UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	§	Chapter 11
	§	
WALTER ENERGY, INC., *et al.*,	§	Case No. 15–02741–TOM11
Debtors.[1]	§	
	§	Jointly Administered
DOMINION RESOURCES BLACK WARRIOR TRUST, by and through its TRUSTEE, SOUTHWEST BANK,	§	Adversary No.: _____
Plaintiff,	§	
VS.	§	
WALTER BLACK WARRIOR BASIN LLC,	§	
Defendant.	§	

PLAINTIFF'S VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER

Dominion Resources Black Warrior Trust ("Plaintiff" or "Dominion") by and through its Trustee, Southwest Bank, hereby files this Verified Application for Temporary Restraining Order and would show the Court 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.

I. Relief Requested

1. In order to prevent Defendant from comingling, encumbering and potentially disposing of Dominion's property, Dominion seeks orders the Defendant as follows:

(a) to segregate the Production Proceeds (defined below) attributable to Dominion's ORRI (defined below) from any and all other cash held by Defendant or any of the other Debtors;

(b) allowing, agreeing or assenting to any lien being placed on the Production Proceeds; and

(c) refusing to comply with the provisions of the Conveyance (defined below) related to distribution of the Production Proceeds.

II. Nature of the Adversary Proceeding and TRO

2. Dominion owns an overriding royalty interest ("ORRI") in gas wells operated by Walter Black Warrior Basin LLC ("Walter Black" or "Defendant"), one of the debtors in the above-captioned Bankruptcy Case (collectively, the "Debtors" and each a "Debtor"). Under Alabama law, an ORRI is a real property interest. As the operator, Walter Black sells the gas produced – on behalf of the interest owners – to Alabama Gas Corporation ("AGC"). The proceeds from the sale of Dominion's share of the gas ("Production Proceeds") are not property of the estate. The governing ORRI Conveyance (as defined and further described below) between Dominion and Debtor, obligates the Debtor to distribute, pursuant to an agreed schedule, Dominion's proportionate share of Production Proceeds.[2] The next distribution of Production Proceeds is due August 14, 2015, and totals $983,828. This payment represents Dominion's share of gas produced during the months of April, May, and June 2015. Despite the fact that the Production Proceeds are not and have never been the Debtor's property, pre-petition

[2] Separately, Alabama law requires that "proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto" by the operator no later than 60 days after the end of the calendar month in which the proceeds of production are received. *See* Ala. Code § 9-17-33 (2015).

or post-petition, the Debtor has indicated that it will not distribute the Production Proceeds to Dominion. Further, the Debtor refuses to segregate the Production Proceeds such that those monies will not be subject to liens of other creditors or used to pay other obligations of the Debtors.

3. Defendant's refusal to segregate the Production Proceeds and subjecting them to liens of third parties places those funds, which are not property of the estate, in jeopardy of never being paid to Dominion. If that occurs, the consequences to the beneficiaries of Dominion will be dire. Dominion's beneficial interests—which trade on the New York Stock Exchange (the "NYSE")—could be delisted from the NYSE.[3] Even more severe, if Dominion does not receive two consecutive distributions, Dominion (as a trust) will likely terminate forcing the Trustee to sell the ORRI. Either instance would likely cause severe and unnecessary harm to the hundreds of Trust beneficiaries. Thus, a preliminary injunction and permanent injunction is necessary to protect Dominion's assets.

4. Dominion filed the Complaint and Application for Preliminary Injunction seeking the following: (i) a declaratory judgment that the ORRI is a real property interest; (ii) a declaratory judgment that the ORRI and the Production Proceeds are not property of the estate; and (iii) a preliminary injunction which (a) segregates the Production Proceeds attributable to the ORRI; (b) prevents the Debtor from encumbering the Production Proceeds; and (c) obligates the Defendant to continue to distribute the Production Proceeds to Dominion in accordance with the Conveyance and Alabama law.

[3] As mentioned below, Dominion's beneficial interests are traded on the NYSE under the symbol "DOM". Pursuant to the rules of the NYSE, Dominion's beneficial interest could be delisted to the extent that the price of DOM falls below $1.00 and stays below $1.00 over a consecutive 30 trading-day period.

III. Factual Background[4]

5. Dominion is a Delaware business trust formed and governed pursuant to the terms of that certain *Trust Agreement of Dominion Resources Black Warrior Trust* entered into effective as of May 31, 1994. Southwest Bank currently serves as Dominion's Trustee. The beneficial interests of Dominion trade on the New York Stock Exchange under the symbol "DOM".

6. Dominion owns certain overriding royalty interests (as previously defined, the "ORRI") as a result of a conveyance by the Debtor's predecessor of an undivided sixty-five (65%) interest in and to any gas produced from certain properties located in Tuscaloosa County, Alabama (collectively, the "Black Warrior Properties" or the "Properties"), more specifically identified in that certain Overriding Royalty Conveyance, dated as of June 1, 1994, (as amended, the "Conveyance").[5]

7. The Black Warrior Properties are operated by Walter Black.[6] There are currently over 500 active wells on the Properties.

8. The ORRI is a non-expense bearing share of the gross gas produced from the Properties.[7] The ORRI is a non-operating interest that does not include the power or right to control or participate in any operations conducted on the Properties.[8] It entitles Dominion to a

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[4] The factual statements herein are supported by the Declaration of Ron Hooper which is attached hereto as Exhibit 1 and incorporated by reference.

[5] *See* Conveyance at 1-2 (grant of overriding royalty interests in Subject Gas), at 6 (definition of "Subject Gas"), and at 3 (definition of "Company Interests"). A copy of the Conveyance is attached hereto as Exhibit A to Exhibit 1. The Conveyance was properly recorded in Tuscaloosa County, Alabama at Conveyance Book 1181, Page 644.

[6] *See* Declaration of William G. Harvey in Support of First Day Motions [Dkt. No. 3] (hereinafter, the "Harvey Declaration") at 14-15. Notably, the Declaration incorrectly states that Dominion is a party to a joint operating agreement with Walter Black.

[7] Conveyance at 1, 13-14 Article V.

[8] Conveyance at 15-16 § 6.06 ("Non-Operating Interest").

proportionate share of gas production proceeds (cash proceeds from the sale of gas), which are paid pursuant to a specific schedule outlined in the Conveyance.[9] The next distribution under the Conveyance is due to be made by Walter Black on August 14, 2015. It is estimated that the distribution will be approximately $983,828, which payment represents Dominion's share of gas produced during the months of April, May, and June 2015.

9. On July 15, 2015 (the "Petition Date"), the Debtors filed petitions under Chapter 11 of the Bankruptcy Code. Notably, the Debtors' filed their Chapter 11 petitions pursuant to a restructuring support agreement ("RSA") with a "Steering Committee" composed of certain of the Debtors' prepetition lenders. More specifically, the prepetition-lender Steering Committee is comprised of certain private equity funds that own a significant position in the Debtors' prepetition debt.[10] Pursuant to the RSA, the Debtors have agreed to seek this Court's entry of a proposed cash collateral order as agreed to by the prepetition-lender Steering Committee.

10. On the Petition Date – in a series of "first day motions" – the Debtors filed their *Motion for an Order (A) (I) Approving Continued Use of the Debtors' Existing Cash Management System, (II) Authorizing Use of Existing Cash Management System, (II) Authorizing Use of Existing Bank Accounts and Checks, (III) Waiving the Requirements of 11 U.S.C. § 345(b), (IV) Granting Administrative Expense Status to Certain Postpetition Intercompany Claims, and (V) Authorizing the Continuation of Certain Intercompany Transactions; and (B) Granting Related Relief* [Dkt. No. 38] (the Debtors' "Cash Management Motion"). As contemplated therein, the Cash Management Motion sought approval of the

[9] Conveyance at 8-9 §3.01 ("Payment") and at 3 (definition of "Computation Period").

[10] *See* Verified Statement of the Steering Committee of First Lien Creditors Pursuant to Bankruptcy Rule 2019 [Dkt. No.260] (hereinafter, the "2019 Statement"). According to the 2019 Statement, the Steering Committee is composed of the following entities: (i) Apollo Global Management LLC; (ii) Ares Management LLC; (iii) Caspian Capital LP; (iv) Fidelity Investments; (v) Franklin Mutual Advisers LLC; (iv) GSO Capital Partners LP; and (v) KKR Credit Advisors (US) LLC.

Debtors' continued use of a "zero balance" cash management system whereby the Debtors would issue invoices from their mining, coking and gas operations and the receipts received therefrom would be swept—either automatically or pursuant to a manual process—on a daily basis to a Master Concentration Account or to a Master Regions Disbursement Account (collectively, the "Master Accounts").[11] Disbursements would then be paid from these Master Accounts.[12] Attached to the Cash Management Motion as Exhibit B is a complicated "schematic" illustrating the various steps to the Debtors' "zero balance" cash management system. The Cash Management Motion does not segregate or provide separate treatment for production proceeds that are attributable to Dominion's ORRI. And, under the Debtors' "zero balance" cash management system, Dominion's proportionate share of production proceeds would be "swept" along with the Debtor's cash.

11. The Debtor did not seek interim relief on the Cash Management Motion, which was granted on the same day that it was filed—the Petition Date.[13]

12. Also, on the Petition Date, the Debtors filed their *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* [Dkt. No. 42] (the "Cash Collateral Motion") wherein the Debtors seek entry of an order containing a stipulation by the Debtors that "any and all of the Debtors' cash, cash equivalents, negotiable instruments, investment property, securities, and any

[11] Cash Management Motion at 6. As used herein, "Master Concentration Account" and "Master Regions Disbursement Account" shall have the meanings ascribed to such terms in the Cash Management Motion.

[12] Cash Management Motion at 6-7.

[13] *See* Cash Management Order, entered July 15, 2015.

amounts generated from the use, sale, lease or other disposition of the Prepetition Collateral, in each case wherever located, constitute Cash Collateral and Prepetition Collateral" of the prepetition lenders.[14] The Cash Collateral Motion also seeks to grant the prepetition lenders an adequate protection package, including liens encumbering the Debtors' "cash".[15]

13. On or about July 20, 2015, the Debtors sent a letter to Dominion stating that the obligation to distribute Dominion's proportionate share of production is a "pre-petition obligation" and they are not permitted to distribute the proceeds that are due to be distributed on August 14, 2015.[16]

14. The Cash Management Order authorizes Walter Black to commingle the Production Proceeds with other cash of the Debtors, which is materially prejudicial to Dominion. If, for example, Dominion is not paid its share of production and there are insufficient funds to pay post-petition claims during the administration of the bankruptcy case, including claims for diminution asserted by the senior lenders, Dominion may be unable to trace its production proceeds and will be foreclosed from trying to identify or seek possession of its property.

15. On July 29, 2015, Dominion filed it's Emergency Motion to Reconsider, on a Limited Basis, the Cash Management Order [Dkt. No. 239] (the "Motion to Reconsider") seeking to amend the Court's Cash Management Order in order to require the Debtors to, inter alia, segregate production proceeds attributable to Dominion's ORRI in order to avoid the commingling of such production proceeds with the Debtors' cash.

16. The Bankruptcy Court held an expedited hearing on Dominion's Motion to Reconsider on August 3, 2015. At the conclusion of such hearing, the Court reset the Motion to

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[14] *See* Cash Collateral Motion at Exhibit A, pg. 10 ¶ 5(f).

[15] *See* Cash Collateral Motion at Exhibit A, pgs. 15-23.

[16] *See* Exhibit 1-F at ¶ 2 ("… we are not permitted to pay obligations that arose prior to July 15, 2015, 'pre-petition obligations', *including royalty payments* under our gas and mineral leases." (emphasis added)).

Reconsider to be heard on August 18, 2015 – the same date as the Debtors' Cash Collateral Motion.[17] As of the filing of this Complaint, the Motion to Reconsider is set for hearing on August 18, 2015, at 10:00 a.m.

IV. Arguments and Authorities

16. In accordance with Federal Rule of Civil Procedure 65(b), made applicable through Bankruptcy Rule 7065, Dominion asks this Court for a temporary restraining order which orders the Defendant as follows:

(a) to segregate the Production Proceeds attributable to Dominion's ORRI from any and all other cash held by Defendant or any of the other Debtors;

(b) allowing, agreeing or assenting to any lien being placed on the Production Proceeds; and

(c) refusing to comply with the provisions of the Conveyance related to distribution of the Production Proceeds.

17. The Supreme Court has stated that courts must consider the following elements in determining whether to issue a temporary restraining order and preliminary injunction: (1) a likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and (4) advancement of the public interest. Winter v. N.R.D.C., 555 U.S. 7, 20 (2008). Each one of those elements is present in this case.

A. Likelihood of success on the merits

18. It is not necessary for parties seeking temporary or preliminary injunctive relief to show that they are certain to succeed on the merits. See Johnson v. United States Department of Agriculture, 734 F.2d 774, 782 (11th Cir.1984); 11A Wright, Miller & Kane, Federal Practice

[17] *See* Order on Emergency Motion By Dominion Resources Black Warrior Trust to Reconsider, on a Limited Basis, the Cash Management Order [Dkt. No. 333], entered August 4, 2015.

and Procedure—Civil 2d § 2948.3, at 188 & n. 5 (2d ed. 1995), the moving parties simply must show a "substantial likelihood" of succeeding after a trial on the merits.

19. The Complaint sets forth a cause of action for a declaratory judgment. Through the declaratory judgment, Dominion seeks a declaration that the ORRI is separate property that is not property of the Defendant's bankruptcy estate. Dominion is not aware of any factual disputes between the parties regarding the obligations in the Conveyance. Thus, the issues in the declaratory judgment are likely a matter of law. And, As set forth in more detail in the Complaint, the overwhelming body of law supports Dominion's arguments that an ORRI is a real property interest that is not property of the Defendant's bankruptcy estate. Thus, Dominion contends that there is a substantial likelihood that it will prevail on its declaratory judgment.

B. Likelihood of irreparable injury

20. It is well settled that a federal court should not issue an injunction unless there is both irreparable injury and lack of an adequate remedy at law. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). If an injury cannot be adequately remedied at law, because damages would be either inadequate or unascertainable, the injury is generally held irreparable. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929). Thus, the requirements of irreparable injury and lack of adequate legal remedy merge.

21. As stated above, the Debtor has taken the position that it will not make distributions under the Conveyance. The Debtor has also refused to recognize the fact that the ORRI is a real property interest owned by Dominion and that the proceeds from gas sales are not property of the estate. The Debtor's positions are contrary to state law, bankruptcy law and the terms of the Conveyance. Thus, an injunction is necessary to prevent the Debtors from inflicting immediate and irreparable harm upon Dominion.

22. As stated more fully in the Declaration of Ron Hooper, the Debtor is responsible for collecting the totality of the production proceeds and distributing to Dominion its proportionate share. (See Declaration of Ron Hooper attached hereto as Exhibit A). If the Debtor continues to refuse to pay Dominion its proportionate share of the gas proceeds, the beneficial owners of Dominion will suffer, as they will not receive the property they are entitled to receive under the terms of the Dominion trust and the Conveyance. Dominion's beneficial interests are traded on the NYSE under the symbol "DOM". Being listed on the NYSE allows Dominion's beneficial interest holders to freely sell their interests in a public market. But pursuant to the rules of the NYSE, Dominion's beneficial interest could be delisted by the NYSE to the extent that the price of DOM falls below $1.00 and stays below $1.00 over a consecutive 30 trading-day period. Such a delisting would prevent Dominion's beneficial holders from freely-selling their interests on the NYSE.

23. Further, Dominion has virtually no assets outside of the ORRI and the production proceeds distributed on account thereof. Dominion cannot operate for a prolonged period without receiving its scheduled distributions. The terms of Dominion's trust agreement state that Dominion will be required to terminate if the ratio of cash received by Dominion attributable to the ORRI in any quarterly period to administrative costs of Dominion for such quarterly period is less than 1.2 to 1.0 for two consecutive quarterly periods. If Dominion (as a trust) terminates, it will likely cause irreparable harm to the beneficiaries because the Trustee will be required to sell the assets of Dominion. And, as a direct result of the Debtor's actions, the market value of the ORRI and the beneficial interests in Dominion are materially depressed.

24. The type of harm described in the Hooper Declaration is irreparable and there is no adequate remedy at law because Dominion's property is being taken, and it is being left with claims against an insolvent bankruptcy estate with no assurance of adequate cxompensation.

Further, if Dominion collapses, the ORRI will be sold and Dominion cannot be put back together or otherwise reconstituted.

C. Balance of hardships.

25. The balance of hardships weighs heavily in favor of Dominion. As stated above, there is substantial likelihood of irreparable harm if the temporary restraining order is not entered. On the other hand, the Debtor has not identified any harm it will suffer if the restraining order is entered.

D. Advancement of public interest.

26. The final factor requires Plaintiff to show that the relief it seeks will not disserve the public interest. The public interest factor can be satisfied if the injunction will ensure that "the public interest in ensuring fair competition and enforcing valid contracts will be vindicated" Digitel Corp. v. Deltacom, Inc., 953 F.Supp. 1486 (M.D.Ala.1996) and the law "favors active but fair competition." Combined Ins. Co. v. Investors Consol. Ins. Co., 499 F.Supp. 484, 488 (E.D.N.C.1980). The public interest would certainly be advanced by obligating the Debtor to comply with the terms of the Conveyance and make the distributions as provided therein. Allowing the Debtor to ignore the separate property rights of Dominion in the Production Proceeds and allowing those funds, which belong to Dominion, to be used in the Debtor's bankruptcy case would no serve the public interest.

E. Bond requirement

27. FRCP 65(c) requires a moving party to post a bond in connection with a temporary restraining order. Accordingly, Dominion is willing to post a bond. However, Dominion contends that the bond amount should be relatively modest. As stated herein, Dominion does not have surplus assets to post a substantial bond and any obligation for it to do so would effectively gut the effect of the temporary restraining order. On the other hand,

segregating the funds and obligating Walter Black to comply with the terms of the Conveyance is not going to harm its operations. This is especially true in light of the fact that the Production Proceeds are not property of the bankruptcy estate and will, eventually, have to be paid to Dominion. The balance of equities, thus, supports Dominion's request for a modest bond in the amount of $500.00.

IV. Conclusion

WHEREFORE, Dominion respectfully requests that this Court enter a temporary restraining order as provided herein and to grant Dominion all other relief that it may be entitled to under law or equity.

Dated: August 11, 2015.

Respectfully Submitted,

BENTON & CENTENO, LLP

By: */s/ Lee R. Benton*

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ATTORNEYS FOR THE DOMINION RESOURCES
BLACK WARRIOR TRUST

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August 2015, I electronically filed the **PLAINTIFF'S VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER, PROPOSED TEMPORARY RESTRAING ORDER AND DECLARATION OF RON E. HOOPER** with the Clerk of the Court using the CM-ECF system, and served a copy of the above and foregoing, upon the following:

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