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

In re:	)	Chapter 11
WALTER ENERGY, INC., *et al.*,	)	Case No. 15-02741-TOM11
Debtors.[1]	)	Jointly Administered

STATEMENT OF WILMINGTON TRUST, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE, IN SUPPORT OF THE CASH COLLATERAL MOTION

Wilmington Trust, National Association, as indenture trustee (the "Trustee") for the 9.500% Senior Secured Notes Due 2019, by and through its undersigned counsel, hereby submits this statement in support of *The Debtors' Motion for Entry of Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363, 507, and 552, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (A) (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Scheduling a Final Hearing; and (B) Granting Related Relief* [Docket No. 42] (the "Cash Collateral Motion") and respectfully represents and sets forth as follows:

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: 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); J.W. Walter, Inc. (0648); Jefferson Warrior Railroad Company, Inc. (3200); Jim Walter Homes, LLC (4589); 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); Walter Black Warrior Basin LLC (5973); Walter Coke, Inc. (9791); Walter Energy Holdings, LLC (1596); Walter Exploration & Production LLC (5786); Walter Home Improvement, Inc. (1633); Walter Land Company (7709); Walter Minerals, Inc. (9714); and Walter Natural Gas, LLC (1198). The location of the Debtors' corporate headquarters is 3000 Riverchase Galleria, Suite 1700, Birmingham, Alabama 35244-2359.

Background

1. The Debtors entered chapter 11 burdened with nearly $2 billion in first lien debt owed to the First Lien Secured Parties.[2] This first lien debt is split between first lien notes and first lien loans, which are collateralized on a *pari passu* basis by substantially all assets of Walter Energy, Inc. and its wholly-owned U.S. subsidiaries. *See* Cash Collateral Motion ¶¶ 12-14, 16. The Trustee serves as indenture trustee for the first lien notes: the 9.500% Senior Secured Notes Due 2019 (the "First Lien Notes").[3] As of the Petition Date, the total outstanding balance of the First Lien Notes exceeded $990 million. *See* Schedules of Assets and Liabilities for Walter Energy, Inc. [Docket No. 591], Ex. D-1.

2. On the Petition Date, the Debtors filed the Cash Collateral Motion. In exchange for the consent of the Trustee and other First Lien Secured Parties to use their cash collateral, the Debtors agreed to an adequate protection package containing customary and appropriate provisions, including, among other things, (i) periodic cash payments (in this case, equal to all outstanding prepetition interest and just 80% of the postpetition interest due, calculated at the applicable non-default contract rate), (ii) superpriority administrative expense claims, (iii) replacement liens on all of the Debtors' assets (including unencumbered assets), and (iv) subject to the Challenge Period, releases for the First Lien Secured Parties. Pursuant to the *Interim Order (A) Authorizing Postpetition Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, (C) Scheduling a Final Hearing Pursuant to*

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Cash Collateral Motion.

[3] The First Lien Notes were issued under that certain Indenture dated as of September 27, 2013 (as amended, restated, supplemented, or otherwise modified from time to time), by and among Walter Energy, Inc., the guarantors from time to time party thereto, and the Trustee.

Bankruptcy Rule 4001(b) and (D) Granting Related Relief [Docket No. 59] (the "Interim Cash Collateral Order"), this Court approved the Cash Collateral Motion on an interim basis.

3. On August 26, 2015, the Official Committee of Unsecured Creditors (the "Committee") filed its lengthy objection to the Cash Collateral Motion, contesting, among other things, the adequate protection package negotiated by the Debtors with the First Lien Secured Parties. *See* Objection of the Official Committee of Unsecured Creditors [Docket No. 555] (the "Committee Objection"). Certain benefit plans for the United Mine Workers of America and the United Steelworkers joined in the Committee Objection [Docket Nos. 558, 559].[4]

4. On August 28, 2015, the Debtors filed a proposed form of the *Final Order (A) Authorizing Postpetition Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Granting Related Relief* [Docket No. 590] (the "Proposed Final Cash Collateral Order").

Grounds for Support of the Cash Collateral Motion

5. As an initial matter, the Trustee concurs with, and joins in, the well-reasoned arguments set forth in the replies by the Debtors and the Steering Committee in support of the Cash Collateral Motion (collectively, the "Replies"), which are being filed substantially contemporaneously herewith. The Replies demonstrate in detail why the relief requested in the Cash Collateral Motion should be authorized in these chapter 11 cases and is in the best interests

[4] While Dominion Resources Black Warrior Trust, Ramsay-McCormack Land Co., Inc., and WHH Real Estate, LLC also filed objections [Docket Nos. 408, 409, 410, 547, 548, 551], their objections do not challenge the terms of adequate protection, but instead are limited to requests that (i) this Court determine that the production proceeds attributable to their royalty interests are not cash collateral or prepetition collateral of the First Lien Secured Parties and (ii) such proceeds be segregated and turned over. Similarly, the objection of the United Mine Workers of America [Docket No. 378] also does not challenge the adequate protection being provided to the First Lien Secured Parties, but focuses on the provisions in the Proposed Final Cash Collateral Order that relate to the RSA.

of the Debtors, their estates, and their creditors. The Trustee, as a fiduciary for all of the holders of the First Lien Notes (and not a signatory to the RSA), writes separately for the purpose of providing additional support for this Court to approve all of the terms of the adequate protection package being provided to the First Lien Secured Parties and to overrule all pending objections.

6. The adequate protection package set forth in the Proposed Final Cash Collateral Order reflects the prudent exercise of the Debtors' business judgment, is customary and appropriately tailored to the circumstances of these chapter 11 cases, and is in the best interests of the Debtors' estates and its creditors. In exchange for protecting interests securing nearly $2 billion in first lien debt, the Debtors can use the First Lien Secured Parties' cash collateral on a consensual basis, allowing them to move forward with a timely, dual-track process for a reorganization or sale of their businesses that would maximize the value of their estates.

7. Adequate protection "should as nearly as possible under the circumstances of the case provide the creditor with the value of his bargained for rights." *Resolution Trust Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 564 (3rd Cir. 1994) (internal quotations and citations omitted). To achieve this end, the Bankruptcy Code authorizes a debtor to provide adequate protection through various means, including periodic cash payments, replacement liens, or other "indubitable equivalent" of the secured party's interest in the property. 11 U.S.C. § 361. Adequate protection similar to the package in the Proposed Final Cash Collateral Order has been granted in recent large and complex chapter 11 cases, including in this jurisdiction and other energy cases such as *Patriot Coal*. *See, e.g.*, *In re The Great Atl. & Pac. Tea Co.*, Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 12, 2015) [Docket No. 531]; *In re Molycorp, Inc.*, Case No. 15-11357 (CSS) (Bankr. D. Del. July 24, 2015) [Docket No. 278]; *In re Patriot Coal Corp.*, Case No. 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) [Docket No.

230]; *In re Belle Foods, LLC*, Case No. 13-81963-11 (Bankr. N.D. Ala. Aug. 12, 2013) [Docket No. 341].

8. As the party seeking to use cash collateral, the Debtors must either obtain the secured creditor's consent or show that the secured creditor's interest is adequately protected. 11 U.S.C. § 363(c)(2) & (e). Having obtained the First Lien Secured Parties' consent, the Debtors' decision to provide the adequate protection package in exchange for such consent is protected by the business judgment rule. *See Aurelius Capital Master, Ltd. v. Tousa Inc.*, No. 08-61317-CIV, 2009 WL 6453077, at *17-18 (S.D. Fla. Feb. 6, 2009) (upholding a consensual cash collateral order under the business judgment rule); Interim Cash Collateral Order ¶ 7. This consent relieves the Debtors of the burden of proving that the First Lien Secured Parties are adequately protected. *See Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 122 (N.D. Ga. 1989) (finding that "by tacitly consenting to the superpriority lien, those creditors relieved the debtor of having to demonstrate that they were adequately protected"); *contra Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984) ("[W]hen a creditor *opposes* a proposed use of cash collateral, the guiding inquiry is whether its security interests are 'adequately protected' absent the additional protection that the cash collateral would provide.") (emphasis added).

9. The Committee establishes no basis on which to challenge the Proposed Final Cash Collateral Order as a prudent exercise of the Debtors' business judgment. Rather, the Committee admits that use of cash collateral is critical to the continued operations of the Debtors' businesses and to preserve the going concern value of the estates for the benefit of all creditors. *See* Committee Objection ¶ 8. Nor does the Committee provide any factual evidence to controvert the Debtors' showing that the adequate protection package was negotiated in good

faith and at arms' length between independent parties represented by sophisticated counsel. Instead, in a misguided attempt to question the Debtors' sound business judgment, the Committee spins a fantasy that protracted, expensive, bet-the-company cash collateral litigation with the Debtors' largest stakeholders would somehow generate more value for the estates. *See* Committee Objection ¶ 22. In reality, such litigation would have put the Debtors' businesses at substantial risk of imminent shut-down, distracted management and employees from day-to-day operations, frightened customers and vendors, and imposed huge administrative expenses on the estates – all without the certainty that, in the end, the Debtors would prevail in obtaining use of cash collateral over the objections of the First Lien Secured Parties. By asking this Court to entertain this fantasy, the Committee improperly asks this Court to substitute its business judgment for that of the Debtors.

10. "Congress did not contemplate that a creditor could find its priority position eroded and, as compensation for the erosion, be offered an opportunity to recoup dependent upon the success of a business with inherently risky prospects." *Swedeland*, 16 F.3d at 567. There is no dispute that the cash collateral is limited and will decline over the course of the cases. As the Committee acknowledges, the operations of the Debtors are cash flow negative even before subtracting adequate protection payments and the fees and expenses of bankruptcy professionals. *See* Interim Order Ex. A; Committee Objection ¶¶ 31-32. Moreover, the First Lien Secured Parties' interests in the mineral properties are being diminished through the extraction of coal and gas from the ground. Yet even though the Debtors are depleting the First Lien Secured Parties' collateral to save their businesses from catastrophic shut-down for the benefit of all creditors, the Committee contests nearly every aspect of the adequate protection package provided to the First Lien Secured Parties. In essence, the Committee asserts that the First Lien

Secured Parties should receive no meaningful adequate protection at all, but instead be satisfied with the preservation of the Debtors' going concern value – the same going concern that cannot fund its own operations.

11. The Committee's erroneous reasoning would vitiate adequate protection for any creditor with a blanket security interest in a debtor's assets. In nearly every chapter 11 case, including these cases, debtors would be forced to shut down and liquidate absent authorization to use cash collateral. And in nearly every chapter 11 case, going concern value will exceed liquidation value. These universal facts should not manufacture a free option for the unsecured creditors to keep the Debtors' businesses running in hopes that commodity prices will increase – all while using the cash collateral of the First Lien Secured Parties without assuring them the protections negotiated at arms' length with the Debtors.

12. The Committee cites no apposite case to support their misguided theories that going concern value can serve as the sole meaningful form of adequate protection. In contrast to the vastly different circumstances of these coal and gas cases, the cited cases are all single asset real estate cases where the secured creditor opposed the use of postpetition rents. *See, e.g.*, *In re Wrecclesham Grange, Inc.*, 221 B.R. 978 (Bankr. M.D. Fla. 1997) (assisted living facility); *In re Mullen*, 172 B.R. 473 (Bankr. D. Mass. 1994) (commercial rental properties); *In re 499 W. Warren Street Assocs., L.P.*, 142 B.R. 53 (Bankr. N.D.N.Y. 1992) (commercial office building); *In re Salem Plaza Assocs.*, 135 B.R. 753 (Bankr. S.D.N.Y. 1992) (shopping center); *In re Cardinal Indus., Inc.*, 118 B.R. 971 (Bankr. S.D. Ohio 1990) (apartment buildings).

13. Even in the context of a single asset real estate case, the Third Circuit has rejected the notion that a secured creditor would be adequately protected without additional collateral beyond purported improvements to the real estate properties. *See Swedeland*, 16 F.3d at 567.

Unlike an apartment building generating the same monthly rental income to cover fixed expenses, the Debtors' revenues are tied to fluctuating commodity prices in an uncertain and depressed energy market and are not replenishing the cash being used to cover its operational and reorganization expenses. As such, the simple preservation of the Debtors' going concern value fails to suffice as adequate protection.

14. Although the Committee relies heavily on *Patriot Coal*, that case also provides no support for the Committee's misguided theories on adequate protection. In *Patriot Coal*, certain secured lenders contested the debtors' request for priming postpetition financing and use of cash collateral. *See* Tr. of Hr'g, *In re Patriot Coal Corp.*, No. 15-32450 (KLP) (Bankr. E.D. Va. June 3, 2015), at 45:21-48:24. As adequate protection for the opposing secured lenders, the debtors offered replacement liens on unencumbered assets, superpriority claims, postpetition interest accrual, and payment of fees and expenses. *See id*. at 112:6-15. The debtors further argued that the preservation of their going concern value also served as adequate protection for such opposing lenders. *See id*. at 115:23-116:5. Ultimately, the *Patriot Coal* court entered a final order that approved the adequate protection package offered by the debtors to the opposing secured lenders. The court also granted releases and periodic cash payments of *all* prepetition and postpetition interest to certain consenting secured lenders. *See In re Patriot Coal Corp.*, No. 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) [Docket No. 230]. If anything, *Patriot Coal* demonstrates that, in the context of a consensual cash collateral order, as is the case here, the type of adequate protection package provided to the First Lien Secured Parties is both customary and appropriate.

15. Accordingly, for the reasons set forth above and in the Replies, the Trustee respectfully requests that this Court overrule the objections of the Committee (as well as those of

the other parties joining in its objections) and grant the Cash Collateral Motion on the terms set forth in the Proposed Final Cash Collateral Order, including approval for all forms of adequate protection offered therein.

Reservation of Rights

16. The Trustee reserves all of its rights, including the right to amend or supplement this pleading, based upon any facts or arguments that come to light prior to or at the hearing on the Cash Collateral Motion.

WHEREFORE, the Trustee respectfully requests that this Court (i) grant the relief requested in the Cash Collateral Motion on the terms set forth in the Proposed Final Cash Collateral Order and (ii) grant such other and further relief as may be necessary and proper.

Dated: September 1, 2015
Boston, MA

ROPES & GRAY LLP

By: */s/ Patricia I. Chen*

Mark R. Somerstein (*pro hac vice*)
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9000
Facsimile: (212) 596-9090
E-mail: mark.somerstein@ropesgray.com

-and-

Patricia I. Chen
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Telephone: (617) 951-7000
Facsimile: (617) 951-7050
E-mail: patricia.chen@ropesgray.com

Attorneys for Wilmington Trust, National Association, as Indenture Trustee

CERTIFICATE OF SERVICE

I hereby certify that, on September 1, 2015, a true and correct copy of the foregoing *Statement of Wilmington Trust, National Association, as Indenture Trustee, in Support of the Cash Collateral Motion* was sent via ECF Noticing to all parties receiving ECF notices in these chapter 11 cases. In addition, I hereby certify that, on September 1, 2015, a true and correct copy of the foregoing was served on the following parties via electronic mail:

Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
Kelley Cornish
E-mail: kcornish@paulweiss.com
Claudia Tobler
E-mail: ctobler@paulweiss.com
Counsel to the Debtors

Bradley Arant Boult Cummings LLP
1819 Fifth Avenue North
Birmingham, AL 35203
Patrick Darby
E-mail: pdarby@babc.com
Jay Bender
E-mail: jbender@babc.com
Counsel to the Debtors

Bankruptcy Administrator
Northern District of Alabama
1800 Fifth Avenue North
Birmingham, AL 35203
J. Thomas Corbett
E-mail: Thomas_Corbett@alnba.uscourts.gov
Jon Dudeck
E-mail: jon_dudeck@alnba.uscourts.gov

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
Scott Greissman
sgreissman@whitecase.com
Counsel to the Administrative Agent

Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
James Savin
E-mail: jsavin@akingump.com
Counsel to the Steering Committee

Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Ira Dizengoff
E-mail: idizengoff@akingump.com
Kristine Manoukian
E-mail: kmanoukian@akingump.com
Counsel to the Steering Committee

Burr Forman
420 North 20th Street, Suite 3400
Birmingham, AL 35203
Michael L. Hall
E-mail: mhall@burr.com
D. Christopher Carson
E-mail: ccarson@burr.com
Counsel to the Steering Committee

Lowenstein Sandler LLP
65 Livingston Avenue
Roseland, NJ 07068
Sharon Levine
E-mail: slevine@lowenstein.com
Paul Kizel
E-mail: pkizel@lowenstein.com
Philip Gross
E-mail: pgross@lowenstein.com
Nicole Brown
E-mail: nbrown@lowenstein.com
Counsel for the United Mine Workers of America

Rumberger Kirk & Caldwell
2001 Park Place North, Suite 1300
Birmingham, AL 35203
Jennifer Kimble
E-mail: jkimble@rumberger.com
Counsel for the United Mine Workers of America

Benton & Centeno, LLP
2019 Third Avenue North
Birmingham, AL 35203
Lee Benton
E-mail: lbenton@bcattys.com
Jamie Wilson
E-mail: jwilson@bcattys.com
Counsel to Ramsay McCormack Land Co. Inc., Dominion Resources Black Warrior Trust, and WHH Real Estate, LLC

Thompson & Knight LLP
333 Clay Street, Suite 3300
Houston, TX 77002
Tye C. Hancock
E-mail: tye.hancock@tklaw.com
Robert Paddock
E-mail: robert.paddock@tklaw.com
Joseph Bain
E-mail: joseph.bain@tklaw.com
Counsel to Dominion Resources Black Warrior Trust

Christian & Small LLP
1800 Financial Center
505 North 20th Street
Birmingham, AL 35203
Bill D. Bensinger
E-mail: bdbensinger@csattorneys.com
Daniel D. Sparks
E-mail: ddsparks@csattorneys.com
Counsel to the Official Committee of Unsecured Creditors

Morrison & Foerster LLP
250 West 55th Street
New York, NY 10019-9601
Brett H. Miller
E-mail: brettmiller@mofo.com
Lorenzo Marinuzzi
E-mail: lmarinuzzi@mofo.com
Jennifer Marines
E-mail: jmarines@mofo.com
Erica Richards
E-mail: erichards@mofo.com
Counsel to the Official Committee of Unsecured Creditors

Quinn, Connor, Weaver, Davies & Rouco LLP
Two North Twentieth Building
2 – 20th Street North, Suite 930
Birmingham, AL 35203
Glen Connor
E-mail: gconnor@qcwdr.com
George Davies
E-mail: gdavies@qcswdr.com
Counsel to the UMWA 1974 Pension Plan and Trust; UMWA 1993 Benefit Plan; UMWA 1992 Benefit Plan; UMWA Combined Benefit Fund; UMWA 2012 Retiree Bonus Account Plan

Morgan, Lewis & Bockius LLP
One Federal Street
Boston, MA 02110-1726
Julia Frost-Davies
E-mail: julia.frost-davies@morganlewis.com
Counsel to the UMWA 1974 Pension Plan and Trust; UMWA 1993 Benefit Plan; UMWA 1992 Benefit Plan; UMWA Combined Benefit Fund; UMWA 2012 Retiree Bonus Account Plan

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
John Goodchild, III
E-mail: jgoodchild@morganlewis.com
Rachel Mauceri
E-mail: rmauceri@morganlewis.com
Counsel to the UMWA 1974 Pension Plan and Trust; UMWA 1993 Benefit Plan; UMWA 1992 Benefit Plan; UMWA Combined Benefit Fund; UMWA 2012 Retiree Bonus Account Plan

Cohen, Weiss and Simon LLP
330 West 42nd Street
New York, NY 10036-6979
Richard Seltzer
Thomas Ciantra
E-mail: tciantra@cwsny.com
Counsel to United Steel Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union

United Steel Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union
Five Gateway Center, Room 807 USW
Pittsburgh, PA 15222
David Jury
E-mail: djury@usw.org

Arent Fox LLP
1675 Broadway
New York, NY 10019
Andrew I. Silfen
E-mail: andrew.silfen@arentfox.com
Counsel to the Second Lien Trustee

By: */s/ Patricia I. Chen*
Patricia I. Chen