document discovery involving targeted discovery requests. Document discovery would be governed otherwise by Rule 7-1.

We have prepared an initial list of discovery requests, based on the facts put in issue by the pleadings. In order to advance our discussions around scheduling and timelines, are you able to advise how soon the petitioners could produce documents responsive to the following list of subjects:

- 1) Managerial decision-making by the Petitioners, including without limitation the provision of managerial and administrative services by WE or other affiliated U.S. entities (hereafter, collectively "WE"), after the date of the Western Acquisition;
- 2) Board minutes of the Petitioners, where applicable, after the date of the Western Acquisition;
- 3) Authorizations or protocols established by WE for the Petitioners with respect to the conduct of the business including without limitation strategic or investment decisions and the expenditure of funds;
- 4) The movement of funds between WE and the Petitioners as of and after the date of the Western Acquisition;
- 5) Actions taken by WE to support the business of the Petitioners;
- 6) The financial position of WE from and after the date of the Western Acquisition;
- 7) The withdrawal liability of WE; and
- 8) Corporate relationship between the Petitioners and WE, including without limitation shareholdings from and after the date of the Western Acquisition?

Any sense of timing that you may be able to provide in advance of tomorrow's call would be very helpful. Thanks.



Craig P. Dennis, Q.C.  
Partner

D +1 604 648 6507  
craig.dennis@dentons.com  
Bio | Website

Dentons Canada LLP  
20th Floor, 250 Howe Street Vancouver, BC V6C 3R8 Canada

大成 Salans FMC SNR Denton McKenna Long

Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This email may be confidential and protected by legal privilege. If you are not the intended recipient, disclosure, copying, distribution and use are prohibited; please notify us immediately and delete this email from your systems. To update your commercial electronic message preferences email [dentonsinsightsca@dentons.com](mailto:dentonsinsightsca@dentons.com) or visit our website. Please see [dentons.com](http://dentons.com) for Legal Notices.

onner et recevoir des communications électroniques de notre part, ou pour vous désabonner et ne plus recevoir de telles communications, veuillez visiter le [centre d'abonnement en ligne de McMillan](#).

This is **Exhibit "E"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 23 day of November, 2016.

  
A Commissioner for taking  
Affidavits within British Columbia

November 15, 2016

File No.: 564818-1

Sent via E-mail: [PRiesterer@osler.com](mailto:PRiesterer@osler.com); [mary.buttery@dlapiper.com](mailto:mary.buttery@dlapiper.com);  
[mwasserman@osler.com](mailto:mwasserman@osler.com); [mpaterson@osler.com](mailto:mpaterson@osler.com)

Counsel for the Petitioners  
Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place  
Suite 6200,  
Toronto ON M5X 1B8

Counsel for the Petitioners  
DLA Piper (Canada) LLP  
Suite 2800, Park Place 666 Burrard St.  
Vancouver, BC V6C 2Z7

Attention: **Mary Buttery**

Attention: **Marc Wasserman**  
**Mary Paterson**  
**Patrick Riesterer**

RE: **In the Matter of the CCAA and in the Matter of the Plan of Compromise and Arrangement of Walter Energy Canada Holdings, Inc. and Other Petitioners**  
**SCBC Action No. S-1510120 (Vancouver Registry)**

Dear Sirs/Mesdames:

We write regarding an order of the United States Bankruptcy Court for the Northern District of Alabama, Southern Division, in the Chapter 11 proceedings of New WEI, Inc. (f/k/a Walter Energy, Inc.), *et al.* made November 14, 2016 (the "Disposal Order").

We understand that it is anticipated that, in accordance with the Disposal Order, certain records relating to dealings between the American and Canadian subsidiaries of Walter Energy, Inc. that are dated or related to events occurring on or after January 1, 2011 (the "US Records"), will be transferred to counsel for Walter Energy Canada Holdings, Inc. and its subsidiaries from New WEI, Inc., its US affiliates and/or its counsel in the United States.

The purpose of this letter is to confirm the obligation of the Petitioners in the above-captioned CCAA proceedings, Osler, Hoskin & Harcourt LLP ("Osler") and DLA Piper (Canada) LLP ("DLA Piper") to take reasonable steps to preserve all US Records transferred to them from the United States.

Preservation of the US Records means taking reasonable steps to:

- (a) ensure that the US Records (including electronically stored information) are not destroyed, lost or relinquished to others, either intentionally, or inadvertently such as

through the implementation of an ordinary course document retention/destruction policy;

- (b) ensure that the US Records are not modified – an issue that arises particularly in the case of electronically stored information (which may be modified by the simple act of accessing the information), and in the case of documents used on an ongoing basis in the operation of the business; and
- (c) ensure that the US Records remain accessible – again, an issue that arises particularly in the case of electronically stored information, which may require particular forms of software or hardware to remain readable.

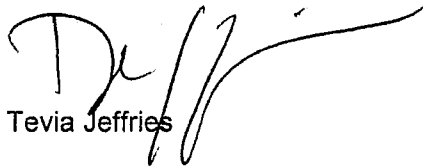
On behalf of the UMWA 1974 Pension Plan (the "**1974 Plan**"), we specifically request and require that Osler, DLA Piper and the Petitioners take all reasonable steps to preserve the US Records. In the case of electronically stored information, please ensure that relevant data is preserved intact and unmodified in its original electronic form.

We will be relying upon this letter in court to evidence our request and notification of your client's preservation obligations.

Compliance with the Petitioners' preservation obligations includes forwarding a copy of this letter to all individuals or organizations that are responsible for any of the items referred to in this letter. If this correspondence is in any respect unclear, please call me immediately.

Thank you in advance for your anticipated cooperation.

Yours truly,  
**Dentons Canada LLP**



Tevia Jeffries

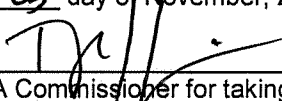
TJ/md

Cc: Attn.: Anthony Tillman, KPMG Inc. (atillman@kpmg.ca)  
Philip J. Reynolds, KPMG Inc. (pjreynolds@kpmg.ca)

Counsel for the Monitor  
Attn.: Peter Reardon, McMillan LLP (Peter.Reardon@mcmillan.ca)



This is **Exhibit "F"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 13 day of November, 2016.

  
\_\_\_\_\_  
A Commissioner for taking  
Affidavits within British Columbia

**Dominguez, Miriam**

---

**From:** Bender, Jay <jbender@bradley.com>  
**Sent:** 13-Nov-16 7:45 PM  
**To:** Mauceri, Rachel Jaffe  
**Cc:** Moore, Cathy  
**Subject:** Re: Walter - Debtors' Motion to Dispose of Records

But you can review them once in Canada. I don't understand the reasoning behind your request.

Sent from my iPad

> On Nov 13, 2016, at 8:20 PM, Mauceri, Rachel Jaffe  
 <rachel.mauceri@morganlewis.com> wrote:

>

> Jay,

>

> I think we'd like to know in advance the nature of the documents that might be shipped to the Canadian entities, and, to the extent the parties are so inclined, see if there was a way to agree on consensual review on an expedited basis.

>

> Rachel

>

> Rachel Jaffe Mauceri

> Morgan, Lewis & Bockius LLP

> 1701 Market Street | Philadelphia, PA 19103-2921

> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001

> rachel.mauceri@morganlewis.com |

> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>

> Assistant: Margaret M. Pongia | +1.215.963.4934 |

> margaret.pongia@morganlewis.com

>

>

> -----Original Message-----

> From: Bender, Jay [mailto:jbender@bradley.com]

> Sent: Sunday, November 13, 2016 6:58 PM

> To: Mauceri, Rachel Jaffe

> Cc: Moore, Cathy

> Subject: Re: Walter - Debtors' Motion to Dispose of Records

>

> Rachel, I don't understand why you need 14 days advance notice before we move documents to Canadian counsel. I will go ahead and tell you now that some documents will be sent to them. We will tell you later what those documents are when we send them there. Your only interest is knowing where they will be so you can access them through discovery in your Canadian proceedings.

>

> On Nov 13, 2016, at 5:38 PM, Mauceri, Rachel Jaffe

<rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>> wrote:

>

> And (with apologies for another follow-up), I've attached the form with our one requested change.

>

> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001  
> rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>>  
> ecast.com/s/6DJABC3pg0giW>  
> Assistant: Margaret M. Pongia | +1.215.963.4934 |  
> margaret.pongia@morganlewis.com  
> <mailto:margaret.pongia@morganlewis.com>  
>  
> From: Mauceri, Rachel Jaffe  
> Sent: Sunday, November 13, 2016 3:47 PM  
> To: 'ccmoore@bradley.com<mailto:ccmoore@bradley.com>'; Bender, Jay  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Cathy and Jay,  
>  
> Just following up - Jay, sorry to omit you earlier.  
>  
> R.  
>  
> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001  
> rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>>  
> ecast.com/s/6DJABC3pg0giW>  
> Assistant: Margaret M. Pongia | +1.215.963.4934 |  
> margaret.pongia@morganlewis.com  
> <mailto:margaret.pongia@morganlewis.com>  
>  
> From: Mauceri, Rachel Jaffe  
> Sent: Sunday, November 13, 2016 7:41 AM  
> To: 'ccmoore@bradley.com<mailto:ccmoore@bradley.com>'  
> Subject: Re: Walter - Debtors' Motion to Dispose of Records  
>  
> Cathy,  
>  
> I'm sorry I didn't connect yesterday. I think this generally works. We'd like  
to include "not less than 14 days'" notice on the transfer of docs to Canada.  
>  
> Could you let me know?  
>  
> Thanks.  
>  
> Rachel  
>  
>  
> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Mobile:

> +1.917.589.5914| Fax: +1.215.963.5001  
> rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/NDdABCWa2M2S7>>  
> Assistant: Peggy Pongia| +1.215.963.4934 |  
> margaret.pongia@morganlewis.com<mailto:margaret.pongia@morganlewis.com>  
> >  
>  
>  
> From: Moore, Cathy [mailto:ccmoore@bradley.com]  
> Sent: Friday, November 11, 2016 05:52 PM Eastern Standard Time  
> To: Mauceri, Rachel Jaffe  
> Cc: Goodchild, III, John C.; Boey, Melissa Y.; Bender, Jay  
> <jbender@bradley.com<mailto:jbender@bradley.com>>  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Thanks Rachel. Following up on our phone call this morning, please see attached draft proposed order and let us know your comments.  
>  
> Thanks,  
> Cathy  
>  
> <image001.png>  
>  
> Cathleen C. Moore  
> Attorney  
> e: ccmoore@bradley.com<mailto:ccmoore@bradley.com> w:  
> bradley.com<<https://protect-eu.mimecast.com/s/bmKGBs36WGWiD>>  
> d: 205.521.8301 f: 205.488.6301  
> One Federal Place, 1819 Fifth Avenue North Birmingham, AL 35203-2119  
> LinkedIn <<https://protect-eu.mimecast.com/s/JnLGBtbp252c8>> | Facebook  
> <<https://protect-eu.mimecast.com/s/XlxOBF59YqYFq>> | Twitter  
> <<https://protect-eu.mimecast.com/s/77J3BtdrZ3Zhb>> | Instagram  
> <<https://protect-eu.mimecast.com/s/E52ZBtLOzNzhM>> | Blogs  
> <<https://protect-eu.mimecast.com/s/R2AdBSlDMwMi0>> | My  
> Bio<<https://protect-eu.mimecast.com/s/v0NmBCQRa7atM>>  
>  
>  
> From: Mauceri, Rachel Jaffe [mailto:rachel.mauceri@morganlewis.com]  
> Sent: Friday, November 11, 2016 7:38 AM  
> To: Moore, Cathy <ccmoore@bradley.com<mailto:ccmoore@bradley.com>>  
> Cc: Goodchild, III, John C.  
> <john.goodchild@morganlewis.com<mailto:john.goodchild@morganlewis.com>  
> >; Boey, Melissa Y.  
> <Melissa.Boey@morganlewis.com<mailto:Melissa.Boey@morganlewis.com>>;  
> Bender, Jay <jbender@bradley.com<mailto:jbender@bradley.com>>  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Cathy,  
>  
> In advance of our 10:30 discussion, attached please see a revised draft order reflecting proposed language.  
>  
> Will you be sending a dial-in?  
>

> Best regards,  
>  
> Rachel  
>  
> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001  
> rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>>  
> [ecast.com/s/6DJABC3pg0giW](https://protect-eu.mimecast.com/s/6DJABC3pg0giW)>  
> Assistant: Margaret M. Pongia | +1.215.963.4934 |  
> margaret.pongia@morganlewis.com  
> <<mailto:margaret.pongia@morganlewis.com>>  
>  
> From: Moore, Cathy [<mailto:ccmoore@bradley.com>]  
> Sent: Thursday, November 10, 2016 4:00 PM  
> To: Mauceri, Rachel Jaffe  
> Cc: Goodchild, III, John C.; Boey, Melissa Y.; Bender, Jay  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Thanks Rachel. We have a conflict at 10 - would 10:30 a.m. (ET) tomorrow work for you?  
>  
> We'll be on the lookout for your proposed language. Based on your summary, I believe that this is broader than we can agree to, but let's discuss in the morning. Another point I wanted to raise ahead of our discussion - is it fair to say that any documents that pre-date 2011 are irrelevant for your purposes? If so, perhaps we can consider how this may be worked into a possible resolution. We can discuss tomorrow. If 10:30 ET works for you, I'll circulate a dial-in.  
>  
> Thanks,  
> Cathy  
>  
> <image001.png>  
>  
> Cathleen C. Moore  
> Attorney  
> e: [ccmoore@bradley.com](mailto:ccmoore@bradley.com)<<mailto:ccmoore@bradley.com>> w:  
> [bradley.com](https://protect-eu.mimecast.com/s/n1kxBh8k2J2UR)<<https://protect-eu.mimecast.com/s/n1kxBh8k2J2UR>>  
> d: 205.521.8301 f: 205.488.6301  
> One Federal Place, 1819 Fifth Avenue North Birmingham, AL 35203-2119  
> LinkedIn <<https://protect-eu.mimecast.com/s/1Z7LBtak4w4iz>> | Facebook  
> <<https://protect-eu.mimecast.com/s/VdlxBSwmElEcv7>> | Twitter  
> <<https://protect-eu.mimecast.com/s/5RdoBCnV515udd>> | Instagram  
> <<https://protect-eu.mimecast.com/s/gLe3BFKaZ7ZFYM>> | Blogs  
> <<https://protect-eu.mimecast.com/s/oaYMBHvXp0phoQ>> | My  
> Bio<<https://protect-eu.mimecast.com/s/Akb9BHZ81Nli9d>>  
>  
>  
> From: Mauceri, Rachel Jaffe [<mailto:rachel.mauceri@morganlewis.com>]  
> Sent: Thursday, November 10, 2016 11:53 AM  
> To: Moore, Cathy <[ccmoore@bradley.com](mailto:ccmoore@bradley.com)<<mailto:ccmoore@bradley.com>>>  
> Cc: Goodchild, III, John C.  
> <[john.goodchild@morganlewis.com](mailto:john.goodchild@morganlewis.com)<<mailto:john.goodchild@morganlewis.com>>>

> >; Boey, Melissa Y.  
> <Melissa.Boey@morganlewis.com<mailto:Melissa.Boey@morganlewis.com>>;  
> Bender, Jay <jbender@bradley.com<mailto:jbender@bradley.com>>  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Cathy,  
>  
> Thank you. I'm a bit jammed this afternoon, but we've drafted some proposed  
language that is under internal/client review, and which we hope to have to you  
later today or early tomorrow.  
>  
> Generally, the language requests that (i) before the Debtors discard/destroy  
any records, they first let the Plan know and give the Plan the opportunity to  
review such records, and (ii) following any such review, to the extent the Plan  
deems any information relevant, the Plan may take (or make copies of) such  
documentation (with all review/copy/delivery costs to be borne by the Plan).  
>  
> How is 10 a.m. ET tomorrow for you?  
>  
> Rachel  
>  
> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001  
> rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>>  
> [ecast.com/s/6DJABC3pg0giW](https://protect-eu.mimecast.com/s/6DJABC3pg0giW)>  
> Assistant: Margaret M. Pongia | +1.215.963.4934 |  
> [margaret.pongia@morganlewis.com](mailto:margaret.pongia@morganlewis.com)  
> <<mailto:margaret.pongia@morganlewis.com>>  
>  
> From: Moore, Cathy [<mailto:ccmoore@bradley.com>]  
> Sent: Thursday, November 10, 2016 10:46 AM  
> To: Mauceri, Rachel Jaffe  
> Cc: Goodchild, III, John C.; Boey, Melissa Y.; Bender, Jay  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Hi Rachel,  
>  
> Thanks for your email. Please let me know if you have time for a quick call  
this afternoon or tomorrow to see if we can work out a resolution.  
>  
> Thanks,  
> Cathy  
>  
> <image001.png>  
>  
> Cathleen C. Moore  
> Attorney  
> e: [ccmoore@bradley.com](mailto:ccmoore@bradley.com)<<mailto:ccmoore@bradley.com>> w:  
> [bradley.com](https://protect-eu.mimecast.com/s/3qn5BspO3v3hwm)<<https://protect-eu.mimecast.com/s/3qn5BspO3v3hwm>>  
> d: 205.521.8301 f: 205.488.6301  
> One Federal Place, 1819 Fifth Avenue North Birmingham, AL 35203-2119  
> LinkedIn <<https://protect-eu.mimecast.com/s/qQ19BF8QM4MU97>> | Facebook

> <<https://protect-eu.mimecast.com/s/47RgBt198k8iln>> | Twitter  
> <<https://protect-eu.mimecast.com/s/deJgBU2axvxH8J>> | Instagram  
> <<https://protect-eu.mimecast.com/s/DJnrBSqMZGZcWg>> | Blogs  
> <<https://protect-eu.mimecast.com/s/8lnqBFx5AaAuVK>> | My  
> Bio<<https://protect-eu.mimecast.com/s/QRo4BCvGz6zhk2>>  
>  
>  
> From: Mauceri, Rachel Jaffe [mailto:[rachel.mauceri@morganlewis.com](mailto:rachel.mauceri@morganlewis.com)]  
> Sent: Tuesday, November 08, 2016 5:06 AM  
> To: Moore, Cathy <[ccmoore@bradley.com](mailto:ccmoore@bradley.com)><<mailto:ccmoore@bradley.com>>>;  
> Boey, Melissa Y.  
> <[Melissa.Boey@morganlewis.com](mailto:Melissa.Boey@morganlewis.com)><<mailto:Melissa.Boey@morganlewis.com>>>;  
> 'sshimshak@paulweiss.com<<mailto:sshimshak@paulweiss.com>>'  
> <[sshimshak@paulweiss.com](mailto:sshimshak@paulweiss.com)><<mailto:sshimshak@paulweiss.com>>>;  
> 'kcornish@paulweiss.com<<mailto:kcornish@paulweiss.com>>'  
> <[kcornish@paulweiss.com](mailto:kcornish@paulweiss.com)><<mailto:kcornish@paulweiss.com>>>;  
> 'ctobler@paulweiss.com<<mailto:ctobler@paulweiss.com>>'  
> <[ctobler@paulweiss.com](mailto:ctobler@paulweiss.com)><<mailto:ctobler@paulweiss.com>>>  
> Cc: Goodchild, III, John C.  
> <[john.goodchild@morganlewis.com](mailto:john.goodchild@morganlewis.com)><<mailto:john.goodchild@morganlewis.com>>>  
> >  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Cathy,  
>  
> Thanks very much for the further information. We are discussing internally and  
with our client and will be back with you shortly.  
>  
> Best regards,  
>  
> Rachel  
>  
> Rachel Jaffe Mauceri  
> Morgan, Lewis & Bockius LLP  
> 1701 Market Street | Philadelphia, PA 19103-2921  
> Direct: +1.215.963.5515 | Main: +1.215.963.5000 | Fax: +1.215.963.5001  
> [rachel.mauceri@morganlewis.com](mailto:rachel.mauceri@morganlewis.com)<<mailto:rachel.mauceri@morganlewis.com>>  
> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm>>  
> [ecast.com/s/6DJABC3pg0giw](https://protect-eu.mimecast.com/s/6DJABC3pg0giw)>  
> Assistant: Margaret M. Pongia | +1.215.963.4934 |  
> [margaret.pongia@morganlewis.com](mailto:margaret.pongia@morganlewis.com)  
> <<mailto:margaret.pongia@morganlewis.com>>  
>  
> From: Moore, Cathy [mailto:[ccmoore@bradley.com](mailto:ccmoore@bradley.com)]  
> Sent: Monday, November 07, 2016 12:03 PM  
> To: Boey, Melissa Y.;  
'sshimshak@paulweiss.com<<mailto:sshimshak@paulweiss.com>>';  
'kcornish@paulweiss.com<<mailto:kcornish@paulweiss.com>>';  
'ctobler@paulweiss.com<<mailto:ctobler@paulweiss.com>>'  
> Cc: Goodchild, III, John C.; Mauceri, Rachel Jaffe  
> Subject: RE: Walter - Debtors' Motion to Dispose of Records  
>  
> Melissa,  
>

> Thank you for your email. The categories of documents that are earmarked for destruction in the event the motion is granted include (by way of illustration) old UMWA complaints, old employee vacation requests, employee handbooks and related health program/drug testing program manuals, shipping tickets and scale tickets for coal shipped more than 2 years ago, copies of old checks (more than 2 years old), old engineering files not relevant to operations or environmental compliance; old land records for property not owned by Walter entities and not conveyed in bankruptcy to other entities, and old employment applications for people not hired by former Walter entities. I have confirmed with my client and my contacts at Warrior Met that the documents referenced in your email are not included among the documents subject to the Debtors' motion. If you would like to suggest language to add to the proposed order to address your concerns, we'd be happy to consider it.

>

> Thanks,

> Cathy

>

> <image001.png>

>

> Cathleen C. Moore

> Attorney

> e: ccmooore@bradley.com<mailto:ccmoore@bradley.com> w:

> bradley.com<https://protect-eu.mimecast.com/s/x1OpBhR4181CD0>

> d: 205.521.8301 f: 205.488.6301

> One Federal Place, 1819 Fifth Avenue North Birmingham, AL 35203-2119

> LinkedIn <https://protect-eu.mimecast.com/s/MLVoBFvXVzVhwa> | Facebook

> <https://protect-eu.mimecast.com/s/Old3BFYmzrzi2V> | Twitter

> <https://protect-eu.mimecast.com/s/95n4BtkvM6MH1N> | Instagram

> <https://protect-eu.mimecast.com/s/lbX8BiKpXNXFmV> | Blogs

> <https://protect-eu.mimecast.com/s/zmOGBs67LoLSDA> | My

> Bio<https://protect-eu.mimecast.com/s/rY11BUlNDnDiW9>

>

>

> From: Boey, Melissa Y. [mailto:Melissa.Boey@morganlewis.com]

> Sent: Sunday, November 06, 2016 11:58 PM

> To: 'sshimshak@paulweiss.com<mailto:sshimshak@paulweiss.com>'

> <sshimshak@paulweiss.com<mailto:sshimshak@paulweiss.com>>;

> 'kcornish@paulweiss.com<mailto:kcornish@paulweiss.com>'

> <kcornish@paulweiss.com<mailto:kcornish@paulweiss.com>>;

> 'ctobler@paulweiss.com<mailto:ctobler@paulweiss.com>'

> <ctobler@paulweiss.com<mailto:ctobler@paulweiss.com>>; Moore, Cathy

> <ccmoore@bradley.com<mailto:ccmoore@bradley.com>>

> Cc: Goodchild, III, John C.

> <john.goodchild@morganlewis.com<mailto:john.goodchild@morganlewis.com>

> >; Mauceri, Rachel Jaffe

> <rachel.mauceri@morganlewis.com<mailto:rachel.mauceri@morganlewis.com>

>

> Subject: Walter - Debtors' Motion to Dispose of Records

>

> [External Email]

> Stephen, Kelley, Claudia, and Cathy,

>

> We are writing regarding the Debtors' Motion for Entry of an Order Authorizing the Abandonment, Disposal, and/or Destruction of Certain Books and Records. As you may know, we represent the UMWA 1974 Pension Plan in Walter Canada's CCAA



proceeding, and are pursuing the 1974 Plan's withdrawal liability claim against the Canadian debtors.

> It is unclear from the Debtors' motion whether any of the records that the Debtors currently plan to abandon, dispose, or destroy are relevant to this claim litigation process. To the extent they are, such documents should be preserved until such time as the 1974 Plan has had the opportunity to review them.

> We would like to discuss the nature and scope of the documents with you, and to reach an agreement pursuant to which the 1974 Plan has the opportunity to review (and copy relevant documents, to the extent applicable, at the 1974 Plan's expense). In the meantime, please note that we plan to file a protective objection pending those discussions.

>  
> Please let us know if you are available for a call next week.

>  
> Thank you very much.

>  
> Kind regards,  
> Melissa.

>  
> Melissa Y. Boey  
> Morgan, Lewis & Bockius LLP  
> 101 Park Avenue | New York, NY 10178-0060  
> Direct: +1.212.309.6915 | Main: +1.212.309.6000 | Fax: +1.212.309.6001  
> melissa.boey@morganlewis.com<mailto:melissa.boey@morganlewis.com> |  
> <https://protect-eu.mimecast.com/s/2DRGBCdMnLnhm><<https://protect-eu.mimecast.com/s/6DJABC3pg0giW>>  
> Assistant: Judith Montelbano | +1.212.309.6339 |  
> [jmontelbano@morganlewis.com](mailto:jmontelbano@morganlewis.com) <<mailto:jmontelbano@morganlewis.com>>

>  
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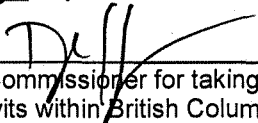
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>

This is **Exhibit "G"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 13 day of November, 2016.

  
A Commissioner for taking  
Affidavits within British Columbia

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

In re:

NEW WEI, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 15-02741-TOM11

Jointly Administered

**ORDER AUTHORIZING ABANDONMENT, DISPOSAL, AND/OR  
DESTRUCTION OF CERTAIN BOOKS AND RECORDS**

Upon consideration of the motion (the "Motion")<sup>2</sup> of New WEI, Inc. and its affiliated debtors and debtors-in-possession (each a "Debtor" and, collectively, the "Debtors"), pursuant to sections 105(a), 363, and 554 of the Bankruptcy Code requesting entry of an Order authorizing the abandonment, disposal, and/or destruction of the Records and the objections filed thereto; and it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that adequate and proper notice of the Motion has been given and that no

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: New WEI, Inc. (*f/k/a* Walter Energy, Inc.) (9953); Atlantic Development and Capital, LLC (8121); Atlantic Leaseco, LLC (5308); Blue Creek Coal Sales, Inc. (6986); Blue Creek Energy, Inc. (0986); New WEI 7, Inc. (*f/k/a* J.W. Walter, Inc.) (0648); Jefferson Warrior Railroad Company, Inc. (3200); New WEI 2, LLC (*f/k/a* Jim Walter Homes, LLC) (4589); New WEI 13, Inc. (*f/k/a* Jim Walter Resources, Inc.) (1186); Maple Coal Co., LLC (6791); Sloss-Sheffield Steel & Iron Company (4884); SP Machine, Inc. (9945); Taft Coal Sales & Associates, Inc. (8731); Tuscaloosa Resources, Inc. (4869); V Manufacturing Company (9790); New WEI 19, LLC (*f/k/a* Walter Black Warrior Basin LLC) (5973); New WEI 18, Inc. (*f/k/a* Walter Coke, Inc.) (9791); New WEI 22, LLC (*f/k/a* Walter Energy Holdings, LLC) (1596); New WEI 20, LLC (*f/k/a* Walter Exploration & Production LLC) (5786); New WEI 1, Inc. (*f/k/a* Walter Home Improvement, Inc.) (1633); New WEI 6 Company (*f/k/a* Walter Land Company) (7709); New WEI 16, Inc. (*f/k/a* Walter Minerals, Inc.) (9714); and New WEI 21, LLC (*f/k/a* Walter Natural Gas, LLC) (1198). The location of the Debtors' corporate headquarters is 2100 Southbridge Parkway, Suite 650, Birmingham, Alabama 35209.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

other or further notice need be given; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors, their estates and all parties in interest; and after due deliberation and sufficient cause appearing therefor; it is hereby ORDERED, ADJUDGED and DECREED that:

1. The Motion is GRANTED as set forth herein.
2. The Debtors are authorized to abandon, dispose of, and/or destroy the Records in a manner the Debtors deem reasonable and appropriate.
3. The Debtors may expend resources of the estate for the purpose of properly disposing of the Records. The Debtors are hereby authorized and empowered to take such steps and to perform such acts as the Debtors deem reasonable and appropriate to implement and effectuate the terms of this Order.
4. Nothing in this Order shall relieve or excuse the Debtors or any other party from complying with any and all applicable Federal Securities Laws.
5. Nothing in this Order shall relieve or excuse the Debtors or any other party from any existing environmental compliance obligations under federal and state law, and nothing in this Order shall be construed as authorizing the disposal, abandonment, or destruction of documents related to such existing environmental compliance obligations.
6. Notwithstanding anything herein to the contrary, the Debtors shall not abandon, dispose of, and/or destroy any Records that (i) the Debtors are required to maintain under their insurance policies or surety bonds (and any related agreements) issued by ACE American Insurance Company or any of its affiliates and successors (collectively, the "Insurance Program"), or (ii) are required or necessary to defend against any claims made under the Insurance Program, including, but not limited to, workers' compensation claims.

7. Notwithstanding anything herein to the contrary, the Debtors shall not, without prior Court approval, abandon, dispose of, and/or destroy any Records relating to any dealings between the Debtors and the Debtors' Canadian subsidiaries which are dated or related to events occurring on or after January 1, 2011 (the "Post-2010 Records"), including but not limited to (i) Post-2010 Records relating to the Debtors' acquisition of the Canadian subsidiaries; (ii) Post-2010 Records relating to corporate governance; and (iii) Post-2010 Records relating to any and all financial transactions between the Debtors and their Canadian subsidiaries. The Debtors may, in their sole discretion, transfer said Post-2010 Records to counsel for the Debtors' Canadian subsidiaries after giving counsel for the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") notice of such transfer.

8. Notwithstanding anything herein to the contrary, the Debtors shall not abandon, dispose of, and/or destroy any Records identified by Mueller Water Products ("Mueller") as relevant to pending tax litigation, including 341 boxes of documents currently in storage at Iron Mountain (the "Mueller Tax Documents"). Notwithstanding the foregoing, the Debtors are authorized to transfer the Mueller Tax Documents to Mueller, without further order of the Court, on terms acceptable to the Debtors, Mueller, and Warrior Met Coal, LLC.

9. The provisions of this Order are non-severable and mutually dependent.

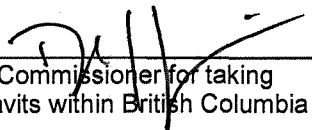
10. This Order shall be effective and enforceable immediately upon entry.

11. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: November 15, 2016

/s/ Tamara O. Mitchell  
TAMARA O. MITCHELL  
UNITED STATES BANKRUPTCY JUDGE

This is **Exhibit "H"** referred to in the Affidavit of  
**Miriam Domínguez** sworn before me at Vancouver  
this 13 day of November, 2016.

  
A Commissioner for taking  
Affidavits within British Columbia

Craig P. Dennis, Q.C.  
Partner  
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D +1 604 648 6507

Dentons Canada LLP  
20th Floor, 250 Howe Street  
Vancouver, BC, Canada V6C 3R8

大成 Salane FMC SNR Denton McKenna Long  
dentons.com

November 22, 2016

File No.: 564818-1

**SENT VIA E-MAIL:** [mpaterson@osler.com](mailto:mpaterson@osler.com)

Counsel for the Petitioners  
Osler, Hoskin & Harcourt LLP  
Suite 6200, 100 King Street West  
1 First Canadian Place  
Toronto, ON M5X 1B8

**Attention: Mary Paterson**

**RE: In the Matter of the CCAA and in the Matter of the Plan of Compromise and Arrangement of Walter Energy Canada Holdings, Inc. and Other Petitioners SCBC Action No. S-1510120 (Vancouver Registry)**

Dear Sirs/Mesdames:

We write on behalf of the UMWA 1974 Pension Plan (the "1974 Plan") regarding your notice of application for summary trial filed November 16, 2016 (the "Notice of Application").

We remain of the view that the Discovery Requests should be answered before a summary trial, including summary determination of the preliminary issues set out in the Notice of Application.

By this letter, we formally request that the Petitioners disclose to the 1974 Plan all documents that are or have been in the Petitioners' possession or control, including the US Records (as defined in our letter dated November 15, 2016) that could, if available, be used by any party of record to prove or disprove a material fact relevant to the issues outlined in the proceeding. In particular, we reiterate our request for documents responsive to the following list of subjects:

- (1) Managerial decision-making by the Petitioners, including without limitation the provision of managerial and administrative services by Walter Energy, Inc. or other affiliated U.S. entities (hereafter, collectively "WE"), after the date of the Western Acquisition;
- (2) Authorizations or protocols established by WE for the Petitioners with respect to the conduct of the business including without limitation strategic or investment decisions and the expenditure of funds;
- (3) The movement of funds between WE and the Petitioners as of and after the date of the Western Acquisition;
- (4) Actions taken by WE to support the business of the Petitioners;

- (5) The financial position of WE from and after the date of the Western Acquisition;
- (6) The withdrawal liability of WE; and
- (7) Corporate relationship between the Petitioners and WE, including without limitation shareholdings from and after the date of the Western Acquisition.

We also request documents evidencing the locality of the management team and key-decision makers of the Petitioners from the incorporation of Walter Energy Canada Holdings, Inc. to April 1, 2016.

Without limiting the generality of the foregoing categories, we request that the Petitioners disclose all board minutes and board resolutions of the Petitioners after the date of the Western Acquisition, management agreements and other intercompany agreements, financial records showing the transfer of funds between WE and the Petitioners, the share or unit register for WE and each of the Petitioners, and any agreement between any officer or director of any of the Petitioners relating to the provision of services to the company after the date of the Western Acquisition.

By this letter, we also advise that we wish to examine for discovery Mr. William G. Harvey on behalf of Walter Energy Canada Holdings, Inc. We propose to examine Mr. Harvey the week of December 12-16. We are open to discussing the timing and venue of the examination.

We ask that you respond to advise whether the Petitioners will be complying with our request for documents and which date during the week of December 12-16 is preferable for the examination for discovery.

Given the limited timeframe before the summary trial, we shortly will be filing a notice of application returnable November 28, 2016 for document discovery along the lines set out in this letter. We will be relying upon this letter in court to evidence our request.

Yours truly,  
**Dentons Canada LLP**



Craig P. Dennis, Q.C.

CPD/md



cc: Attn.: Anthony Tillman, KPMG Inc. (atillman@kpmg.ca)  
Philip J. Reynolds, KPMG Inc. (pjreynolds@kpmg.ca)

Attn: Marc Wasserman, Osler, Hoskin & Harcourt LLP (mwasserman@osler.com)  
Patrick Riesterer, Osler, Hoskin & Harcourt LLP (PRIesterer@osler.com)

Attn: Mary Buttery, DLA Piper (Canada) LLP (mary.buttery@dlapiper.com)

Counsel for the Monitor  
Attn.: Peter Reardon, McMillan LLP (Peter.Reardon@mcmillan.ca)