

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

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In re:	:	Chapter 11
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WALTER ENERGY, INC., <i>et al.</i> ,	:	Case No. 15-02741-TOM11
	:	
Debtors.	:	Jointly Administered
	:	
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**SECOND LIEN NOTES TRUSTEE BOKF, N.A.’S PRELIMINARY OBJECTION  
AND REQUEST TO HOLD IN ABEYANCE THE DEBTORS’ MOTION FOR AN  
ORDER (A) AUTHORIZING THE DEBTORS TO ASSUME A RESTRUCTURING  
SUPPORT AGREEMENT AND (B) GRANTING RELATED RELIEF**

BOKF, N.A. (“BOKF”), in its capacity as Trustee, and Collateral Agent for the 11.0%/12.0% Senior Secured Second Lien PIK Toggle Notes due 2020 (the “PIK Notes”), by and through its undersigned counsel, hereby files this Preliminary Objection and Request to Hold in Abeyance (the “Preliminary Objection”) the Debtors’ Motion for an Order (A) Authorizing the Debtors to Assume a Restructuring Support Agreement and (B) Granting Related Relief [ECF No. 44] (the “RSA Motion”)<sup>1</sup>, and in support thereof, respectfully represents as follows:

**Preliminary Objection**

1. These chapter 11 cases are only in the beginning stages; yet the relief sought in the RSA Motion will dictate their direction and outcome. It is therefore premature to impose such limitations and restrictions at this juncture, particularly when the Debtors face complex legal issues and have a complicated capital structure. Allowing more time before this Court is asked to consider the approval of the RSA Motion will enable other stakeholders, including the Official Committee of Unsecured Creditors (the “Committee”) and non-signatories to the RSA,

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<sup>1</sup> Capitalized terms not otherwise also defined herein shall have the meanings ascribed to the RSA Motion.



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to conduct the appropriate diligence and investigation with respect to the RSA, as well as develop and consider alternatives and negotiate with the Debtors and other parties in interest.

2. In support of the RSA Motion, the Debtors cite only to a single case in this Circuit where a court approved the assumption of a plan support agreement on an interim basis, with final approval conditioned upon confirmation of the plan. *See In re Cypress of Tampa LLC*, No. 8:12-17318, (KRM) (Bankr. M.D. Fl. March 4, 2013). Courts are often reluctant to approve plan support agreements in the infancy of a bankruptcy case where a debtor locks itself into a plan prior to seeking higher or better offers or negotiating with many existing creditors, and have refused to do so. *See e.g. In re Innkeepers USA Trust, et al.*, 442 B.R. 227, 231-32 (Bankr. S.D.N.Y. 2010). Even where courts in other Circuits have approved the assumption a plan support agreements, such approval required specific showings and was not without limitations or restrictions. For example, in *In re Residential Capital LLC*, the court approved a plan support agreement *after* (a) the parties had engaged in an extensive court-supervised mediation process, (b) an examiner had been appointed and conducted an investigation, and (c) the creditors' committee had an opportunity to conduct its investigation. *In re Residential Capital, LLC*, Case No. 12-12020, 2013 WL 3286198 at \*3-\*4 (Bankr. S.D.N.Y. June 27, 2013). In approving the plan support agreement, the court in *Residential Capital* also noted that there were a variety of circumstances under which parties to the plan support agreement could withdraw their support and that the plan support agreement was a part of the process but was far from the last step. *Id.* at \*5, \*19. In stark contrast, the RSA here is far from a mere jumping off point after negotiations. Rather, it locks in both a plan and sale process in the earliest stages of the case, with virtually no room for alternatives.

3. Further, the ability of a debtor to exercise a fiduciary out is an important provision that courts look to when considering a plan support agreement. While the Debtors here can

terminate the RSA on the basis of a Fiduciary Action, the consequences of doing so would be severe, if not catastrophic, and would likely irreparably harm the Debtors, especially because a termination event under the RSA is inextricably tied to the use of cash collateral. *See Innkeepers*, 442 B.R. at 235 (where default provisions in a plan support agreement not only triggered the loss of support of a creditor but also triggered termination of the debtors' right to use cash collateral, such default provisions "cannot be sustained"). Taken as a whole, and given the structure to be implemented, the RSA impedes, if not bars, the Debtors from adequately satisfying their fiduciary duties owed to all creditors.

#### **Request to Hold RSA Motion in Abeyance**

4. BOKF requests that the RSA Motion be marked off the calendar and held in abeyance so that the issues, defects and flaws and the process behind the RSA can be properly addressed.<sup>2</sup>

5. The non-signatory parties should also have the time necessary to diligence and investigate, develop and consider alternatives, the ability to consider the RSA and its consequences, and the opportunity to negotiate with the Debtors and the Steering Committee to ensure that these cases proceed in a fair manner that maximizes value for all creditors.

6. BOKF reserves its rights to supplement, modify and amend this Protective Objection in writing or orally at the final hearing on the RSA Motion.

7. Nothing herein shall prejudice BOKF's rights under the Intercreditor Agreement.<sup>3</sup>

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<sup>2</sup> Given the large amount of debt and the complexity of the issues and concerns already raised, BOKF has begun to consider whether the appointment of examiner is required in these cases and reserves all rights with respect thereto.

<sup>3</sup> For the avoidance of doubt, nothing herein should be deemed or construed as an attempt to take any action in violation of the Amended and Restated Intercreditor Agreement, dated as of March 27, 2014, by and among the Walter Energy Inc., the other Grantors party thereto, Morgan Stanley Senior Funding, Inc., as Credit Agreement Collateral Agent, Wilmington Trust, National Association (as successor in interest to Union Bank, N.A.), as Initial Additional Collateral Agent, and Resigning Trustee, as Second-Lien Notes Collateral Agent (the "Intercreditor Agreement").

## Conclusion

8. For the reasons stated above, BOKF respectfully requests that the RSA Motion be held in abeyance and marked off the calendar until the issues, concerns and objections are adequately addressed.

Dated: August 26, 2015  
New York, New York

### **ARENT FOX LLP**

Attorneys for BOKF, NA, solely in its capacity  
as Successor Indenture Trustee

/s/Mark P. Williams

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing via ECF, which provides notice to all parties of record in these proceedings and upon the Master Service list in accordance with the Court's Order Pursuant to 11 U.S.C §§ 102 and 105(A) and Rules 2002(M) and 9007 Implementing Certain Notice and Case management procedures (Doc. 56) this the 26<sup>th</sup> day of August, 2015.

/s/Mark P. Williams

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OF COUNSEL