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

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

DEBTORS' OPPOSITION TO COAL ACT FUNDS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

Walter Energy, Inc. and its affiliated debtors and debtors-in-possession in the above-captioned chapter 11 cases (each a "Debtor" and, collectively, the "Debtors") submit this opposition to: (i) the *Emergency Motion for a Stay Pending Appeal* [Docket No. 1619] (the "Stay Motion") filed by the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America 1992 Benefit Plan (together, the "Coal Act Funds"); and (ii) the *UMWA Joinder in the UMWA Funds' Emergency Motion for a Stay Pending Appeal of the Sale Order* [Docket No. 1622] (the "Joinder") filed by the United Mine Workers of America (the "UMWA"), both of which seek to stay the effect of this Court's order approving the sale of the Debtors'

[1] The debtors in these cases (collectively, the "Debtors," and each a "Debtor"), 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.

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Alabama Coal Operations [Docket No. 1584] (the "Sale Order") during the Coal Act Funds' and UMWA's respective appeals.[2]

INTRODUCTION

1. On January 8, 2016, the Court authorized the going-concern sale of substantially all of the Debtors' Alabama mining operations to Coal Acquisition, LLC pursuant to the Asset Purchase Agreement. The Sale, which is currently scheduled to close in late February, will preserve the jobs of many of the Debtors' current employees, and provide for the assumption of $185.5 million in cash, trust funding, and assumed liabilities, including Black Lung and environmental claims. In total, the Sale will bring upwards of $1.3 billion dollars of value to the Debtors' estates, maximizing the value of the estates for the Debtors' creditors. As recognized by the Court—and by the numerous creditor constituencies who support the Sale—the Sale is in the best interest of the Debtors, their estates, their creditors and other parties in interest.

2. Staying the Sale Order risks liquidating the Debtors and triggering a conversion of these cases to Chapter 7. The Buyer would not have entered into the Stalking Horse Agreement, and will not consummate the Sale, if the Acquired Assets are not sold free and clear of all claims, liens, interests and encumbrances[3] pursuant to section 363(f) of the Bankruptcy Code, including Coal Act liabilities. *See* APA § 9.6 (conditions to closing Sale include entry of Sale Order and Sale Order becoming Final Order). The Sale Order thus provides that upon Closing, the Debtors

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[2] Unless otherwise defined, all capitalized terms shall have the meanings provided in the Sale Order or the *Debtors' Omnibus Reply to Objections to the Debtors' Motion for (A) An Order (I) Establishing Bidding Procedures for the Sale(s) of All, or Substantially All, of the Debtors Assets; (II) Approving Bid Protections; (III) Establishing Procedures Relating to the Assumption and Assignment of Executory Contracts and Unexpired Leases; (IV) Approving Form and Manner of the Sale, Cure and Other Notices; and (V) Scheduling an Auction and a Hearing to Consider the Approval of the Sale(s); (B) Order(s) (I) Approving the Sale(s) of the Debtors Assets Free and Clear of Claims, Liens, Encumbrances and Interests; and (II) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Certain Related Relief* [Docket No. 1552] (the "Omnibus Reply"), as applicable. The Omnibus Reply is incorporated herein by reference.

[3] Other than Permitted Encumbrances and Assumed Liabilities, as set forth in the Stalking Horse Agreement.

shall transfer all of the Debtors' rights, title, and interest in the Acquired Assets to the Stalking Horse Purchaser free and clear of all claims, liens, interests, and encumbrances, including Coal Act liabilities. *See* Sale Order ¶ 6. There is nothing unusual or extraordinary about the Sale Order. Bankruptcy courts routinely authorize the sale of a debtor's assets free and clear of a debtor's liabilities related to those assets under section 363(f). If they did not, or could not, the very purpose of section 363—maximizing the value of the debtor's assets for the benefit of all stakeholders—would be gutted.

3. The Coal Act Funds' appeal is rooted in the argument that Coal Act liabilities are not an "interest in property" and are therefore excluded from free and clear sales under section 363(f). But there is nothing unique about the Coal Act that justifies its exclusion from the ordinary operation of section 363(f). Many courts have authorized the sale of a debtor's assets free and clear of Coal Act liabilities. Despite the Coal Act Funds' protests to the contrary, no court has held that a sale of a debtor's assets *cannot* be made free and clear of its Coal Act liabilities. The Coal Act Funds, therefore, have no likelihood of success on the merits of their appeal.

4. Because the Coal Act Funds have no likelihood of success on appeal, they have cited the wrong standard for a stay of the Sale Order. They claim they need show only a serious legal question, citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). *See* Stay Motion ¶ 7. But *Nken v. Holder*, 556 U.S. 418 (2009), provides the governing standard for stays pending appeal, not *Ruiz*. The first stay prerequisite *Nken* requires is a "strong showing" that the movant is "likely to succeed on the merits." *Id.* at 426. The Coal Act Funds have failed to make *any* showing that they will succeed on their Coal Act arguments on appeal, much less a strong showing. They have lost on these precise issues every time they have argued them before. They have also conceded

that there is no case law on their side in the Eleventh Circuit. The Coal Act Funds thus cannot get past the first legal prerequisite for a stay.

5. Moreover, both the private and public interests weigh heavily against a stay. A stay of the Sale Order would be the functional equivalent of liquidating the Debtors. Not closing the Sale would be devastating to the Debtors, their estates, and all stakeholders, because the Debtors do not have the cash to continue operations and will be forced to liquidate. All stakeholders will fare far worse in a liquidation. The Court has recognized that "[u]nder such a scenario, the evidence established that the value of the Debtors' estates will plummet, all of the Debtors' stakeholders will suffer, all of the Debtors' employees will lose their jobs, all of the Debtors' key vendors will lose a business partner, and the Central Alabama community will lose a valuable contributor to its economy and corporate life." 1113/1114 Order ¶ 100. While the Debtors will suffer irreparable harm if the stay is granted and the sale is lost, the Coal Act Funds will suffer no harm if the stay is denied.

6. Finally, neither the Coal Act Funds nor the UMWA can obtain a stay because they can offer no, or only negligible, security to protect the Debtors, the Stalking Horse Purchaser, and numerous other stakeholders from the damages that will result if this $1.3 billion asset sale is thwarted. For all of these reasons, the Court should deny the Stay Motion.

ARGUMENT

I. The Coal Act Funds are not entitled to a stay pending appeal.

7. A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review." *Nken*, 556 U.S. at 427. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). *See also In re Land Ventures for 2*, No. 2:10-CV-839, 2010 WL 4176121, at *1 (M.D. Ala. Oct. 18, 2010) (recognizing that a stay pending appeal is "an exceptional response"). The

Coal Act Funds bear the burden of proving a stay is justified. *Nken*, 556 U.S. at 433–34. The four prerequisites for a stay are (1) whether the Coal Act Funds have made a "strong showing" that they are "likely to succeed on the merits;" (2) whether the Coal Act Funds "will be irreparably injured absent a stay;" (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding;" and (4) "where the public interest lies." *Id.* at 434. *See also Huntsville Golf Dev., Inc. v. Whitney Bank*, No. 5:13-CV-671, 2013 WL 4804283, at *1–2 (N.D. Ala. Sept. 6, 2013) (Hopkins, J.).

8. The burden rests on the moving party to present "satisfactory evidence on all four criteria." *In re Davis*, 373 B.R. 207, 210 (Bankr. N.D. Ga. 2007) (quoting *In re Bilzerian*, 276 B.R. 285, 296 (M.D. Fla. 2002)). "The failure to satisfy any one prong of the standard for granting a stay pending appeal justifies denial of the motion." *Huntsville Golf Dev.*, 2013 WL 4804283, at *2 (citing *In re Lykes Bros. S.S. Co., Inc.*, 221 B.R. 881, 884 (Bankr. M.D. Fla. 1997)).

A. The Coal Act Funds have failed to show any likelihood that they will win on appeal.

9. The Coal Act Funds are not entitled to a stay under the controlling standard articulated by the United States Supreme Court in *Nken v. Holder*. *Ruiz*, cited by the Coal Act Funds, does not provide the governing standard. *See Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (denying request to stay sale order under section 363(f) and quoting *Nken* for proposition that "[a] stay is not a matter of right, even if irreparable injury might otherwise result"). Under *Nken*, the Coal Act Funds must make a "strong showing" they are "likely to succeed on the merits" of their appeal. 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S> 770, 776 (1987)). A better than negligible chance of winning is "not enough." *Id.* at 434. The Coal Act Funds cannot make such a showing.

i. The Coal Act Funds will not prevail on appeal under section 363(f) of the Bankruptcy Code.

10. The central issue in the Coal Act Funds' appeal is whether this Court has authority to enter an order under section 363(f) of the Bankruptcy Code approving the Sale to the Buyer free and clear of the Debtors' Coal Act liabilities. Courts have universally answered that question in the affirmative, and the Coal Act Funds have failed to cite *any* authority to the contrary. In *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), the Fourth Circuit held, as this Court did in the Sale Order, that the Bankruptcy Code authorizes sales free and clear of Coal Act liabilities. The *Leckie Smokeless* court ruled that even if the buyer is a successor under the Coal Act, and even if the Coal Act liability is a "tax," the sale can still be made free and clear of those claims because they are obligations of the debtor. The Coal Act Funds' purported claims under the Coal Act are based on future ownership of the Debtors' property, and are therefore subject to a sale free and clear under section 363(f). *Id.* at 582.

11. Since *Leckie Smokeless*, numerous other courts have approved sales of assets free and clear of Coal Act liabilities. *See, e.g.*, *In re HNRC Dissolution*, No. 04-158 (HRW), 2005 WL 1972592 (E.D. Ky. Aug. 16, 2005) (dismissing Coal Act Funds' appeal of sale order approving sale free and clear of Coal Act liabilities); *In re Patriot Coal*, No. 15-32450-KLP, ECF No. 1615, at 39–42, 125 (Bankr. E.D. Va. Oct. 9, 2015) (confirming plan and approving sale of assets including provision that purchaser shall not be deemed "to have any responsibility for any obligations of all or any of the Debtors based on any theory of successor or similar theories of liability, including, without limitation, pursuant to the Black Lung Act, the Coal Act, or the UMWA 1974 Pension Plan."); *In re WP Steel Venture LLC*, No. 12-11661 (KJC), ECF No. 849, at 5–6, 8, 16–17 (Bankr. D. Del. Aug. 10, 2012) (order overruling Coal Act Funds objection "on the merits" and authorizing sale free and clear of Coal Act liabilities); *In re WP Steel Venture LLC*,

No. 12-11661 (KJC), ECF No. 748 (Bankr. D. Del. Aug. 1, 2012) (Coal Act Funds' objection to sale of assets free and clear of Coal Act liabilities). Thus, the Coal Act Funds have litigated and lost in numerous courts the question of whether a bankruptcy court may authorize the sale of assets free and clear of Coal Act liabilities. They have not cited a single case, published or otherwise, in which they have prevailed on the issues raised in their appeal, despite frequently litigating them. The Coal Act Funds have conceded that there is no precedent supporting their position in the Eleventh Circuit. *See* Stay Motion ¶ 11; Sale Hr'g Trans. at 194:3–5.

12. *Leckie Smokeless* is well-reasoned, widely accepted, and directly on point. Numerous other courts have cited *Leckie Smokeless* favorably for authorizing sales free and clear not only of Coal Act liabilities, but other forms of successor liability as well. *See, e.g.*, *In re PBBPC, Inc.*, 484 B.R. 860, 869 (1st Cir. B.A.P. 2013) (concluding that the "more expansive" reading of the term "any interest" advanced by numerous circuit courts, including the Fourth Circuit in *Leckie Smokeless*, is "more consistent with the language in the Bankruptcy Code and the policy expressed in § 363" and affirming sale free and clear of debtor's experience rating for state unemployment liabilities); *Ind. State Police Pension Trust v. Chrysler, LLC (In re Chrysler LLC)*, 576 F.3d 108, 126 (2d Cir. 2009), *cert. granted and judgment vacated on other grounds*, 558 U.S. 1087 (2009) (affirming sale free and clear of product liability claims and agreeing with *Leckie Smokeless* that "the term 'any interest in property' encompasses those claims that 'arise from the property being sold'"); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289–90 (3d Cir. 2003) (adopting *Leckie Smokeless* analysis and affirming sale free and clear of successor liability for civil rights claims and travel voucher program); *In re Old CarCo LLC*, 538 B.R. 674, 682–687 (Bankr. S.D.N.Y. 2015) (favorably citing the *Leckie Smokeless* court's broad interpretation of "interest in property" and casting doubt on the continued vitality post-*Leckie* of *In re Wolverine Radio Co.*);

In re Ormet Corp., No. 13-10334 (MFW), 2014 WL 3542133, at *2–3 (Bankr. D. Del. July 17, 2014) (favorably discussing *Leckie Smokeless*'s extinguishment of successor liability claims under section 363(f) as necessary to "the important policy inherent in the Bankruptcy Code to maximize the value of the debtor's assets for distribution to creditors in accordance with the priority scheme in the Code" and affirming sale free and clear of successor liability claim for under-funding of debtor's pension plan).

13. The Coal Act Funds are also cannot prevail on their argument that because Coal Act claims might arise in the future they are not "interests" or "claims" subject to section 363(f). Courts have repeatedly rejected this argument. *See, e.g.*, *Leckie Smokeless*, 99 F.3d at 580–82; *In re USA United Fleet Inc.*, 496 B.R. 79, 88 (Bankr. E.D.N.Y. 2013) (holding that "it is not relevant that [a purchaser's] liability was contingent on future events" for purposes of selling free and clear under section 363(f); *PBBPC*, 484 B.R. at 870 ("[W]e find no legal basis for [the] argument that, as a general matter, property cannot be sold to an unrelated third party free and clear of a debtor's future tax obligations.") (quoting *Leckie Smokeless*, 99 F.3d at 586); *In re P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (assets could be sold free and clear of "a contingent claim against debtor's estate"); *In re Old Cargo LLC*, No. 09 CIV. 8875 CM, 2010 WL 9461648, at *16 (S.D.N.Y. July 2, 2010), *aff'd sub nom*. *In re Old Carco LLC*, 438 F. App'x 30 (2d Cir. 2011) (sale was free and clear of claim even though "the claim against New CarCo did not accrue until the assets were transferred"). A contrary result would defeat section 363(f)'s core purpose of increasing the value of a debtor's assets for the benefit of all creditors. *See Leckie Smokeless*, 99 F.3d at 586–87. The Coal Act Funds also seek to disrupt the priority scheme of the Bankruptcy Code by allowing the Coal Act Funds to recover more than other unsecured creditors. *See Trans World Airlines*, 322 F.3d at 291–92. Neither result is tenable under the facts or the law.

14. The Coal Act Funds have not and cannot make a strong showing that they are likely to prevail on the merits of their appeal, and this Court can and should deny the Stay Motion on this basis alone.

ii. The Coal Act Funds will not prevail on appeal under the Tax Anti-Injunction Act.

15. As noted above, well-settled law authorizes this Court to enter the Sale Order free and clear of the Debtors' Coal Act liabilities. This dispute is about the scope of section 363(f), and the Coal Act Funds' arguments under the Tax-Anti Injunction Act are nothing more than a red herring intended to generate confusion and complicate a simple principle—that a bankruptcy court has authority under section 363(f) to order a sale free and clear of Coal Act liabilities. *See* Sale Hr'g Trans. at 35: 21–25 ("Our position is that the Anti-Injunction Act prohibits Your Honor from exercising jurisdiction to enjoin the Coal Act Funds from collecting for periods that occur after a bankruptcy is over. That is the entire legal issue right there."). In any event, the Coal Act Funds cannot prevail on appeal under the Tax Anti-Injunction Act, either.

16. The Coal Act Funds have not cited a single case holding that the Tax Anti-Injunction Act deprives bankruptcy courts of jurisdiction to enter sale orders under section 363(f). Generally, the Tax Anti-Injunction Act does not prevent this Court from enforcing specific provisions of the Bankruptcy Code. *In re Wilshire Courtyard*, 729 F.3d 1279, 1293 (9th Cir. 2013); *In re Hechinger Inv.*, 335 F.3d 243, 247 (3d Cir. 2003). Specifically, as discussed above, section 363(f) allows this Court to approve an asset sale free and clear of Coal Act obligations. *Leckie Smokeless*, 99 F.3d at 581–82. *See also USA United Fleet*, 496 B.R. at 84 ("[E]ven when a sale order affects a taxing authority's ability to collect a tax, the [Tax Injunction Act] does not act as a *per se* bar.").

17. The Tax Anti-Injunction Act, by its own terms, does not apply to the Sale Order. *See* Omnibus Reply at 19–24 (discussing applicability of the Tax Anti-Injunction Act to the Sale). The Tax Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). *See also Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1129, 1133 (2015) (observing the Tax Injunction Act was modeled after the Tax Anti-Injunction Act and holding it does not bar "every suit" that merely has an indirect "negative impact" on taxes); *Hibbs v. Winn*, 542 U.S. 88, 103–05 (2004) (same, holding it is not a "sweeping congressional direction to prevent federal-court interference with all aspects" of "tax administration"). The "purpose" of the Sale, in the language of 26 U.S.C. § 7421(a), is not to "restrain" the payment of Coal Act premiums. The purpose of the Sale is to save the Debtors' businesses and maximize value for all constituencies. Accordingly, the Tax Anti-Injunction Act does not apply.

18. Finally, the premiums for health benefits under the Coal Act are not "tax[es]" for purposes of the Tax Anti-Injunction Act. The Supreme Court in *National Federation of Independent Business v. Sebelius* held that the Tax Anti-Injunction Act does not apply where Congress labels something a "penalty" rather than a "tax." 132 S. Ct. 2566, 2584 (2012). While the label applied cannot change the substantive or constitutional nature of the exaction, the label determines the applicability of this narrow jurisdictional statute because both the Tax Anti-Injunction Act and the Coal Act are "creatures of Congress's own creation." *Id.* at 2583. The Tax Anti-Injunction Act does not apply to the Sale Order because the Coal Act labels the exactions at issue as "premiums" to be collected by the Commissioner of Social Security, 26 U.S.C. § 9704, not "taxes" to be collected by the Internal Revenue Service.

19. For the foregoing reasons, the Coal Act Funds have not and cannot show a likelihood of success on appeal. The Stay Motion should be summarily denied.

B. The Coal Act Funds have failed to demonstrate an irreparable injury.

20. A showing of irreparable harm must be "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). Only showing some "possibility of irreparable injury" fails to satisfy *Nken*'s second requirement. 556 U.S. at 434–35. "Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough." *In re Lickman*, 301 B.R. 739, 748 (Bankr. M.D. Fla. 2003) (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987)).

21. The Coal Act Funds argue that they will suffer irreparable harm because they will likely lose their right of appeal without a stay. *See* Stay Motion at 9. The Debtors agree with the Coal Act Funds that closing the Sale will moot their appeal, but mootness does not constitute irreparable harm. The overwhelming majority of courts, including the district courts within the Eleventh Circuit, have recognized that mootness "is insufficient by itself to establish irreparable injury." *In re Charter Co.*, 72 B.R. 70, 72 (M.D. Fla. 1987); *accord, e.g.*, *In re F.G. Metals, Inc.*, 390 B.R. 467, 472 (Bankr. M.D. Fla. 2008); *In re Fullmer*, 323 B.R. 287, 304 (Bankr. D. Nev. 2005); *In re Convenience USA, Inc.*, 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003); *In re Ba–Mak Gaming Int'l, Inc.*, No. 95-CV-1991, 1996 WL 411610, at *2 (E.D. La. July 22, 1996); *In re 203 N. LaSalle St. P'ship*, 190 B.R. 595, 598 (N.D. Ill. 1995); *In re Best Prods. Co.*, 177 B.R. 791, 805 n.12 (S.D.N.Y. 1995); *In re Moreau*, 135 B.R. 209, 215 (N.D.N.Y. 1992); *In re Kent*, 145 B.R. 843, 844 (Bankr. E.D. Va. 1991); *In re Asheville Bldg. Assocs. v. Carlyle Real Estate Ltd. P'ship, VIII*, 93 B.R. 920, 923 (W.D.N.C. 1988); *In re Great Barrington Fair & Amusement, Inc.*, 53 B.R.

237, 240 (Bankr. D. Mass. 1985); *In re Baldwin United Corp.*, 45 B.R. 385, 386-87 (Bankr. S.D. Ohio 1984).

22. Moreover, the record shows the Coal Act Funds will not suffer any harm if the Sale closes. The Debtors are current on their premium payments under the Coal Act, and there are $4.2 million in letters of credit that will pay premiums for a year following closing. *See* Sale Hr'g Trans. at 124:2–125:4 (Mesterharm testimony); Sale Hr'g Mesterharm Exs. 6 & 7. Multiple sources fund Coal Act liabilities, including supplemental federal funding from reclamation assessments and payments by Federal agencies. *See* 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h)–(i). Furthermore, under the Coal Act, the Coal Act Funds can adjust premiums charged to employers required to contribute to the 1992 Plan in order to discharge their obligation to provide benefits for retirees. *See* 26 U.S.C. § 9712(d)(2)(B); *Holland v. Williams Mountain Coal,* 256 F.3d 819, 821 (D.C. Cir. 2001) ("The plaintiff trustees are obligated to provide benefits for retirees who are entitled to benefits under § 9711 . . . . If they cannot compel payment by the last signatory operator, a related person, or a 'successor-in-interest,' they can adjust the premiums they charge employers obliged to contribute to the 1992 Plan. [26 U.S.C. § 9712(d)(2)(B)]. Thus there is no chance of the miners being denied their benefits."). Without any evidence of possible irreparable injury, the Coal Act Funds have failed to meet their burden for establishing the second prerequisite for a Rule 8007 stay.

C. The balance of the private and public interests weighs against a stay.

23. The balance of the parties' and the public's interests concerning the Sale weighs heavily against a stay. Any delay in implementation of the Sale Order will result in profound and likely irreparable cost to the Debtors and their estates. At the Sale Hearing, the Debtors testified that their cash would decrease to $30 million—the minimum amount needed to safely shut down

their mines—by the second week of February 2016. *See* Sale Hr'g Trans. at 62:2–9 (Zelin testimony regarding cash balance). On January 14, 2016, the Debtors filed a motion requesting additional post-petition financing of $50 million and continued use of cash collateral in order to continue operations as they work towards consummating the Sale. *See Debtors' Motion for an Order (A) Authorizing the Debtors to Obtain Senior Secured Postpetition Financing, (B) Authorizing Continued Postpetition Use of Cash Collateral, (C) Granting Adequate Protection to Prepetition Secured Parties and (D) Granting Related Relief* [Docket No. 1646] (the "DIP Motion"). If this Court stays the Sale, the Debtors will not be able to secure the requested $50 million of post-petition financing, and therefore will not have sufficient liquidity to continue operations for more than another week or two. *See* Sale Hr'g Trans. at 62:6–13 (Zelin testimony regarding effect of failure to defer adequate protection payments); DIP Motion at 11 (order staying Sale Order is event of default under the DIP Credit Agreement).

24. Moreover, a delay will jeopardize the Sale itself, which the Court and the vast majority of the Debtors' stakeholders recognize is in the best interest of the estates and creditors. *See* Sale Order at 2 ("The relief granted herein is in the best interests of the Debtors, their estates and creditors, and other parties in interest."). If the Sale is stayed, the Stalking Horse Purchaser would likely walk away from the deal, leaving the Debtors, their mines, the miners and other employees, and the community in an economic and environmental crisis. The very distinct possibility that the Debtors will have to liquidate if the Sale does not move forward is sufficient cause to deny the Stay Motion. *In re Gen. Motors Corp.*, 409 B.R. 24, 33 (Bankr. S.D.N.Y. 2009) ("We're not talking about delaying distributions to creditors for a little longer. We're talking about the death of a company. If I or any other court were to grant the requested stay, GM would soon have to liquidate.").

25. A bond might provide paper security, but it cannot preserve the tenuous status quo pending the Sale, nor can it protect the miners and the community against the risk of irreparable loss. *See id.* ("[W]ith the death of GM on the line, the damage to the public interest would be irreparable."). If the Sale is stayed, the Debtors are at risk of losing a $1.3 billion, value-maximizing asset sale that will benefit their stakeholders, resulting in immeasurable harm to the creditors in the chapter 11 cases, and the broader community. The Coal Act Funds, on the other hand, will suffer no harm if the Sale closes. This gross imbalance warrants denial of the Stay Motion. *In re Section 20 Land Grp.*, 252 B.R. 819, 821 (Bankr. M.D. Fla. 2000) (foreclosing inquiry into other requirements for stay after determining non-movants would suffer "substantial harm").

II. The Coal Act Funds cannot obtain a stay without posting a bond sufficient to protect the Debtors and other parties against losses they will suffer pending the appeal.

26. The Coal Act Funds cannot avoid having to post a bond as a prerequisite to a stay of the sale. *In re Bleaufontaine*, 634 F.2d 1383, 1390 & nn.13–14 (5th Cir. Unit B 1981); *In re Dutch Inn of Orlando,* 614 F.2d 504, 506 (5th Cir. 1980). *See also* FED. R. CIV. P. 62; FED. R. BANKR. P. 7062 & 8007; *In re Horizon Natural Res.*, No. 04-cv-00158-HRW, ECF No. 81, at 8–9 (E.D. Ky. Feb. 25, 2005) (denying stay of sale free and clear of Coal Act liabilities when Coal Act Funds were unable to post $500 million bond). Without a bond, the Coal Act Funds cannot obtain a stay. *See* COLLIER ON BANKRUPTCY ¶ 8007.09 (16th ed. 2015) (explaining the party desiring a stay under Rule 8007 "is normally required to file a bond in a sum sufficient to protect the rights of the party who prevailed in the bankruptcy court"); *In re Gleasman*, 111 B.R. 595, 602 (Bankr. W.D. Tex. 1990) ("There is in general a strong policy against granting stays without providing some security to the adverse party."). It has long been the law in this district that one seeking a stay pending a bankruptcy appeal *must* post adequate security: "[I]t would be an

intolerable abuse if a suitor, no matter how frivolous his objections, could, by the simple expedient of filing a petition for review, stay the execution of every order until finally confirmed by the District Court, and then if the petition be determined adversely to him, escape all liability for damage done by the delay to the adverse party." *In re Home Disc. Co.*, 147 F. 538, 554–55 (N.D. Ala. 1906).

27. To provide adequate security, the bond securing any stay of the sale would need to be *at least* $1.35 billion. The Debtors and creditors face potential harm of losing a $1.15 billion credit bid, $185.5 million in cash, trust funding, and assumed liabilities, and $50 million in prospective debtor-in-possession financing. *See* Sale Order ¶ M; DIP Motion; Sale Hr'g Trans. at 122:4–9. Altogether, the Debtors, and their creditors, may lose nearly $1.35 billion in value if the Sale is stayed until the disposition of the Coal Act Funds' appeal.

28. The proper measure of a bond is the potential harm to the Debtors and other parties. "If a stay pending appeal is likely to cause harm by diminishing the value of an estate or endangering the non-moving parties' interest in the ultimate recovery, and there is no good reason not to require the posting of a bond, then *the court should set a bond at or near the full amount of the potential harm to the non-moving parties*." *In re Weinhold*, 389 B.R. 783, 788 (Bankr. M.D. Fla. 2008) (emphasis added). Without any showing by the Coal Act Funds of their ability to post a bond, this Court should deny their stay motion. *See In re Horizon Natural Res.*, No. 04-cv-00158-HRW, at 8–9; *In re Pub. Serv. Co. of N.H.*, 116 B.R. 347, 350 (Bankr. D.N.H. 1990) (denying motion for stay and declining to even set bond amount "[i]n view of the admitted inability of the appellants to post a bond of [sufficient] magnitude"). And if the Coal Act Funds cannot post a bond, their appeal is a dead letter. 11 U.S.C. § 363(m); *In re Charter*, 829 F.2d 1054, 1056 (11th

Cir. 1987); *Bleaufontaine*, 634 F.2d at 1390; *Dutch Inn*, 614 F.2d at 506; *HNRC Dissolution*, 2005 WL 1972592 at *4, *7.

29. The Coal Act Funds contend that any bond should be small, "reflecting the disparate financial interests at issue and taking into account the financial status of the Coal Act Funds." Stay Motion at 18. The Debtors' request for a $1.35 billion bond is a conservative estimate of the substantial risk of harm to the Debtors and other interested parties. *See In re Gen. Motors Corp.*, 409 B.R. at 34. The Coal Act Funds seek a stay at the expense of all other parties in interest, without offering to provide a bond that even comes close to adequately compensating other parties for the losses likely to flow from a stay. Such a stay "would be unconscionable." *Id.* at 35. Even if the Coal Act Funds could post an adequate bond—which they cannot—it would not protect the Debtors and other interested parties. As discussed above, the Debtors' most immediate concern is running out of cash. A bond will not solve the Debtors' liquidity crisis pending an appeal, or prevent a liquidation.

CONCLUSION

For these reasons, the Debtors ask the Court to deny the Stay Motion and the Joinder.

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BRADLEY ARANT BOULT CUMMINGS LLP

By: /s/ Patrick Darby

Patrick Darby
Jay Bender
Scott Smith
John Watson
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8000
Email: pdarby@babc.com, jbender@babc.com, ssmith@babc.com, jwatson@babc.com

- and -

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Stephen J. Shimshak (*pro hac vice*)
Kelley A. Cornish (*pro hac vice*)
Claudia R. Tobler (*pro hac vice*)
Ann K. Young (*pro hac vice*)
Michael S. Rudnick (*pro hac vice*)
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 373-3000
Email: sshimshak@paulweiss.com, kcornish@paulweiss.com, ctobler@paulweiss.com, ayoung@paulweiss.com, mrudnick@paulweiss.com

Counsel to the Debtors and Debtors-in-Possession