NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

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

AND

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

PETITIONERS

WALTER CANADA GROUP'S BOOK OF EVIDENCE

(Volume 6)

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EXPERT REPORT OF MARC ABRAMS

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

I. INTRODUCTION

a. Personal Background

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

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

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

b. Instructions Provided To Expert In Relation to Proceedings

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

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

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

c. Overview of The Report

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

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

III. RELEVANT PROVISIONS UNDER ERISA

a. Withdraw Liability Under ERISA

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

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

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

5 29 U.S.C. § 1301(a)(3).

6 29 U.S.C. § 1401; 29 U.S.C. § 1386.

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

8 29 U.S.C. § 1382.

9 29 U.S.C. § 1399(c)(5).

b. "Controlled Group" Liability

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

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

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

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

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

[13] 26 C.F.R. § 1.1563-1(a)(1)(i).

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

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

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

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

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

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

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

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

a. Presumption Against Extraterritorial Application

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

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

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

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

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

22 *Id.* (quotations omitted).

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

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

b. Determining Congressional Intent

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

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

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

24 *Id. at* 2101.

25 *Id.*

26 *Id.*

27 *Id.*

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

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

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

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

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

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

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

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

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

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

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33 *Id.* at *8-10.

34 *Id.* at *7.

35 *Id.* at *9.

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

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

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

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

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

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

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

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

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

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

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

c. Courts Addressing The Extraterritorial Effect Of Other ERISA Provisions

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

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

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

43 *Id.* at *5-6.

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

* * * * *

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

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

45 *Id.* at *2.

46 *Id.*

47 499 U.S. 244 (1991).

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

d. Domestic Application of ERISA to Foreign Entities

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

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

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

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

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

[52] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62 *Id.* at 1020-22.

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

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

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

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63 *Id.* at 1025.

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

65 *Id.* at 943-45.

66 *Id.* at 943.

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

68 *Id.* at 1192-93.

69 *Id.* at 1201.

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

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

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

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

[72] *Id.* at 130.

[73] *Id.* at 127.

[74] *Id*. at 128.

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

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

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

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

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

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

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

V. CONCLUSION

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

VI. CERTIFICATION

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

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

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

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

Marc Abrams

WILLKIE FARR & GALLAGHER LLP

ATTORNEY BIOGRAPHY

PRACTICE

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

Company Side

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

Transactional Side

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

MARC ABRAMS
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Business Reorganization and Restructuring

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EDUCATION

Widener University
JD, 1978
Villanova University
BA, 1975

SELECTED PROFESSIONAL AND BUSINESS ACTIVITIES

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

BAR ADMISSIONS

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

EDUCATION

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

SELECTED SIGNIFICANT MATTERS

Company Side

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

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

SELECTED SIGNIFICANT MATTERS, Continued

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

Mr. Abrams' representative cross-border matters include:

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

SELECTED SIGNIFICANT MATTERS, Continued

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

Transactional Side

Mr. Abrams' representative transactional side matters include:

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

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

PUBLICATIONS, NEWS AND EVENTS

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

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

AWARDS AND RECOGNITIONS

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

Abrams, Marc **EXHIBIT B**

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

Marc,

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

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

Please answer this question.

Best regards,

Mary

Mary Paterson
Partner
Ext. 4924

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

Thank you Mary. This is informative.

Marc

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

Marc,

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

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

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

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

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

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

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

We look forward to working with you.

Mary

OSLER

Mary Paterson
Partner

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EXHIBIT C

Index of Materials Reviewed

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

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

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

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