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WARRIOR MET AND WALL STREET GREED: WHAT CORPORATE RAIDERS ARE DOING TO WORK- ERS AND CONSUMERS

HEARING BEFORE THE COMMITTEE ON THE BUDGET UNITED STATES SENATE ONE HUNDRED SEVENTEENTH CONGRESS SECOND SESSION

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WARRIOR MET AND WALL STREET GREED: WHAT CORPORATE RAIDERS ARE DOING TO WORKERS AND CONSUMERS

THURSDAY, FEBRUARY 17, 2022

U.S. SENATE,
COMMITTEE ON THE BUDGET,
Washington, DC.

The Committee met, pursuant to notice, at 11:00 a.m., via Webex and in Room SH-216, Hart Senate Office Building, Honorable Bernard Sanders, Chairman of the Committee, presiding.

Present: Senators Sanders, Warner, Kaine, Van Hollen, Padilla, Grassley, Crapo, Toomey, Johnson, Scott, and Braun.

Staff Present: Warren Gunnels, Majority Staff Director; and Nick Myers, Republican Staff Director.

OPENING STATEMENT OF CHAIRMAN SANDERS

Chairman SANDERS. Okay. Let us get going. Let me thank Senator Braun for serving as Ranking Member today, filling in for Ranking Member Graham. Let me also thank our colleagues who will be attending this hearing and our witnesses who will be with us this morning.

Today we are going to discuss an issue of enormous consequence but which, unfortunately, is not talked about enough, not talked about enough here in Congress, not talked enough about in the media, and that is the incredible concentration of ownership and power that a handful of Wall Street investment firms have over our entire economy and the enormous impact they have on workers, consumers, and virtually every person in our country.

Today, in America, just three—one, two, three—Wall Street firms—BlackRock, Vanguard, and State Street—manage \$22 trillion in assets. Let me repeat that. Three companies manage \$22 trillion in assets.

So what does that mean? Well, for starters it means that the amount of money these three firms control is nearly equal to the entire gross domestic product, the GDP, of the United States. Three companies and more than five times the GDP of Germany. These three firms—BlackRock, Vanguard, and State Street—are major shareholders in more than 96 percent of S&P 500 companies. In other words, they have significant influence over many hundreds of companies that employ millions of American workers and, in fact, enormous impact over our entire economy.

Let us talk about banking. We all remember that after the Wall Street crash of 2008, there was a whole lot of discussion about the

wealth and the power of the major banks that were, quote/unquote, “too big to fail.” You all remember that? Well, these three Wall Street investment firms that we are talking about today are the largest shareholders of some of the biggest banks in America—JPMorgan Chase, Wells Fargo, and Citibank. In other words, they have enormous influence over enormous banks.

Let us talk about transportation. These three Wall Street firms are among the top owners of all four major airlines—American, Southwest, Delta, and United.

What about health care? Everybody is concerned about health care, the cost of health care in America. Together these three firms own an average of 20 percent of the major drug companies in America. Wall Street firms, in general, have bought up thousands of nursing homes. Everybody is concerned about the cost of nursing homes. They bought up thousands of nursing homes where profits have been soaring at the same time as mortality rates have gone up as well.

These three firms are also responsible for the astronomical prices and emergency rooms. Yes, three firms own emergency rooms in hospitals all across this country, increasing prices by over 60 percent and driving over half a million Americans into bankruptcy each year. These three firms.

These three firms will tell you that they are passive investors, that they are not involved in the day-to-day decisions of the companies they own. But let us be clear. These three companies control nearly one-fourth of votes at shareholder meetings, leveraging their power to influence CEO compensation, stock buybacks, and environmental commitments, mergers, and pension benefits.

In addition to the big three, a small handful of Wall Street vulture funds, so-called private equity firms, also have an enormous control over industry after industry after industry. Over the past two decades, private equity takeovers have slashed nearly 1.3 million jobs and shut down nearly 20,000 stores in the retail industry, including Toys “R” Us, Payless, and Dollar General.

Let us talk about housing. Last year a small number of Wall Street firms and other extremely wealthy investors bought about 1 out of every 7 homes in some of the largest cities in America, and now own over 1 million apartments, hiking rents by as much as 30 percent and neglecting needed repairs on the safety of tenants. Wall Street firms are responsible for the astronomical prices in emergency rooms. Yes, these firms own emergency rooms in hospitals all across this country, increasing prices by over 60 percent and driving over half a million Americans into bankruptcy each year. These wall street firms.

And if, interestingly enough, you have not heard much about the power of these Wall Street firms, that may have something to do with the fact that a small number of Wall Street firms control about half of the newspapers in America.

Now we are talking about a small number of Wall Street firms that buy up companies, load them up with debt, and make a huge amount of money by laying off workers, slashing wages, shipping jobs overseas, and eliminating health care and pension benefits. According to recent studies, after these Wall Street firms take over companies as a result of leveraged buyouts, jobs are slashed by 13

percent, wages fall by 6 percent, and the companies that Wall Street firms take over are 10 times more likely to declare bankruptcy.

When we talk about power in America many people think that, you know, President of the United States, pretty powerful guy, that he is the most powerful person in this country. Well, frankly, I am not so sure. Given the enormous power that the CEOs of these extremely large Wall Street financial firms have over our economy, it may well be that these guys are more powerful than the President of the United States.

And that brings us to where we are today with Warrior Met Coal in Brookwood, Alabama, where workers have been engaged in a strike for 11 months, fighting for economic justice, fighting for dignity on the job. In 2016, a group of private equity funds, led by Apollo and Blackstone, acquired Walter Energy and formed Warrior Met Coal. As part of the restructuring, workers were forced to take a \$6 per hour wage cut, over 20 percent of their wages, and massive cuts to their health care and retirement benefits. The concessions the miners made five years ago saved Warrior Met \$1.1 billion.

Let us be clear. The workers agreed to these cuts with the understanding that they would be restored when the company returned to profitability. That is not what happened. While Warrior Met has returned to profitability and could afford to pay its CEO, Walter J. Scheller III, \$4 million in compensation each year, it has reneged on that deal and is offering workers an insulting \$1.50 raise spread over five years, about a \$0.30 an hour increase over five 5 years, while refusing to restore the health care and pension benefits that were taken away from them in 2016.

Now, so everybody should understand this, I invited Mr. Scheller, the CEO of Warrior Met, to testify at this hearing. He was invited. I wanted to ask him how, over the last five years, Warrior Met could afford to provide \$1.5 billion in stock buybacks and dividends to its wealthy shareholders and huge bonuses to its executives but somehow could not afford to treat its workers with the dignity and respect they deserve.

Once again, concessions made by the workers totaled \$1.1 billion over five years. Stock buybacks and dividends over the same period totaled \$1.5 billion.

I invited, for this hearing, Larry Fink, the CEO of BlackRock and the largest shareholder of Warrior Met to testify at this hearing. My hope was, and my hope remains, that Mr. Fink will do the right thing and demand that Warrior Met's management sit down with their workers and negotiate a contract in good faith. Unfortunately, Mr. Fink has declined to testify.

Further, I invited Stephen Schwarzman and Marc Rowan, the CEOs of Blackstone and Apollo, to testify at this hearing as well. Unfortunately, all of them declined to participate.

The good news is, however, that we have a number of excellent witnesses who are not afraid to come before the public and answer questions. They include Braxton Wright, a worker at Warrior Met, and Cecil Roberts, the President of United Mine Workers of America (UMWA). Our last panel will include several economists who have studied and written extensively on this issue.

Let me just be very clear about this. What is happening at Warrior Met is not an aberration. It is not an exception to the rule. At a moment of unprecedented corporate greed in this country, attacks against working people are taking place in company after company, industry after industry.

And here is a dangerous reality. Never before in the history of the United States of America have so few owned so much and had so much power over our economy. This extraordinary concentration of ownership held by Wall Street over our economy is an issue that Congress and the American people must deal with.

And with that let me introduce Senator Braun and recognize him for his opening remarks. Senator.

OPENING STATEMENT OF SENATOR BRAUN

Senator BRAUN. Thank you, Mr. Chairman. I appreciate how far witnesses have traveled to come here today to discuss this. It is a multi-faceted discussion. This is the Budget Committee. And I think the whole issue of concentration in industry—I came from Main Street America where we had no help from government, and we did not have any of the crony capitalist things that occur, largely through this place, that gives a leg up to many industries.

I will cite that in the classic way the economy should work you should have full competition, no barriers to entry. You should have an engaged and informed consumer. Those are the elements that make capitalism and free markets work. Sadly, over time, they evolve in a different way. But I will go back to my original point. This is the Budget Committee, and I am not sure that this is the jurisdiction that we can discuss it. Of course, the Chair can discuss whatever he wants to. I think there is validity in looking at some of those issues.

I am going to focus on what I think we should be doing, and that is talking about the fact that we have just recently eclipsed \$30 trillion in debt as a country. The Senator and I have had a vibrant discussion on the floor, reaching about 26 or 27 minutes, 6, 7 months ago. And I know there is a difference of opinion there too.

But when it comes to how any entity works you cannot borrow from your kids and grandkids on things that you are consuming, as much as we would like to do it, for whatever the benefit is that might accrue. It is a bad business plan, it will run into the ditch in a hard way, and we will have to reconcile it down the road to where currently we ought to be looking at the drivers of it, which would be Medicare, Social Security, programs everybody would want to be there, and to be in sound shape. If we keep plowing ahead now with \$1.5 trillion deficits baseline, taking us into that next tier of indebtedness, it will not be a good ending for all the people that depend on it, mostly elderly, for their retirement and their health care.

What I would like to do is get back to the essence of this Committee, which means that we do regular order, discuss these things, not talking about spending, a CR vote that we are going to have later today, where we are talking about a budget that should have been worked on last year, finished with all appropriations done by September 30, 2021. That is not running the place very well for all the people that depend upon it.

In this particular dispute with workers and mine, that is probably not the domain of the Budget Committee, although I understand the relevance of it. It probably should be kept in the private sector because it is currently part of a legal dispute.

Look at what the Biden administration did when it got the reins. We had 1 percent inflation. We were raising wages in the toughest places, the old-fashioned way. We were not making government the centerpiece of our lives. I understand, through frustration, how it is easy to go there.

But you look at some of the first moves, and now remember we are asking OPEC to produce more oil when we shut down the Keystone XL pipeline. We were stopping exploration and drilling on our Federal lands. And I am the guy that started the Climate Caucus here on the Republican side, and I believe in the long run the cleanest, least-expensive fuel is going to win the day. But we cannot ignore the things that we should be doing, like budgets through regular order, like remaining energy independent in the short run, so that we are not in positions like we currently find ourselves.

We are 100 percent dependent for 17 key mineral resources and a lot of the new technology that we will be addressing climate issues with, who is cornering the market? It is China. And when we get diverted and when we do not do budgets, when we get down a trail that is unsustainable, we are going to end up with problems and issues that are going to be far greater than what we are talking about here today.

American families want us to get a few things right. They want us to live within our means, they do not want us to borrow money from their kids and their grandkids, and we should all be working together, in the proper jurisdiction, to address these issues. But when it comes to the Budget Committee I think we ought to stay more focused on it, and I know that it has not been popular to do it the old-fashioned way. We have only put a budget together I think once in the last 20 years.

I will end with this quote from Admiral Mike Mullen, and this is from Defense, and I think part of the problem here in D.C. is that we roll over for each other's needs, Republicans for Defense, when we hold it sacrosanct and we do not require it to do audits. The other side of the aisle getting way ahead of its skis when we cannot afford it, even though it might be well intentioned.

He said, as it relates to defense, and we are looking at it right now with Putin peering into Ukraine, "I fear red ink more than do the Red Menace." And I think that is a good statement that ought to be put into practice and that we ought to look at for across this Federal Government.

Chairman SANDERS. Thank you, Senator Braun.

We are pleased today to have two United States Senators with us who will be making remarks. We begin with Senator Elizabeth Warren of Massachusetts who is the Chair of the Senate Banking, Housing, and Urban Affairs Committee's Economic Policy Subcommittee. She has spent years studying and writing about all things relating to private equity and asset management industries, and is a champion of working people in this country.

Senator Warren, thanks so much for being with us.

**STATEMENT OF THE HONORABLE ELIZABETH WARREN, A
UNITED STATES SENATOR FROM THE STATE OF MASSACHU-
SETTS**

Senator WARREN. Well, thank you very much, Mr. Chairman. I appreciate you inviting me to participate in this hearing, and I appreciate the powerful work that you have been doing on the issue of economic concentration. You are an extraordinary and a tireless leader, and I am honored to be in this fight with you.

So thanks to you, today we have the opportunity to discuss the very real impact that private equity and Wall Street giants have had on workers and communities across this country.

For nearly a year, more than 1,100 Warrior Met Coal miners in Brookwood, Alabama, have been on strike. They are striking for nothing more than what they are owed: fair pay, fair benefits, and fair working conditions. All of these were stripped away when giant, vulture private equity firms swooped in to buy Warrior Met's predecessor company, Walter Energy, as it went through bankruptcy.

Apollo, Blackstone, and the other private equity firms that bought Walter Energy in 2016 presented themselves as saviors, here to save the company, here to save jobs, here to save the day. But it was all hype. They showed up because they smelled profits, and they planned to boost those profits by crushing the company's workers. These private equity firms terminated the miners' collective bargaining agreement with the United Mine Workers. They forced a pay cut of more than 20 percent on workers. They cut medical, leave, and retirement benefits. And just to juice their profits a little more, they ended the company's pension and health obligations to 2,800 retired coal miners and their families.

Private equity was the driving force behind all of this. The private equity investors in Warrior Met dictated the terms and conditions of the 2016 takeover of the company, and those same private equity investors continue to bear responsibility for the cuts in pay and benefits that have pressed workers to the wall and led to the current Warrior Met miners' strike.

Coal mining is dangerous work. The hours are long, the tasks are back-breaking. But when private equity took over, miners were told that all that hard work just did not produce enough revenue to give the workers the protection and the security that they had earned.

Money was supposedly tight, but the investors—Apollo, Blackstone, and the other private equity firms—what happened to them? They made out like bandits. They ran the same play that private equity has run over and over and over. They loaded Warrior Met up with debt, and then they used that debt to pay nearly \$800 million in dividends to themselves and to other shareholders. And then, after sucking as much cash for themselves out as they possibly could, private equity sold off their shares and moved along to the next victims.

Warrior Met miners are on strike today because private equity ripped them off. What happened to Warrior Met workers is what happens when these billion-dollar Wall Street firms come to town. Private equity squeezes as much as they can out of the companies and their employees, and when they think there is nothing left to squeeze, they leave everyone else in the dirt.

Nationwide, private equity's takeover of retail has killed more than 1.3 million jobs over the last decade. It is responsible for jacking up prices for consumers in everything from education to health care. The arrival of private equity can even be a matter of life and death. Research even shows that when private equity takes over a nursing home, short-term mortality rates jump by about 10 percent.

But even as they keep raking in billions of dollars in fees, the typical private equity fund has not managed to outperform the stock market since at least 2006. Think about that. They strip assets and squeeze workers with frightening energy, but they do not actually make a better rate of return than the average mutual fund. All that destruction comes with a lot of high overhead costs and the result is only modest returns to investors.

This is why I introduced my Stop Wall Street Looting Act in 2019, and why I reintroduced it a few months ago, so we can put an end to predatory and dangerous private equity practices.

This is not about killing private equity. It is about fixing the system and protecting workers and communities. My bill would prevent private equity firms from walking away after driving companies into the ground and leaving the workers in the dirt. My bill prioritizes worker pay in the bankruptcy process and strengthens rules so that workers are more likely to receive severance, pensions, and other pay that they earned. My bill creates incentives for job retention, so that workers, like Warrior Met's, can benefit from a company's second chance in bankruptcy. And my bill ends the immunity of private equity firms from legal liabilities when those companies break the law. When workers at a plant are short-changed or residents at a nursing home are hurt because private equity firms force it to cut corners, private equity should be on the hook.

So Mr. Chairman, I thank you again for allowing me to testify today, and I appreciate your partnership on these issues. I am going to keep fighting to end the outrageous practices of private equity firms. I am going to keep fighting to turn the Stop Wall Street Looting Act into law. And I am going to keep fighting to make sure that Warrior Met workers get what they are rightfully owed. Thank you.

[The prepared statement of Senator Warren appears on page 34]

Chairman SANDERS. Senator Warren, thank you very much.

Our next panelist is Senator Tommy Tuberville, who is the junior Senator from the state of Alabama, the home of the Warrior Met coal company. Senator Tuberville, thank you very much for being with us today.

**STATEMENT OF THE HONORABLE TOMMY TUBERVILLE, A
UNITED STATES SENATOR FROM THE STATE OF ALABAMA**

Senator TUBERVILLE. Thank you, Chairman Sanders and Ranking Member Braun. Thank you for the opportunity to testify before the Senate Budget Committee on an issue that directly impacts my state of Alabama.

And with that I want to first welcome my constituent, Braxton Wright, who will be testifying on the next panel.

Next I want to associate myself with the remarks made by Ranking Member Braun. While this is not the first time the Chairman has directly involved himself in union dealings in my home state of Alabama, I want to make it clear and on the record, I do not believe the Budget Committee has jurisdiction over matters involving labor practices across our country. If a hearing like this should take place at all it should be in front of the Senate Health, Education, Labor, and Pension Committee, better known as HELP, of which I am a member.

That being said, I think it is inappropriate for Congress to weigh in on labor disputes which are properly being resolved through the judicial system. Workers in private companies across our nation have the right to decide whether they want to join a union or not. My home state of Alabama is a right-to-work state, and we are proud of that fact. Our workers are not forced to join a union—they have the right to decide—and there are some companies operating in Alabama that have workforces who voted to have a union in place.

So to me it is clear that the purpose of this hearing is for the majority to push a political agenda. This hearing is what I call the dream Democrat political parlay, where members can be pro-union, anti-Wall Street and anti-mining production all in one hearing.

I want to make sure the record accurately reflects the facts and figures of what is being discussed today with Warrior Met Coal, located in Brookwood, Alabama. The jobs at Warrior Met Coal pay an average wage of over \$97,000 annually. This is one of the top average wages in the state. Since Warrior Met Coal was established in 2016, it has created an additional 600 jobs.

On April 1, 2021, Warrior Met workers initiated a strike. Four days later, on April 5th, the International Union of Mine Workers of America accepted a contract proposal by Warrior Met. However, the local union membership took a vote and did not ratify it. Since then it is my understanding that there have been nine—I repeat, nine—contract proposals offered by Warrior Met to union officials, but none of these offers have been presented to the Alabama union workforce for a vote. How can the workforce get back to work if they are not shown the latest offers on the table? That does not make sense.

And again, neither does this venue. The Budget Committee or Congress, in general, is not the proper place to litigate a labor dispute between private companies and their workforce. Clearly Congress has enacted laws and established agencies and practices to handle these exact type of labor disputes.

Our Federal courts and the Department of Labor's National Labor Relations Board, or NLRB, have already made multiple decisions in this case. I strongly question the overt political influence of this hearing and the strong pro-union stance of this Committee. Actions, like holding this hearing, seek to call into question the judicial system and labor ruling decisions of the NLRB.

I want to make it clear: Congress does not have any decision-making authority between Warrior Met Coal and union members, nor should we get involved in how they work out their own labor agreements. Congress has decision-making authority over the Federal budget and how much money our government spends. That is

what I think the Committee should be paying attention to, not the labor disputes in private companies in Alabama.

We have to get our fiscal house in order. Inflation has engulfed our economy. Families face bare grocery shelves and gas is more than \$5 a gallon in some places. Our national debt has gone over \$30 trillion. That amounts to a credit bill for \$240,000 per taxpayer in this country. We need to return to free market enterprise with less government intervention.

In closing, it is my hope that Warrior Met Coal and the union workforce can come to a beneficial agreement for all involved and that Congress will not try to tip the scales in one direction. We must get Americans to work so that our economy can once again thrive.

I thank the Committee for their time and consideration of my comments. Thank you, Mr. Chairman.

[The prepared statement of Senator Tuberville appears on page 36]

Chairman SANDERS. Thank you very much, Senator Tuberville.

And now we will hear from the second panel.

[Pause.]

Okay. This panel will consist of Cecil Roberts, who is the International President of the United Mine Workers of America. President Roberts is a six-generation coal miner, raised in Kanawha County, West Virginia. He rallies with Warrior Met workers on the picket line in Alabama every week.

Our second panelist is Braxton Wright, who is a mine employee at Warrior Met and a member of the United Mine Workers Local 2368. He has worked at the Brookwood mine for 17 years and has been on strike since April 1, 2021.

We have also invited, as I mentioned earlier, to this hearing the CEO of Warrior Met, Walter J. Scheller III. Unfortunately, he has chosen not to be with us.

We will now hear from Cecil Roberts, the International President of the United Mine Workers of America. Mr. Roberts, thanks so much for being with us.

STATEMENT OF CECIL ROBERTS, INTERNATIONAL PRESIDENT, UNITED MINE WORKERS OF AMERICA

Mr. ROBERTS. Thank you, Senator, for scheduling this hearing and inviting us to participate. We appreciate the willingness to hear from workers here today. And I want to thank Ranking Member Braun also for allowing us to be here today and the panelists here, the Senators here on this Committee. My good friend, Senator Kaine, is here. This is an opportunity that workers do not always have, to have their voice heard here on Capitol Hill.

Today is the 323rd day of our strike in Alabama. I would like to take this opportunity to invite Senator Tuberville to stop by, at his convenience, and maybe he could be of some help with respect to encouraging Warrior Met to join with the United Mine Workers and fashion an agreement to end this strike.

Three hundred twenty-three days, but this did not start 323 days ago. I think it would be fair to say that not a single coal miner ever caused a bankruptcy. No one ever asked a shuttle car operator, "Do you want us to invest some money here or there?" They do not ask

the continuous miner that. They do not ask the long wall operator that. All these decisions that lead to bankruptcy are made by others than to coal miners.

In 2015, there was a bankruptcy filing by Walter Energy, and that hearing for that bankruptcy took place in Alabama. The first thing that happened in this bankruptcy is something that has been alluded to here by both you and Senator Warren. Retirees, 2,700 of them, sitting at home, 75, 85 years old, given their lives to this industry, get a notice. Well, the bankruptcy judge decided you do not have health care.

The second thing that happens is the pension plan goes away. The next thing that happens is that the collective bargaining agreement that was ratified by an overwhelming majority of these workers, that was in place at the time is terminated. The next thing that happens is what? Most people do not know this. You do not have a job here anymore.

So, in reality—people get discharged in bankruptcy court. Now who decided that that was going to happen? How did that come about?

At the time, these investors from New York, mainly, were playing a role already with respect to what was going on in the bankruptcy court. So now workers who had nothing, absolutely nothing to do with the filing of this bankruptcy or the creating of this bankruptcy, are now being told, “Well, you have got to fix this.” The workers have to fix this. How in the world is that going to take place?

The first thing that happens is we are told, by this private equity group, “We do not have to hire a single one of your members back. They are unemployed, as far as we are concerned. Now, if you want to get your members back to work you have to deal with us and reach an understanding with us, and if that understanding is not something we want then there will be an opportunity for your members, who have got 40 years in this coal mine, 30 years, 20 years, been there forever, producing coal for this company that was there previously.”

Now they are telling us, “You do not have any leverage.” You know what? They are right. That is the truth. Can you imagine trying to bargain with somebody that is taking coal mines over, who came here from New York and do not even know what color the coal is, do not have any idea of what happens in a coal mine, but they are telling us, “We are not hiring those people back unless you do certain things,” and they have already gotten everything that you could ever ask for, as an investor or an employer, out of the bankruptcy court. You have cancelled health care for retirees. You have terminated the contracted. You have now terminated the employees unless your union bargains their way back in.

So now the union is at the bargaining table with this group. And we do reach an agreement. It was a terrible agreement, but the workers were told the truth. If we do not reach an agreement with this group, they do not have to hire us, if we will not be here to represent you, and who knows what is going to happen to this place. No entity should have that kind of power delegated to them by the laws that are passed here in this location that we are sitting now. That is the law. Bankruptcy laws are horrendous for working-

class people. There have been 60-some of these in the coal fields of Appalachia. No group of workers should be treated like that.

And let me tell you what has happened since that contract was ratified. It has been five-plus years. Senator Tuberville said how much money they make. Yeah, you go in the mines and spend 12 hours a day, 6 days a week, for a year, 2 years, 3 years, 4 years, 5 years. These workers are totally exhausted and they are totally fed up.

About the contract that was voted on, the one thing that this Committee should know, it failed, 95-5. These other agreements he is talking about are the same agreement. They changed this word. They changed that word. New proposal. That is what we have been faced with for about a year now. I think it is disgraceful that these workers have been on strike this long of a time.

And you are going to hear momentarily from Braxton Wright, who has been on this picket line daily, and he is one of the leaders of our union on that level. His wife, Haeden, has headed up our Auxiliary. But there are 800 of these families that have not only suffered through this strike but they have suffered for five-plus years because of what happened to them when these investors rode into town and could not spell coal, could not tell you what color it is. All they knew is there was some money to be made here. And they are gone now. They are gone now. And now we are tasked with how we keep this company profitable.

Coal is selling, by the way, for about \$500 a ton. This is metallurgical coal. You would have to work at it to not make money with respect to the price of coal being at that level.

With that I yield, Mr. Chairman.

[The prepared statement of Mr. Roberts appears on page 37]

Chairman SANDERS. Mr. Roberts, thank you very much.

Our next panelist is Braxton Wright, who is a mine employee at Warrior Met and a member of UMWA Local 2368. He has worked at the Brookwood mine for 17 years. He has been on strike since April 1, 2021.

Mr. Wright, thanks so much for being with us.

**STATEMENT OF BRAXTON WRIGHT, MINE EMPLOYEE,
WARRIOR MET COAL, AND MEMBER, UMWA LOCAL 2368**

Mr. WRIGHT. Thank you for having me.

Chairman Sanders, Ranking Member Braun, distinguished members of the Committee, my name is Braxton Wright and I have worked at the mines in Brookwood, Alabama for over 17 years. I come from a family of coal miners. My grandfather was injured in a mining accident at Black Diamond Mines in West Blocton, and later passed away due to his injuries. My father worked in the coal mines a short time. My father-in-law is a retired UMWA miner who retired at the time of the Walter Energy bankruptcy with more than 30 years.

Today I would like to speak with you about how private equity firms such as Apollo, Blackstone, and other private equity who held stock in Walter Energy dictated the terms and conditions of the 2016 takeover of Walter Energy, which was renamed Warrior Met Coal, and what that means to workers, families, and communities. These private equity investors bear much of the responsibility for

the cuts in pay and benefits, and have led to the United Mine Workers' unfair labor practice strike at Warrior Met.

The past five years working under this bankruptcy contract has been difficult for the miners and their families. These private equity groups have played a role in the exploitation of the UMWA miners as well as numerous other workers who do not have the benefit of a union contract.

Due to the Chapter 11 Bankruptcy filed by Walter Energy in 2016, miners took massive concessions in order to make the company profitable again. Some of these concessions included a \$6-an-hour pay cut, depending on your pay grade. It, by itself, placed a huge strain on workers and their families. When you are required to work 12 hours a day, 6 to 7 days a week, you are lucky if you see your spouse or children more than a few hours a day.

Before the bankruptcy, many spouses did not have to work. After the bankruptcy, many spouses were forced to work outside the home while still being the primary caregiver. So children saw both parents less as a result of the cuts in the bankruptcy contract.

It would break your heart to hear how many times my oldest daughter, Averi, would ask me, "Why weren't you at my game?" "Why didn't you come to my field trip or awards day at school?" "Why can't you go with us to the park?" Every time I had to answer, "I had to work" or "I had to sleep," knowing that my child deserved to have time with both her parents. These have been the voices of hundreds of children whose parents worked at Warrior Met Coal.

While Warrior Met claims to give us eight holidays, in actuality the only dedicated holidays we spent with our families were Thanksgiving, Christmas Eve, and Christmas Day.

The push to increase production and profits for investors at the expense of workers was amplified more with the four-strike policy implemented in 2016. All absences, late arrivals, or early outs resulted in a strike. On the fourth occurrence you would be fired. This policy was a huge source of stress and worry for families. If you arrived a few minutes late you were still required to work but you would still receive a strike. If you were involved in an accident, had a medical emergency, your child was sick or hospitalized, your spouse was in labor or hospitalized, it did not matter. If you could not give 24-hour notice you would receive a strike.

My brothers and sisters have been given strikes for having accidents on the way to work and being late. Our spouses learned to not call to tell us about accidents or emergencies at home until after we were done with our shift, out of fear that we would receive a strike. When my own daughter was in the hospital and I was working my 12-hour overnight shift, my wife was afraid to tell me she had been admitted until my shift ended at 7 a.m., because if I left she knew I would receive a strike. I worked my shift in Brookwood then drove to the hospital and then drove back to the mines, back and forth for three days in order to be with my family.

These unfair labor practices and conditions led the UMWA rank-and-file membership to strike starting on April 1st of 2021. We are still fighting for a better contract for ourselves, our families, and our communities. We are waiting for Warrior Met, whose largest shareholder is BlackRock, to come to the table and offer a fair con-

tract to those of us whose labor has been used to make them billions.

This is why I am asking that you support the Stop Wall Street Looting Act, which will help to reform the private equity industry. This bill would help workers, families, and communities by forcing private investment firms like BlackRock to take responsibility for the actions of the companies they take over. Management at Warrior Met has stated, "We will starve them out" and "They aren't worth anything else." The investment firms that own Warrior Met need to be held accountable for these statements and the treatment workers have endured not only while on strike but for the past five years.

While the company I have helped make billions of dollars over the past decade has turned their back on the workers during our strike, the UMWA has provided strike pay and insurance for the miners while on strike. Other unions and other workers across the country have provided solidarity and direct support. The Auxiliary, made up of the families of the mine workers, has worked tirelessly to bring in support for us to provide food, clothing, baby items, and holiday gifts to striking families.

All workers deserve respect in our workplace and fair compensation for our labor. We will continue to fight for the UMWA brothers and sisters and we will continue to speak out against the exploitation of workers by companies funded by private equity. We will continue to stand up for ourselves but also for all the workers, families, and communities suffering under the same circumstances.

I have traveled with the UMWA to New York City to bring the strike to the doorstep of BlackRock and call on them to take action to support the workers and communities they invest in. BlackRock, Vanguard, and the other private equity owners have responded with silence. I would like to ask Congress to take action to ensure that workers and families do not continue to be the victims of these private equity firms who do not care if workers are pushed to the limits as long as they are receiving the highest return on investment possible.

Thank you for allowing me to be here today and to share a glimpse of why we are striking in Brookwood.

[The prepared statement of Mr. Wright appears on page 105]

Chairman SANDERS. Mr. Wright, thank you very much for being with us.

I would imagine that working people and their families who have been without a regular paycheck for almost a year are hurting. Can you talk a little bit about what it means to be on strike for over 300 days? What does it mean to the workers who are on strike, their kids, their families? Can you say a word about that?

Mr. WRIGHT. It has been difficult. I mean, we have had to cut back on non-necessary items. We do not get to get out as much as maybe we used to. You know, vacations are cut off or ended. At times, when my wife was sick, her pay was even cut out for a month. So it was kind of like, you know, playing Russian roulette with bills. You would throw them out on the table and pick up which one you are going to pay at the time.

But it is difficult to tell your children that you cannot do things because you are not at work right now, that you are on strike. You

know, most of us have picked up other jobs at other places to make ends meet, but it is not the same as what we were accustomed to.

Chairman SANDERS. How do folks feel about a company, as Mr. Roberts mentioned, that knows very little about the industry, making huge profits, providing stock buybacks at the same time as workers are experiencing major cuts in wages and health care? How do people respond to that?

Mr. WRIGHT. It is not fair. I mean, they exploit our work. They work us on skeleton crews with less than what we had before the strike. And then we get to watch them, you know, sit in the office and make \$4 million a year, or \$1.2 million as a secretary, and say that we do not deserve what we make now. It is tough. It is tough, you know. It is tough seeing their lack of just care for their workers and their employees.

Chairman SANDERS. Okay. Let me ask Mr. Roberts a question. Mr. Roberts, has Warrior Met come back to the negotiating table since you all went on strike in April of last year?

Mr. ROBERTS. Yes is the answer to that, but quite frankly there has not been any progress made at the bargaining table. The nine contracts that Senator Tuberville alluded to are basically the same contract that was voted down 95-5 by our membership, and if those contracts had been put to the membership they would say, "What is the difference in these contracts?" and you would really have to search for the difference. They just continued to put the same contract on the table over and over and over.

I think what is going on here, and there is some evidence of this, by the way, they are trying to starve the union out. They are trying to starve the workers out. And as we speak here today, we are in a mess all over the United States, right now. Advertising for workers, having job fairs, to come to Alabama and take the jobs of Braxton and his brothers and sisters on strike. So we have got the strikebreaker piece of this at work also. They are paying those people more money and higher benefits than they have offered at the bargaining table for these workers. And it is clear, Senator, what is happening here.

Jay Gold, an industrialist from the 1920s, said, "I could hire half the working class to kill the other half." That is apparently what is going on here. There is a job fair that is being held either today or this week in Pennsylvania. You can drive through the coal fields of West Virginia and Appalachia, and you will see billboards, "Come to Alabama and work for Warrior Met. This is the number you call."

So this is eliciting people to come to Alabama, drive by these folks on the picket line, and to take their jobs.

Chairman SANDERS. Remind us again what kind of pay cuts and health care benefit cuts have workers experienced in this process.

Mr. ROBERTS. Originally, those pay cuts were \$6 to \$8, in that range. Somewhere in the second, third year of the contract Warrior Met realized that people are not going to stay here and work for those kinds of wages, so they increased the wages of the two top classifications. They raised the wages for the lower classifications, but they are still \$2 or \$3 below what everybody else is making in neighboring mines that are organized. So they realized they had to do that.

But here is the thing that we need to mention. The health care plan that was part of the original contract, and it still is, there is a \$7,000 out-of-pocket cost that each family might have to pay. So you take a wage cut, take money out of the household, and if you happen to have a sick child, as was just alluded to by my brother here, then you are reaching into the savings you had before to try to provide health care for your families.

Chairman SANDERS. What kind of wage increases are they offering now?

Mr. ROBERTS. The contract that was voted down had about, I think, \$1.50 over five years.

Chairman SANDERS. \$1.50 over five years.

Mr. ROBERTS. Five years.

Chairman SANDERS. Averaging \$0.30 an hour at a time when inflation is at 7 percent.

Mr. ROBERTS. That is correct.

Chairman SANDERS. Okay. Senator Braun.

Senator BRAUN. Thank you, Mr. Chairman.

I come from the southwestern part of Indiana, where it is the only real mining in our state. I have been underground mines. Surface mining is probably more dominant there.

Braxton, you have got one of the hardest jobs that would be out there. When I looked, especially in the underground mines, at what you put up with, that is something most people would choose not to do.

I think today we are talking about the issue that you are wrestling with, with the company. I think you have got to be careful, too, that you do not homogenize big corporations and private equity in with the rest of what drives this country, which would be businesses like mine, where you treat employees like you are a family.

And in what we are going through currently, I think it has given due attention to issues, and you have got this tug-of-war between more and more concentrated industries, and you are in a particular pickle with it.

I want to be on the record citing that.

My question is for Mr. Roberts. How many of the workers that you represent are coal miners, roughly, by percentage and number if you have got it handy.

Mr. ROBERTS. Probably 80 percent.

Senator BRAUN. Eighty percent. And then when you look at what has beset the industry—businesses, owners, and workers themselves—current policies to me look like, especially in light of China building a coal-fired plant weekly over there, that we are trying to deconstruct the industry. I had the issue of pulling permits at the Twin Metals facility up in Minnesota.

Mr. Roberts, does that bother you, in a broader sense, in terms of where mining is headed, and how much do you think the current Administration is kind of pushing you over the edge?

Mr. ROBERTS. Thank you for the question, Senator. The number of coal miners that have lost their jobs in the last 10 years we put at about 40,000. Every coal mining job, particularly in Appalachia, also supports about four other jobs, and if you do the math on that you are talking about 200,000 people have lost their jobs.

There are a variety of reasons people have lost their jobs. I worked in a metallurgical coal mine myself, and I was fortunate enough to leave that mine in 1977, and membership has chosen to allow me to continue doing what I am doing since 1977, by vote of the membership.

But the first big hit to the coal industry was not regulations having to do with the generation of electricity. The first big hit was the closures of most of the steel industry in the United States and moving that offshore. And we have spoken about that. If we wanted to bring jobs back to the coal fields, if we had a steel industry in the United States of America—we have spoken repeatedly here on Capitol Hill about how you bring jobs back to Appalachia. That is one way you could do that. Because when the steel industry shut down in America, the marketplace moved to China, Brazil, and other locations. And if we had those jobs back here we would be able to reopen many of these metallurgical coal mines.

Where I am from, I was born as far up the holler as you could get on Cabin Creek. The blacktop ended and the dirt road started. Shamrock Holler is a suburb of Cabin Creek Holler, so that is where I am from. And all that coal, K4 coming down the holler, so to speak, up to Dakota, that is all metallurgical coal. Winterford was all metallurgical. They were gone. The coal is not gone. They just cannot ship that coal economically across the ocean and compete.

So we have spoken out. So this is how you get jobs back in Appalachia.

With respect to the generation of electricity in this country, we never denied for one minute the existence of climate change, because I think that debate has been settled. What we argue for is a way to allow people to keep their jobs as long as possible, use technology and investment in technology to generate electricity. And we realize—and I think you do not have to much more than look around—that as time goes on, less and less coal is being utilized to generate electricity in this country.

So we are not just sitting and watching these things happen. We have ideas, and I know that might shock some people that a union has got ideas about the economy. And we have testified to those concepts here on Capitol Hill many times.

So, you know, it bothers me any time somebody loses their job, but one of the things that has repeatedly happened in this nation—and you can go back 100 years if you want—whenever an industry winds down we do not have a program that exists in this United States on how to deal with those workers losing their jobs. And we have spoken out on that too. We think there should be some kind of supplemental pay for those workers as you transition, some opportunities to be trained, and those jobs to be here.

For example, right now two-thirds—I do not mean to get so long-winded but you asked, and I will shut up here in a moment—but two-thirds of all the windmills in the world are made in China, and they ought to be made here. And I would say that same thing for solar panels.

Senator BRAUN. Well, thank you, and very briefly, I think that you have got to always be aware of where you want to go in the long run. And I said it earlier. The cleanest, the least-expensive

fuel is going to win the day. But you have got to be careful that you do not do things in the short run that actually accelerate what has already been a process for coal miners in the wrong direction.

I think this Administration needs to pay more attention on distinguishing between the two. And I think the coal miners ought to speak up, because in my opinion, they are not distinguishing between what we may need to do to keep the industry alive so it could survive in the long run when other technology might make it relevant. Thank you.

Chairman SANDERS. Thank you. Senator Kaine.

Senator KAINE. Thank you, Mr. Chairman and Ranking Member Braun, and thanks to our witnesses, one of whom is a friend and one of, even though, Mr. Wright, I have not met you, I know an awful lot of Virginians just like you in Tazewell, Buchanan, Russell, and Wise counties. I have worked with them for many, many years, and I am really happy you are here today.

I will say, about President Roberts, doing what we do, all of us, is not easy. If you are doing this kind of work and you are in politics it is more than a 9-to-5. It is a nights and weekends job. I am in my 28th year since I ran for City Council in Richmond, and you sometimes wonder like is it worth it? It is worth it to have the chance to help folks every day, but it is also worth it because I have met people that I never would have met had I not done this. And I consider President Roberts just, you know, it is almost worth the price of admission of being in public office 28 years that I met you and we are friends, and I am so inspired by your leadership.

I also just, you know, want to say, I am sitting here listening to this hearing today and I am thinking about my father who ran an ironworker-organized welding and metalworking shop in the stockyards of Kansas City. And I just grew up in a house that was a management house that did not hate labor but actually really liked labor. You know, he had six employees in a good year, and in a really good year, seven or eight, plus my two brothers and me and my mother. And the fact that so much of corporate America just seems to hate unions, I just did not come up in a household like that.

You know, my dad told me that his workers' training and skill were going to put my brothers and I through college and that my dad's business acumen was going to put his workers' kids through college. It was a team. And there could be disagreements, just like there can be disagreements within any family, but it was a team. And it was not that the union was our enemy, and we have got to bust the union, and we have got to grind them to nothing, and we have got to bankrupt out their contracts and bring in people. It was never about that.

My dad got asked to be on the board of the Ironworkers Pension Fund. There were three employer reps and three employee reps on that board, and I remember when they asked him to do it he was like, "I only have six employees. This is a big union. You have got big employers all over the country. Why would you ask a guy like me, with a small, little shop in the stockyards of Kansas City?" They said, "Because you treat people with respect."

Why would we not treat people with respect? Why would we not treat union workers with respect? I mean, yeah, it is about dollars.

Yeah, it is about benefits. But underneath all of that it is about respect. It should be about respect. And I just thank God I was raised in the kind of house I was raised in, and I am just so puzzled at the behavior of those who would want to grind down people because they want to exercise a right that is protected in the law to act collectively.

President Roberts, you and I, we worked on some important issues in the last few years—saving miners' health care. I remember being around a table in Castlewood, Virginia, with a lot of mining families who were really worried because they were about a week away from losing health care benefits. We worked together to save them. Saving pensions of UMWA members—we worked on that together. But there is an issue pending right now with us that we have got to work together on and that is the Black Lung Disability Trust Fund. And I just want to ask you about this.

The black lung issues are not getting easier. They are getting tougher. The treatment is getting tougher in a time of COVID, where people have respiratory issues from COVID. The coincidence of COVID and black lung is much more potentially damaging and fatal to people.

Congress did not act at the end of the calendar year, and the elevated excise tax that funds the Black Lung Trust fund, to take care of people who are doing this extremely hard work is now challenged.

Mr. President, I would like you to just address this question. What is the importance of us fully funding this Black Lung Disability Trust Fund with a coal excise tax, and what are the implications if we do not resort to the level it was until December 31, 2021?

Mr. ROBERTS. Well first of all, thank you for the kind remarks, Senator, and you have been a friend probably 40 years ago. I am getting older and I want to thank both you and Senator Sanders for helping save the pensions and the health care of, I guess at the time was 85,000 to 90,000 people. That has been one of the most remarkable pieces of legislation ever passed here, in this Congress, as far as I am concerned. And it led to others having their protection also.

But getting to your point, I would point out this industry and this government never recognized pneumoconiosis is an occupational illness until 1969, and it took an explosion in West Virginia, killing 78 miners, before they ever did.

But to answer your question, if we do not come up with a funding mechanism here—which there is one that exists but we have just let it terminate, for all intents and purposes. It is half of what it was. Even at full funding levels it was not adequate to keep up with the number of people who are suffering from pneumoconiosis and dying in this country. There have been probably 100,000 people die since 1969, from this disease.

And in your area, southwest Virginia, eastern Kentucky, and southern West Virginia, silica is running wild there. That is the other thing we would ask Congress to think about. Young people are getting pneumoconiosis mainly from silica, and we need a silica standard to save their lives, but we need to fund this program. If we do not fund it, at some point in time Congress is going to say

we are not taking any more money out of the general Treasury to pay these benefits. That is our fear, and that is why we need to deal with this.

Senator KAINE. Thank you. Thank you, Mr. Chairman.

Chairman SANDERS. Thank you, Senator Kaine. Senator Toomey I believe is with us virtually. Senator Toomey, are you there?

Okay. I believe Senator Warner is with us virtually.

Senator WARNER. Thank you, Mr. Chairman, and I am glad you are hosting this hearing. I want to first of all echo what my friend and colleague, Senator Kaine, said to President Roberts that we need those black lung benefits. And as President Roberts just indicated, you know, the incidence of this disease hitting much, much younger miners is stunning. Tim and I both see it in southwest Virginia, and I know our colleagues in West Virginia see it as well.

I know we are talking about private equity in a large way. I just want to bring to the Committee's attention—and I do not want to shock the Chairman on this because he knows that I have been viewed as sometimes to be pro-business. I am, but some of these private equity firms—I am going to raise a question about bankruptcy.

But I just wanted the Committee to know that, you know, over the last couple of years the Intelligence Committee has been hosting a series of classified briefings to alert business and academia and others about the challenges posed by the Communist Party in China. When we criticize China I want to make clear my beef is with the Communist Party, Xi Jinping's leadership, and their intellectual property theft, their authoritarian behavior. It is not against the Chinese people, and obviously not against Chinese Americans.

But the practices of the Communist Party in China, we have shared on a regular basis with venture capital, with banks, with manufacturers, with the Chamber of Commerce, with college presidents. The only group—and I hate to give Chairman Sanders more ammunition—but the only group that would not even sit and listen was private equity, because these private equity companies were making so much money investing in Chinese technology firms—the Alibabas, the Huaweis, the Tencents—that were then being used to create an Orwellian surveillance state in China that they did not want to hear the truth.

Now finally we are restarting these classified briefings. We actually met with counties from around the country yesterday. NACo was in town—again, bipartisan—just to lay out these challenges. The private equities indicated they would finally sit and hear the truth, maybe because finally the Chinese government is clapping down on some of these tech companies where they made so much money. But it was embarrassing that this part of our financial network would not even hear some of the challenges posed by the Communist Party in China.

That brings us to the question of the hearing, though. President Roberts, one of the things we have seen—I remember Westmoreland Coal when it went in—we have got bankruptcy provisions that allow workers and their pension benefits—I think Category 4. I know there was a case in Alabama that you all worked on.

But a bankruptcy code, and I have been trying to work with Joe Manchin on, re-establishing a higher priority for workers and their pensions, if a company goes under. That is going to take some changes under both Chapter 11 and Chapter 7 bankruptcy.

I know this is something your members have had to deal with, unfortunately on way-too-often a basis, but can you speak to this issue about how we can make a bankruptcy code that takes care of creditors but it actually is fair to workers and pensioners as well?

Mr. ROBERTS. Thank you, Senator, and I thank you for your friendship to not only me but to coal miners for many, many years.

Yes, the problem with bankruptcy—there are multiple problems, but for workers that have to get into the back of the line and even fight for their jobs, I found that very offensive, I found that to be morally wrong, and I think Congress needs to deal with that aspect of it, if they do not deal with anything else.

Pensions and health care that people who have earned should be protected in bankruptcy. And I support the efforts that Senator Warner and Senator Manchin are trying to make any bankruptcy laws in this country a little more fair.

But one of the things that invites these people to come in and try to do, like what happened here at Warrior Met and has happened 60-some times in the coal fields over the past couple of years, is the fact that workers do not have a chance in bankruptcy. And it goes to what I said in my opening statement, is that workers never create bankruptcy but they are asked to pay for it, and that should not be the way things work in the United States of America.

Senator WARNER. Thank you, President Roberts, and thank you, Mr. Chairman, for this hearing.

Chairman SANDERS. Thank you, Senator Warner.

Senator TOOMEY, are you there?

[No response.]

Okay. I think with that let me thank the panel, and now we will hear from Panel 3. Gentlemen, thanks very much.

Mr. ROBERTS. Thank you very much, Senator, for the hearing.

[Pause.]

Chairman SANDERS. Okay. This is our third and last panel. Two of our guests are virtual and two are here in person. Our virtual guests are Nomi Prins, who is an economist and author and a former managing director at Goldman Sachs. She is a former Wall Street banker. Dr. Prins' work sheds a light on the manipulation and unethical practices of the banking industry. We will hear from her in a moment.

James Kwak is a research fellow at the University of Connecticut School of Law. He researches business law and corporate finance. He is the author of the book "13 Bankers: The Wall Street Takeover and the Next Financial Meltdown."

Douglas Holtz-Eakin, who is with us here in person, is the President of the American Action Forum. He is the former Director of the Congressional Budget Office and served on President George H. W. Bush's Council of Economic Advisors.

And Duncan Wood, who is also with us, is Vice President for Strategy and New Initiatives at the Wilson Center. His work fo-

cuses on North American politics and Mexico and U.S. Mexican ties. He lectures and publishes on hemispheric issues and relations. And we thank all of our panelists for being with us.

Why don't we begin virtually with Nomi Prins.

**STATEMENT OF NOMI PRINS, PH.D., ECONOMIST AND
AUTHOR, FORMER MANAGING DIRECTOR, GOLDMAN SACHS**

Ms. PRINS. Thank you, Chairman Sanders and Senator Braun for the privilege and opportunity to speak before you today. I am a former managing director of Goldman Sachs. Before that, I ran the international analytics group as a senior managing director at Bear Stearns in London. I have held positions at Lehman Brothers and the Chase Manhattan Bank.

After years on Wall Street, the levels of greed, unparalleled influence, and unethical practices in the industry caused me to step away. Since then, I have worked to uncover the manner in which the global economy and our financial system has become so unequal, unjust, and fractured.

In 2008, two of the investment banks that I had once worked for went bankrupt and saw their risky bets and bad practices nearly tank the global economy. Those banks no longer exist. However, the economy remains on edge.

Today, nearly a decade and a half later, we sit at another precipice of grave risk. Asset management behemoths and private equity institutions have amplified the distortion in financial markets. The magnitude of their influence over securities and companies has no historical comparison. Their unfettered access to policymakers and major institutions spans the world. These new financial giants are leaving smaller market participants from all parts of the economic spectrum exposed to concentrated systemic risk and diminished representation.

Yes, it is true that Wall Street banks remain as powerful and influential as ever. But now asset management firms, with trillions of dollars at their disposal, have become more influential than governments and the regulatory entities responsible for keeping them in check.

It is important to understand that at the top of this financial hierarchy stands BlackRock. The financial goliath manages \$10 trillion in assets. That is more money than the size of any other country's GDP besides China or the United States. BlackRock's meteoric rise has seen its assets triple since 2012, and nearly double from five years ago.

The world's largest asset manager acts as a money manager, private equity fund, institutional investor, trading software platform, and government partner. What has truly made it untouchable is its ability to produce and attract capital to Exchange Traded Funds or ETFs. ETFs are attractive because they offer intraday liquidity for both buyers and sellers in financial markets. But what the shock from the early days of the pandemic in 2020 showed us was that frenetic ETF activity can intensify panic in the markets. Quick outflows executed in bulk can exacerbate a falling market, which can hurt those that can afford it least, the most.

Ultimately, leveraging its government connections, BlackRock was awarded a no-bid contract to manage the Federal Reserve's

corporate bond buying program. The contract allowed BlackRock the opportunity to essentially support its own investment grade bond ETFs in the midst of a pressurized environment.

BlackRock and its executives had access to confidential information and the ability to formulate business decisions for themselves and their large clients. No other institution in the world has or had such access during or since that crisis.

Currently, BlackRock, Vanguard, and State Street manage more than \$22 trillion in global assets. For comparison, U.S. GDP stands just shy of \$24 trillion. The asset management industry has only grown more concentrated at the top over the past decade.

These Big Three dominate the market. Their growing stranglehold on U.S. equity participation provides them greater chances to hold veto power or directly influence business strategies for nearly all major corporate decisions.

As these institutions expand further into the world of private equity, their ability to dictate corporate control and outright ownership in every sector of the economy will have a greater human cost. Private equity business practices are largely designed to extract capital, not build it. As a result, small businesses and communities caught in the private equity crossfire will come under greater control of big finance that puts cost and job cutting ahead of worker stability.

Today, BlackRock and these other institutions have expanded to such a magnitude that they effectively are the market. This represents a monopoly sort of influence over competition, assets, and transactions. It elevates the systemic risk that the global financial system faces. This renders everyday people, retail investors, workers and anyone with a 401(k)-retirement plan exposed to the risk that these massive trillion-dollar institutions pose. These individual shareholders of ETFs or other funds, seeking to invest their hard-earned money in the markets and build for retirement, have had their ability to obtain a seat at the financial table reduced.

By creating a shareholder pass-through structure, similar to the kind that Wall Street has used for decades, we can strive to even the playing field and reduce the immense power of mega money managers. This would enable participants invested in ETFs or other funds to hold shareholder rights with respect to the corporations in which these vehicles are invested. Currently, these rights are retained by the asset management companies themselves.

We should enact policies focused on reducing the sheer size and concentration of asset-management institutions and private equity firms to establish a more efficient, transparent, and equitable marketplace. The risk of corporate wrong-doing, fiscal mishaps, unfair tax advantages, and conflicts of interest is too great to ignore. So is the possibility of extreme price movements due to the leverage and trading patterns of these mammoth asset management institutions. Our financial stability and security depends on addressing this.

Thank you.

[The prepared statement of Ms. Prins appears on page 108]
Chairman SANDERS. Thank you very much, Dr. Prins.

Our next panelist is James Kwak, a research fellow at the University of Connecticut School of Law. Mr. Kwak, thank you very much for being with us.

**STATEMENT OF JAMES KWAK, PH.D., RESEARCH FELLOW,
UNIVERSITY OF CONNECTICUT SCHOOL OF LAW**

Mr. KWAK. Thank you. Thank you, Chairman Sanders, Ranking Member Braun, and the entire Committee for your time today.

I apologize I cannot be with you today. For the past 10 years I taught corporate law and corporate finance as a professor at the University of Connecticut. Previously I co-founded Guidewire Software, which has been a public company since 2012.

My topic today is the concentration of economic power. There are three major types of concentrated economic power in the United States. One is technology giants, such as Amazon or Facebook, and we know all about them. The second is large private equity firms, each of which can control well over 200 companies. Senator Warren already spoke about how private equity firms use their power.

The third is large asset management firms, primarily, as Dr. Prins said, BlackRock, Vanguard, and State Street. As she said, these three companies are major shareholders of virtually every large public corporation. This type of concentrated economic power is probably the least known of the three, so I focus on it here.

Our economy is based on the principle of shareholder capitalism. The idea is that a corporation is controlled by its shareholders, who have the power to elect the board of directors. The basic idea is that the people who invest their money get to make the decisions. Now this system is neither necessary nor is it ideal, but it is how most people think about corporate governance today.

Today, BlackRock, Vanguard, and State Street effectively own more than 20 percent of most large corporations and they cast about 25 percent of the votes in elections for directors.

So why do they have this power? Because investors have been shifting their money into index funds, and the Big Three have a 90 percent market share in U.S. stock index funds. And, as Dr. Prins said, the manager of an investment fund gets to cast the votes, not the investors in that fund, even though it is the investors whose money is at stake.

Now corporate executives tend to listen to the view of their largest shareholders, in part because those shareholders can vote them out of their jobs. So this means that a handful of executives, at a handful of asset management companies, have influence over virtually every large company.

So the next question is what are they doing with that power, and different observers have identified at least four different problems. Some people think that the Big Three actually do not provide enough oversight of corporate directors and executives, and the reason is that all the funds that track the same index—so, for example, all of the S&P 500 index funds—get the same returns. So if you manage an index fund you have no incentive to pressure companies to do anything really. So that is number one.

Number two is that some people, including Senators Toomey and Johnson, think that Larry Fink, the CEO of BlackRock, is using his company's power to push his personal political agenda on the cor-

porate sector. Fink has recently been very outspoken about the need for corporations to take climate risk seriously.

Number three. Some people think, on the contrary, that the Big Three, despite Larry Fink's statements, are not doing enough about climate risks and other environmental, social, and governance concerns.

Number four, and perhaps most concerning, some scholars think that large asset managers are facilitating collusion between companies in the same industry. The idea is that if you own 10 percent of every airline, for example, you want them to collude instead of competing with each other, and economic studies have found that greater common ownership by asset managers leads to higher prices in both the airline and the banking industries.

Now not all of these criticisms can be true at the same time in the same company, but they point to the problems that the economic power of large asset management firms creates. Now I do not want to overstate the point. Larry Fink today cannot give orders to corporate CEOs and expect them to be followed 100 percent of the time, but his power is increasing every year.

So, in summary, I would say this is not really shareholder capitalism anymore. This is financial intermediary capitalism, where the decisions are made by companies that accumulated other people's money, and they accumulated it because they are very good at administering and selling low-cost index funds. And I doubt that this is the best way to allocate power over our economy.

So let us take the example of climate change. Again, some people think that BlackRock should not do anything about climate change. Others think it is doing too little. But I think both sides should agree that how our nation's corporations respond to this challenge should not depend on the personal opinions of one man.

Just this week, Charlie Munger, who was Warren Buffett's lieutenant for decades, said, and I quote, "We have a new bunch of emperors and they are the people who vote the shares in the index funds. I think the world of Larry Fink, but I am not sure I want him to be my emperor."

Thank you very much.

[The prepared statement of Mr. Kwak appears on page 110]

Chairman SANDERS. Thank you very much, Mr. Kwak.

Our next panelist is Douglas Holtz-Eakin, who is the President of the American Action Forum. Mr. Holtz-Eakin, thanks a lot for being with us.

STATEMENT OF DOUGLAS HOLTZ-EAKIN, PH.D., PRESIDENT, AMERICAN ACTION FORUM

Mr. HOLTZ-EAKIN. Well thank you, Chairman Sanders, Ranking Member Braun, and members of the Committee for the privilege of being here today. Let me make a couple of points very quickly and then I look forward to answering your questions.

The first point is to just remind us that it is useful in these circumstances to step back from the particulars of this case and remember that financial markets have a very important role to play in the U.S. economy. Financial markets are the mechanism by which we take the savings of each household, pool them together, and provide the capital that businesses need to start up, to expand,

to improve their technologies, and that intermediation is a crucial function.

It is financial markets that allow people to diversify their financial holdings, and thus get away from the risk of a particular holding. It allows them to mitigate health risks, longevity risks, disability risks, all sorts of risk management to make their lives more secure and more safe.

And it is the way by which we separate ownership and management. So we can specialize in management while having the owners control the shares in publicly traded companies and other arrangements like that.

And the U.S. has been successful, largely because it has the deepest, most liquid, best capital markets on the planet, and the beneficiaries of that success have been the American households who, from the end of World War II to the Great Recession saw the standard of living double every 35 years. And you could imagine a family like mine, where my father came out of the Navy and went to work for the steel industry, and in those 35 years rose into the middle class and was very successful.

Point number two is within those financial markets there are many different business models. We have banks. We have insurance companies. We have mutual funds. We have pension funds. We have a myriad of business models that are competing to provide those services that households value in the financial area. And private equity is one of those business models, and at least, to my eye, the rule that one ought to adhere to is that policies, whether they be tax or legal or regulatory, bankruptcy, those policies should tilt the playing field as little as possible among those business models so that they have to deliver on the basis of their performance, not on having an advantage in a policy arena.

Private equity does appear to be successful in that competition. In my written testimony we have a variety of measures of the success—10-year average rate of return at 12.3 percent in the decade leading up to 2020, 11.7 million workers.

And point three, they are probably more successful than that because the basic model is to take entities that need restructuring, that are performing below average, and deliver higher returns. And so getting the market rate of return is actually quite an accomplishment in those circumstances. So I think we have reason to believe the private equity model is a successful model on the whole and across the economy.

And so my last point is simply that particular policies, whether it is legislation like Senator Warren's Stop Wall Street Looting Act, which contains provisions that are targeted on just one entity—in this case, 100 percent tax on fees from portfolio companies and increasing the tax on carried interests, limited interest deductibility, restriction on dividends, special treatment of workers in bankruptcy, special liability rules for primary equity—those kinds of provisions are not going to satisfy the neutrality dictum and are not the way I think Congress ought to pursue whatever issues do arise.

I would prefer instead, as Senator Warner mentioned, rethinking bankruptcy law as a whole if there needs to be a higher priority placed on workers, health insurance, pensions, whatever it might

be. Do that in a neutral fashion across all entities and do not discriminate against a single business model.

But I thank you for the chance to be here today, and I look forward to answering your questions.

[The prepared statement of Mr. Holtz-Eakin appears on page 119]

Chairman SANDERS. Thank you very much.

Duncan Wood is a Vice President for Strategy and New Initiatives at the Wilson Center. Dr. Wood, thanks for being with us.

**STATEMENT OF DUNCAN WOOD, PH.D., VICE PRESIDENT FOR
STRATEGY & NEW INITIATIVES, THE WILSON CENTER**

Mr. WOOD. Thank you so much, Chairman Sanders, Ranking Member Braun, distinguished Committee members. My remarks today will focus on the challenges facing the critical minerals supply chain and the need for concerted action by government and the private sector to address a significant and growing deficit in the availability of these resources as the global energy transition brings a dramatic increase in demand.

In the summer of last year, the Wilson Center convened a Critical Minerals Working Group, made up of stakeholders from industry, academia and civil society, to examine the vulnerabilities that exist in the supply chain and to discuss how the private sector and government can address them. The working group produced a report, titled "The Mosaic Approach," which identified three main vulnerabilities.

The first, namely to meet its climate goals, the United States must face rapidly and dramatically rising demand for critical minerals while constrained by chronic underinvestment in mining, processing, infrastructure, and human capital. Current trends show that demand for critical minerals outpaces that of supply and will continue to rise, particularly considering the key role the critical minerals will play in the clean energy transition.

An International Energy Agency (IEA) assessment found that to reach the Paris Agreement goals of less than a 2 degrees Celsius rise in global temperature clean energy technologies would demand four times the current mineral input by the year 2040. The IEA foresees mineral demand specifically for electric vehicles and grid storage for EV batteries to increase by at least 30 times by 2040.

The second challenge the United States faces is from China, intense competition from China for access to critical minerals, and we must recognize the intense geographic concentration of both the extractive and processing activities for critical minerals. China's dominant position in the supply chain stems not only from its ownership and control of critical minerals mines, but also processing facilities.

In the maps I have included in my written testimony you can observe the impressive geographical concentration of resources and processing facilities that leaves the U.S. at a huge geopolitical and competitive disadvantage. China has assumed a dominant position in the processing of cobalt, around 50 percent of global processing capacity; rare earth elements, around 80 percent; and lithium, around 50 percent, all of which are essential minerals for the clean

energy transition. The United States must invest in both extraction and processing to meet the challenge.

Third, there is a governance challenge that impacts the first two vulnerabilities in which mining firms from the United States, unlike their Chinese counterparts, must adhere to justifiably stringent compliance measures in the areas of environment, society and transparency disclosure regulations, regardless of whether they are operating domestically or internationally. Permitting requirements on U.S. mining firms place them at a competitive disadvantage compared to Chinese competitors and provide a strong disincentive for developing resources within the United States.

As this challenge becomes clear, it is also obvious that the United States has fallen behind in the extractive industries. In part, this is because we have not invested enough in mapping our resources, in part because we rely too heavily on sourcing from other countries, and in part because it is overly costly and time-consuming to develop these essential mineral resources here in the U.S.

One of the biggest impediments to the development of new mineral resources here is to be seen in the permitting process. Whereas permitting in Australia and Canada, countries that have suitably high standards, typically takes between 2 to 3 years for a new mine, here in the U.S. it takes between 7 to 10 years, with companies subject to 30 or more local, state, and Federal regulations and programs.

It is important to emphasize here that I am not suggesting a lowering of standards. Strong environmental protections remain a priority for mining companies, in part due to the demands of investors, in part due to the demands of end users to green the value chain, and in part due to increased public oversight.

Rather than lowering standards, it is the regulatory and permitting process that requires review. Regulatory innovation that takes firm competitiveness and national geopolitical and climate objectives into consideration is desperately needed to provide more transparent timelines for permitting, clearly define the roles of different agencies to avoid regulatory duplication, and to allow for shared responsibility between regulators and the firms they regulate.

Alongside that revised permitting process the United States must seek to internationalize these higher standards. An effort on the part of the U.S. government, alongside its partners, to raise Environmental and Social Governance (ESG) standards around the world will help to protect the environment and level the playing field to help U.S. firms compete domestically and globally.

In conclusion, as America moves towards a clean energy future, with massive investment in renewable energy and electrification of the vehicle fleet, we must address a deeply concerning reality. The lack of investment here in critical minerals extraction and processing leaves the country vulnerable to supply shortages and interruptions in the production of batteries, vehicles, and advanced technologies. Whereas countries such as China have invested heavily, the United States has for too long neglected its own natural endowments and has failed to engage with foreign allies and partners to guarantee supply.

The clean energy transition cannot happen without critical minerals. To secure that supply chain, the U.S. government must work with the extractive industries at home and abroad to facilitate responsible and environmentally conscious extraction in as efficient a manner as possible.

Many thanks.

[The prepared statement of Mr. Wood appears on page 123]

Chairman SANDERS. Dr. Wood, thank you very much.

Senator Braun has another appointment and has asked to go first. Senator Braun.

Senator BRAUN. Thank you, Mr. Chairman. Mr. Wood, I just heard what you said, and earlier I was talking to Mr. Roberts about coal. Of course, oil and gas would be theretoo, where, to me, especially in that case, there is a difference between your long-term goals and what you need to do in the present if we were energy independent. Now you are asking OPEC, you know, to pump more.

So here, though, it seems to me to be just a blatant contraction, when you are pushing electric vehicles, and a lot of the things that lower greenhouse gasses and where critical minerals are a component of all that.

Do you think there is an inherent contradiction coming from the Biden administration, and do you think that in the short time that we need to get there with supply chains and 18 find these critical minerals, in many cases in the U.S., is the Administration helping or hurting?

Mr. WOOD. Thank you for the question. My take on this is that we have set an ambitious goal. Right now we are not in a position to be able to reach that goal. Many of the critical minerals that are required for the energy transition are to be found here in the United States, but we have not developed those resources for a number of reasons.

A lot of the critical minerals are not found here in the United States, and that means that we do have to engage with allies and partners overseas to make that happen. And that is why I keep coming back to the point. This is not something that government can do alone. This is not something that industry can do alone. There does have to be a much more collaborative approach to identify where the resources are, to identify the impediments to their extraction, and to try to make sure that these are aligned with United States' geopolitical and competitiveness goals.

At the current point in time, I see a future where we have built factories that will produce an electric vehicle fleet but we simply do not have the critical minerals that we need for the battery technology to make those electric vehicles functional.

Today we live in a world where we look out and we see massive inflation of car prices because of a lack of semiconductors. In the future we might be in a similar situation where we simply do not have enough lithium coming through to U.S. automobile manufacturers. The consequences of that are going to be massive unemployment, massive inflation, and really a failure to meet our ambitious goals.

Senator BRAUN. Thank you. And I would suggest to President Biden that if you are going to put the rhetoric out there that you want to convert electric vehicles for those critical minerals that lay

within our own country you cannot have your cake and eat it too. And you at least need to make sure we open that up if we are going to go there with policy and then try to get the relationships built with other countries where we do not have them here.

Thank you. Thank you, Mr. Chairman.

Chairman SANDERS. Thank you, Senator Braun.

Let me go virtual here to Dr. Prins. Dr. Prins, tell me what I am missing when I think that the American people should be very worried when three huge Wall Street investment firms control assets of \$22 trillion, nearly the entire annual GDP of the United States. Are you concerned that this extraordinary concentration of ownership might be a danger to our economy, and, in fact, with so much power in so few hands a danger to democratic society? Dr. Prins.

Ms. PRINS. Yes I am—and here is why. Any time the disconnect between the American people's accessibility to money and power relative to that of mega-financial institutions grows, we lost a piece of our democratic society. In this particular case, what we are seeing is a precipice of a highly concentrated amount of cheap capital. So this is not even because of the leveraging of capital that is coming through, say, the Federal Reserve or other elements externally. This is people's capital. It is institutional capital, and it can be used, and has been used, to affect corporate decisions.

And as Mr. Kwak mentioned, it has also been used to effectively consolidate the decisions of entire industries, whether explicitly or implicitly. The problem with that is when you have so much concentration of power and capital in the hands of such a small amount of asset management companies, there is too much potential for systemic risk because of that concentration to default on the entire market system as well as, therefore, on the economy. And it is always the people in the economy that are most hurt when market disruptions or crises happen, because it impacts them the most.

And secondarily, if people believe that they are invested, for example, through their retirement funds, in exchange-traded funds within these large, concentrated, few players have amassed, and believe that, therefore, they are investing in companies that they perchance have some influence over, even to see the ability to proxy vote, to be real shareholders in these companies they are mistaken in that.

So what these three companies have done, they have taken away power from anyone who has invested in the markets at a smaller level and they have concentrated power to influence mostly all of the companies in the country.

Chairman SANDERS. Okay. Thank you very much. Let me ask Mr. Kwak a question, and that is, given that Wall Street money managers and private equity firms are nearly entirely unregulated, what ideas do you have for congressional action?

Mr. KWAK. Thank you for the question, Senator. I think there are two types of issues that have been raised regarding private equity firms. One is essentially what Senator Warren talked about, which is what private equity firms do to their portfolio companies, such as causing the company to take on a lot of debt, taking the cash out as a special dividend to themselves, and so on. I think that the act introduced by Senator Warren would be a very good first step.

The second issue with private equity firms is that a lot of people think that private equity firms are not entirely above board with the investors in private equity funds. That is a topic which the Securities and Exchange Commission (SEC) recently promulgated a proposed rule to address. The issue here is, for example, private equity firms may charge fees to the fund, meaning that they have to be paid by all the investors, when they should be absorbing those fees because the private equity firms are paid a management fee by the private equity fund. I know that is a little complicated, but essentially it is possible that private equity firms are playing a little bit fast and loose with their investors' money.

Turning to the large asset management firms, I think the issue that Dr. Prins and I have been discussing is the concentration of voting power in the hands of these companies. Various scholars have proposed a number of different solutions. I will mention a few, and I will try to be brief.

Some legal scholars think that because of the competition effects, the anti-competitive effects that have been noticed, this kind of accumulation of shares in all of the leading companies in one industry could be prosecuted under the Clayton Act. So that is one possibility.

Some people have suggested that index funds should be limited in the amount that they can own of any individual company, or that limit would have to be applied at the fund family level. So for example, there would be a limit on how much BlackRock's index funds could own of any company.

The last suggestion I will mention is one that Dr. Prins has also mentioned, which is essentially allowing the shareholders in the funds to vote the shares instead of having the fund manager vote the shares. The issue there is that we would have to have a mechanism for those shareholders to express their preferences about how they want their shares to be voted. I think that could be done, and I will spare you the details. Thank you.

Chairman SANDERS. Okay. Thank you very much. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chairman, for holding this hearing to put the spotlight on how corporate greed is, in critical sectors especially, leading to higher prices for consumers and harming workers and families.

There are a number of issues I would like to raise and ask questions about, but let me set the stage by also acknowledging that the American economy has come roaring back. With the greatest year of job growth in our nation's history, in 2021, corporate greed still casts a large shadow over our recovery.

Mr. Chairman, as you know, Angela and I are raising three boys, three growing boys, and so I can assure you I have seen first-hand how price increases are affecting families, families across the country, whether that is at the gas pump, at the grocery store, when it comes to paying for childcare, at the pharmacy, and elsewhere.

These price increases are not just because of rising costs or small businesses just trying to get by. Many corporations are posting record profits. Estimates show that the earnings of S&P 500 companies rose nearly 50 percent over the past year, while they cited increased costs to justify increased prices for American families. It

should be unthinkable that during a global health pandemic, while so many working families were struggling to get by, that billionaires got richer, but they did.

So as we continue our recovery we need to both upgrade our nation's infrastructure and pass the President's plan to reduce the cost of essentials, like prescription drugs, health care, childcare, housing, and more. We must also ensure that wealthy corporations are not just using the pandemic and the supply chain as excuses to exploit consumers and increase their profits. So I am proud to be part of this Committee's efforts to fight for solutions that help us build a more equitable, inclusive economy and hold corporate interests accountable.

The first issue I want to ask about deals with the agricultural industry and the dynamics of consolidation. Not only have mergers and acquisitions changed the landscape of the agricultural industry but financial investments, including from equity-related funds in this sector has grown significantly in recent years. At the end of 2016, the top five asset management firms owned at least 10 percent, upwards of 30 percent of the shares of the top firms in the agricultural and food sector.

Given this common ownership across the industry, these firms have little incentive to bolster competition and innovation between individual firms. Instead, they can encourage inexplicable price increases to make even more profits across the entire sector, and the end result is higher prices at the grocery store for American families.

Mr. Kwak, why is addressing the common ownership of companies important to keeping down the cost of food for American families?

Mr. KWAK. Thank you for the question, Senator. You are absolutely right that the food sector is highly concentrated. For example, in poultry, hog, and beef processing I believe the top four companies in each of those industries has more than 50 percent and up to 85 percent of the market share. The same is true in agricultural inputs, such as seeds, herbicides, and pesticides.

And to give you one example, in the agricultural input markets the largest companies are Bayer, which bought Monsanto, BASF, Corteva, and Syngenta. Syngenta is owned by a Chinese company. BlackRock is the largest shareholder of Bayer and BASF, and Corteva's three largest shareholders are Vanguard, BlackRock, and State Street.

I am not aware of economic research that has been done specifically on this question and this industry, but I think it is very possible that what is happening is what has been found to be true in banking and airlines, which is that the CEOs of those companies know who their largest shareholders are, and they know that their largest shareholders will benefit from anti-competitive behavior, and therefore they engage in that anti-competitive behavior.

So I cannot prove it but I think that the large ownership stakes of these asset management firms could very well be leading to higher prices in the food sector.

Senator PADILLA. Thank you, Mr. Kwak. Clearly more research to be done in this area.

Mr. Chair, let me shift for a minute from talking about putting food on the table to those who give us food for thought. Preserving local journalism is important to keeping Americans informed about what is going on in their communities, encouraging civic engagement, and countering today's rampant disinformation campaigns, as well as the dangerous spread of misinformation.

Unfortunately, in regions across the country, private equity firms have bought newspapers with no intention of ensuring long-term stability. Instead, we see instance after instance of these firms gutting newsrooms to maximize short-term profits. And I will give you one of many, many examples. A hedge fund bought the Vallejo, California's Times-Herald newspaper. As soon as that happened, the number of newsroom staff was slashed, the remaining staff's ability to cover and investigate local stories obviously dwindled, and its final reporter was fired after criticizing the extreme cost-cutting measures.

These types of acquisitions have contributed to the decline in newspaper newsroom employment by 57 percent since 2008, leaving more than 3 million Americans without access to a local paper.

So the question is for Dr. Prins. Dr. Prins, how can we ensure that corporations are held accountable for gutting essential American institutions like our newspapers?

Ms. PRINS. Thank you, Senator. That is an excellent question. All of the points that you have made in your statement related to this question are very important to answering it.

First of all, we need to make sure—and this is largely a private equity-driven execution of journalism in terms of the takeover patterns, and as you mentioned, the short-term gain interest versus the longer-term information outflow or democratic journalism interest. That is not the point of what private equity institutions do. They want short-term turnaround.

And so in the field of journalism, or really even agriculture, the idea is we need to restrict the ability of these sort of hits on a concentration, above say a certain percentage, in those industries, whether it is related to journalism, whether it is related to agriculture, however it winds down on the different industry levels. Because otherwise we basically open the field to the sense of capital only striving to really destroy rather than to build up. Certain institutions like journalism, as well as certain businesses and sectors like agriculture that, you know, work towards all of the American people in terms of if we do not concentrate them and get rid of the competition within them, then we can have a better price competitive nature and that will reduce prices.

So I think it is all connected to reducing the influence of that private equity sector.

Senator PADILLA. Thank you very much. Thank you, Mr. Chair.

Chairman SANDERS. Senator Padilla, thank you for your excellent questions. And let me thank each of our witnesses for appearing before the Committee today. Their full statements will be included in the record. As information for all Senators, questions for the record are due by 12 noon tomorrow, with signed hard copies delivered to the Committee clerk in Dirksen 624. Email copies will also be accepted. Under our rules, each of our witnesses will have seven days from receipt of our questions to respond with answers.

With no further business before the Committee, this hearing is adjourned, and I thank everybody for attending. Thank you.
[Whereupon, at 12:55 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

[Prepared statements and responses to written questions submitted for the record follow:]

Statement of Senator Elizabeth Warren
Senate Budget Committee Hearing on “Warrior Met and Wall Street Greed: What
Corporate Raiders are Doing to Workers and Consumers”
February 17, 2022

Thank you, Mr. Chairman, for inviting me to participate in this hearing, and for your powerful work on this issue. You are an extraordinary—and tireless—leader and I’m glad to be in this fight with you. Thanks to you, today we have the opportunity to discuss the very real impacts that private equity and Wall Street giants have on workers and communities across the country.

For nearly a year, more than 1,100 Warrior Met Coal miners in Brookwood, Alabama have been on strike. They’re striking for nothing more than what they are owed: fair pay, fair benefits, and fair working conditions. All of these were stripped away when giant, vulture private equity firms swooped in to buy Warrior Met’s predecessor company, Walter Energy, as it went through bankruptcy.

Apollo, Blackstone, and the other private equity firms that bought Walter Energy in 2016 presented themselves as white knights – here to save the company. Here to save jobs. Here to save the day!

But it was all hype. They showed up because they smelled profits—and they planned to boost those profits by crushing the company’s workers. These private equity firms terminated the miners’ collective bargaining agreement with the United Mine Workers. They forced a pay cut of more than 20% on workers. They cut medical, leave, and retirement benefits. And, just to juice their profits a little more, they ended the company’s pension and health obligations to 2,800 **retired** coal miners and their families.

Private equity was the driving force behind all of this. The private equity investors in Warrior Met dictated the terms and conditions of the 2016 takeover of the company, and those same private equity investors continue to bear responsibility for the cuts in pay and benefits that have pressed workers to the wall and led to the current Warrior Met miners’ strike.

Coal mining is dangerous work. The hours are long; the tasks are back-breaking. But when private equity took over, miners were told that all that hard work just didn’t produce enough revenue to give them the protections and the security they deserved.

Money was supposedly tight, but the investors—Apollo, Blackstone, and the other private equity firms—what happened to them? They made out like bandits. They ran the same play that private equity has run over and over. They loaded Warrior Met up with debt, and then they used the debt to send nearly \$800 million in dividends back to themselves and to other shareholders. And then, after sucking out as much cash for themselves as they possibly could, private equity sold off their shares and moved on to the next victims.

Warrior Met miners are on strike today because private equity ripped them off. What happened to Warrior Met workers is what happens when these billion-dollar Wall Street firms come to

town: private equity squeezes as much as they can out of companies and their employees, and when they think there's nothing left to squeeze, they leave.

Nationwide, private equity's takeover of retail has killed more than 1.3 million jobs over the last decade. It's responsible for jacking up prices for consumers in everything from education to health care. The arrival of private equity can even be a matter of life or death. Research even shows that when private equity takes over a nursing home, short-term mortality rates jump by 10%.

But even as they keep raking in billions in fees, the typical private equity fund hasn't managed to outperform the stock market since at least 2006. Think about that: they strip assets and squeeze workers with frightening energy, but they don't actually make a better rate of return than the average mutual fund. All that destruction comes with high overhead costs and the result is only modest returns to investors.

This is why I introduced my *Stop Wall Street Looting Act* in 2019—and why I reintroduced it a few months ago: so we can put an end to predatory and dangerous private equity practices.

This is not about killing private equity—it's about fixing the system and protecting workers and their communities.

- My bill would prevent private equity firms from walking away after driving companies into the ground and leaving the workers in the dust.
- My bill prioritizes worker pay in the bankruptcy process and strengthens rules so that workers are more likely to receive severance, pensions, and other pay that they earned.
- My bill creates incentives for job retention, so that workers—like Warrior Met's—can benefit from a company's second chance after bankruptcy.
- My bill ends the immunity of private equity firms from legal liability when the companies they own break the law. When workers at a plant are shortchanged or residents at a nursing home are hurt because private equity firms force companies to cut corners, private equity should be on the hook.

So Mr. Chairman, I thank you again for allowing me to testify today, and I appreciate your partnership on these issues. I'm going to keep fighting to end the outrageous practices of private equity firms. I'm going to keep fighting to turn the *Stop Wall Street Looting Act* into law. And I'm going to keep fighting to make sure Warrior Met workers get what they're owed.

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United States Senate

COMMITTEES:
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VETERANS' AFFAIRS

**Senate Budget Committee Hearing
“Warrior Met and Wall Street Greed:
What Corporate Raiders are Doing to
Workers and Consumers”
Thursday, February 17, 2022 at 11:00AM
216 Senate Hart Office Building**

U.S. Senator Tommy Tuberville (AL)
Written Testimony

Chairman Sanders and Ranking Member Braun, thank you for the opportunity to testify before the Senate Budget Committee on an issue that directly impacts the state of Alabama.

I want to make it clear, on the record, that I do not believe the Budget Committee has jurisdiction over matters involving labor practices across our country.

Our federal courts and the Department of Labor’s National Labor Relations Board (NLRB) have already made multiple decisions regarding Warrior Met Coal and its workforce. I have strong concerns about the overt political nature of this hearing and the blatant pro-union stance of this Committee. Actions, like holding this hearing, seek to call into question the judicial system and labor ruling decisions of the NLRB.

It is my hope that a beneficial agreement can come together for all involved in this private business matter and that Congress will not try to tip the scales in one direction. We must get Americans to work so that our economy can once again thrive. I thank the Committee for their time and consideration of my comments.

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**Testimony of Cecil E. Roberts
Before the
United States Senate
Committee on the Budget
February 17, 2022**

Chairman Sanders, Ranking Member Braun, and distinguished members of the Committee, thank you for calling this very important hearing today. The growing trend of vulture capitalism as practiced at Warrior Met Coal in 2016 is creating havoc among working people who have the misfortune of being employed by a company that is acquired by private equity. In case after case, workers end up with lower pay, worse health care benefits, less time to spend with their families and an increasingly oppressive working environment.

By their very nature, private equity firms have no incentive to care about workers, their families or their communities. They are not part of these communities. They never see the havoc they create. They never experience the personal anguish workers and families endure as a result of decisions made hundreds or thousands of miles away in New York, Boston, or other financial centers.

For private equity, the only consideration is the size and speed of a return on their investment. They use America's failed bankruptcy laws to gouge where they can, cutting off retiree health care and derailing pension plans. Indeed, the actions Congress took in 2017 and again in 2019 to preserve retired miners' health care and pensions are a direct result of the ability of private equity firms to use the bankruptcy process to shed obligations to current and former workers of the distressed companies they buy.

The experience the United Mine Workers of America and about a thousand of our members in Alabama have had with private equity firms like Apollo Global Management, Blackstone, KKR and others – who bought the remnants of the bankrupt Walter Energy out of bankruptcy to create Warrior Met Coal – serves as a prime example and cautionary tale of the destruction private equity can and does bring to workers, families and communities.

Three years after a 2012 corporate decision by Walter Energy to spend \$3.3 billion to acquire Western Coal Corp., a Canadian coal company with operations in British Columbia and Wales¹, the price of metallurgical coal dropped precipitously and the company began losing money. Walter Energy was eventually forced to file for Chapter 11 Bankruptcy Reorganization on July 15, 2015.²

¹ "Walter Energy Acquires Western Coal," LEXPERT <https://www.lexpert.ca/big-deals/walter-energy-acquires-western-coal/347263>

² "Coal Miner Walter Energy files for bankruptcy," Reuters, <https://www.reuters.com/article/us-walter-energy-bankruptcy/coal-miner-walter-energy-files-for-bankruptcy-idUSKCN0PP20320150715>

I would note here that the workers had absolutely nothing to do with the company's bankruptcy filing. If Walter Energy had access to the \$3.3 billion it paid for Western Coal, it would have had more than sufficient resources to weather what eventually became merely a short-term dip in metallurgical coal prices.

On April 1, 2016, a consortium of private equity firms and mutual funds led by Apollo and Blackstone Inc.'s GSO Capital Partners (GSO), calling themselves Coal Acquisition, LLC, purchased the debt of Walter Energy and brought the company out of bankruptcy. As part of the agreement to facilitate this transaction, Apollo and its private equity partners insisted that Walter Energy file motions in the bankruptcy court to:

- 1) Eliminate any obligation to provide health care for some 2,700 retirees and dependents;
- 2) Eliminate any obligation to contribute to the UMWA 1974 Pension Plan;
- 3) Eliminate the company's collective bargaining agreement with the UMWA.³

The Bankruptcy Court's December 28, 2015 order granted all three of these motions.⁴ I note that Apollo claimed to Senator Warren that it did not have anything to do with the motions made by Walter Energy to terminate retiree health care, pension contributions and the union contract itself. Yet the Court's order demonstrates otherwise. That claim is demonstrably false.

Several weeks prior to the Court's order, Stephen D. Williams of Coal Acquisition⁵ sent me a letter that, while not recognizing the union as the collective bargaining agent of the workforce, listed what the company intended to offer those it hired to work at its operations.⁶ Mr. Williams' letter made it clear that the company did not intend to recognize the union and was insisting on severe cuts to pay, health care and other benefits, paid time off from work, as well as other significant concessionary terms and conditions of work. As far as Apollo and its partners were concerned, they were through with the union and any union collective bargaining agreement.

The Walter Energy bankruptcy is not the only time Apollo has sought concessions from workers pursuant to a bankruptcy proceeding. Last December, Apollo conditioned its debtor-in possession financing to the bankrupt Mexican airline AeroMexico on the company's ability to obtain labor concessions from its unionized workforce.⁷ When the Mexican Pilots and Flight

³ Opinion and Order Granting Debtors' Motion, page 3 (attached)

⁴ "Bankrupt Walter Energy gets nod from Judge to end labor pacts," Reuters <https://www.reuters.com/article/walter-energy-bankruptcy-idAFL1N14116920151229>

⁵ I note that Mr. Williams was clearly an employee of Apollo and its partners, operating as Coal Acquisition, at this point. He is now the Chairman of the Board of Warrior Met Coal, making the notion that Apollo is "no longer involved" with Warrior Met suspicious, at best

⁶ Stephen D. Williams letter (attached)

⁷ FINAL ORDER GRANTING DEBTORS' MOTION TO (I) AUTHORIZE CERTAIN DEBTORS IN POSSESSION TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 362, 363 AND 364; (II) GRANT LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS TO DIP LENDERS PURSUANT TO 11 U.S.C. §§ 364 AND 507; (III) MODIFY AUTOMATIC

Attendants unions rejected the contract modifications AeroMexico sought, the airline asked the Mexican government to terminate its collective bargaining relationship with these unions citing its need to retain access to DIP loan financing from Apollo.⁸

Believing that the workers at the mines and other company operations needed representation, we continued to discuss union recognition with Coal Acquisition. Eventually, they agreed to recognize the union as the collective bargaining representative for the workers and agreed to negotiate a new agreement. But they were not willing to move very far at all from the terms specified in Mr. Williams' letter.

In early 2016, and in order to preserve the company and the jobs that go with it, the union's bargaining team agreed to a tentative agreement with Coal Acquisition. It was and remains our belief that the company would not have emerged from bankruptcy without a collective bargaining agreement, because it would have been unable to find an experienced, professional workforce. The membership ratified the agreement and it became effective on April 1, 2016 when the sale of Walter Energy's assets to the newly-named Warrior Met Coal became final. Our members made the determination to preserve their jobs and their union with the hope that when the company again became successful, they would have the opportunity to share in those rewards.

In all, the concessions made by the union and the elimination of retiree health care and pension contributions amount to nearly \$1.1 billion in savings to the company over the five-year term of the 2016 contract.

Apollo and its private equity partners did not take long to cash in. Warrior Met earned \$1.5 billion in revenue in 2016 and 2017 alone, as prices for metallurgical coal rebounded. As Senator Warren, Senator Brown and Senator Sanders noted in a letter to Apollo management last fall, "While workers endured severe cuts to pay and benefits after the Warrior Met takeover, Apollo and the rest of the private equity consortium appear to have made off like bandits. Warrior Met has returned at least \$1.4 billion – or more than twice the company's market capitalization last year – in dividends to its owners since the company went public in 2017... These dividends include, in 2017 alone, a special cash distribution of \$190.0 million paid to Warrior Met's private equity owners prior to the company's initial public offering (IPO)⁹ and a 'special cash dividend of approximately \$600.0 million' paid seven months after the IPO to shareholders,¹⁰ the largest of whom were Apollo, GSO, Franklin Mutual, and KKR."

STAY PURSUANT TO 11 U.S.C. §§ 361, 362, 363, 364 AND 507; AND (IV) GRANT RELATED RELIEF"
(<https://document.epiq11.com/document/getdocumentsbydocket/?docketId=863259&projectCode=AEM&docketNumber=527&source=DM>)

⁸ https://aeromexico.com/cms/sites/default/files/ENG_ER_TERMINACION_CCT_VF.pdf

⁹ Warrior Met Coal, LLC, Securities and Exchange Commission Form S-1 Registration Statement, Filed April 10, 2017, https://www.sec.gov/Archives/edgar/data/0001691303/000119312517118042/d501786ds1a.htm_pp.F-46.

¹⁰ Warrior Met Coal Press Release, "Warrior Met Coal Announces Fourth Quarter and Full Year 2017 Results," February 14, 2018, <http://investors.warriormetcoal.com/news-releases/2018/02-14-2018-210126191>.

As the Senators noted in their letter, Apollo and its partners sold their stock in Warrior Met in 2017. To summarize, they took \$1.1 billion in concessions from the workers and an additional \$790 million in dividends directly from the company's treasury and got out of town.

Warrior Met says that its business strategy is to operate as if the next metallurgical coal market downturn is just around the corner. But these concerns about the company's long-term viability appeared to be absent when Warrior Met added \$350 million in debt to the company's balance sheet to payout a special cash dividend in 2017. This is known as a "dividend recapitalization" and is a common private equity practice. Now that Apollo and the other private equity funds have received their special dividends and sold their shares, mine workers are being told that Warrior Met cannot afford improved wages and benefits because the company might not be viable in a future market downturn. In other words, Warrior met wants the miners to pay for the conditions created by private equity's investment in Warrior Met.

Apollo will tell you that they have no interest in Warrior Met and cannot make a difference in this strike. That is questionable. Although as noted Apollo sold its stock in 2017, an employee of theirs, Mr. Gareth Turner, remained on the Warrior Met Board of Directors until just last November. He was on the Board when it made the decision to force our members to strike. I would also point out that another Warrior Met Board member, Alan Schumacher, has served and continues to serve as Apollo's representative on the Boards of other companies it controls or owns a part interest in. And as I noted earlier, the same Stephen D. Williams who represented the Apollo-driven Coal Acquisition, LLC, is currently the Chairman of the Board of Warrior Met Coal.

We are in a standoff of Apollo's making at Warrior Met Coal. The corporate framework and mindset that Apollo left in its wake still exists at Warrior Met, and is, in my opinion, the primary roadblock to reaching an agreement with the company today.

Apollo demanded and got significant concessions from the workers. It would not have provided the financing to bring the company out of bankruptcy without that. Apollo demanded and got a workplace that can only be described as punitive for the workers. Apollo demanded and got a corporate culture that put aside decades of harmonious relations with its workforce and the United Mine Workers of America and instead became abrasive and confrontational.

You will hear from Braxton Wright about what it has been like to work for Warrior Met these last five years. Frankly, it is unlike any experience UMWA members have anywhere else in the country. Indeed, within 25 miles of the Warrior Met operations there are two other mines, owned by competitors, which have recently signed agreements with the UMWA that include standards of pay, benefits, time off from work and other terms and conditions that are reflected in our contracts nationwide. Many of our members on strike at Warrior Met have gone to work in those mines, and I have no doubt they do not intend to return once this strike is settled.

Without agreeing to an industry-standard contract with us, Warrior Met is destined to become a “farm team” for those other mines. Miners will hire into Warrior Met to get the experience and certifications they need, and then will jump to those other operations as soon as they can. We do not want to see that happen. As with all our employers, we want them to be successful financially while demonstrating a sense of fairness to our members and be seen as a good, safe place to work.

It is my hope and belief that we can still negotiate a reasonable collective bargaining agreement that is fair to both our members and Warrior Met. But until the company is completely shed of the private equity taint, that remains difficult.

Thank you again for your time and attention, and I welcome any questions you may have.

COAL ACQUISITION LLC
ONE BRYANT PARK
42nd FLOOR
NEW YORK, NEW YORK 10036
(212) 872-1000

November 6, 2015

Cecil E. Roberts
President
United Mine Workers of America
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172

Dear Mr. Roberts:

In connection with Coal Acquisition LLC's ("CA's") proposed purchase of substantially all of the assets of Jim Walter Resources, Inc. ("JWR"), pursuant to the Asset Purchase Agreement dated November 5, 2015, we plan to begin interviewing potential candidates for employment with CA on or around November 30, 2015. We are contacting you because some of the individuals we plan to interview are currently represented by the United Mine Workers of America ("UMWA") at JWR Mines Nos. 4 and 7, preparation plants, and surface facilities. For the avoidance of doubt, this letter is being provided to you as a courtesy; nothing herein should be construed as recognition of the UMWA as a collective bargaining representative of any employees at CA.

The terms and conditions of employment for those individuals offered employment by CA at Mines No. 4 and 7, preparation plants, and surface facilities will include:

- All employees shall be employed on an at-will basis.
- Offers of employment will generally be made in accordance with the schedule of job classifications and wages attached hereto as Attachment A, except for certain select individuals determined by CA to have skills warranting a different wage rate, who will be notified of such wage rate(s) in any offer of employment.
- There will be no shift differentials.
- Employees will receive overtime at a rate of time and one-half (1 ½) the employee's regular rate of pay for all hours actually worked over forty (40) in a work week. There will be no daily overtime.
- There will be no premium payments for weekends or holidays (unless such work causes an employee to actually work in excess of forty (40) hours per week).

Cecil E. Roberts
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- Employees may be eligible to participate in CA's employee benefit plans on terms and conditions substantially similar to the terms and conditions for CA's salaried employees, including with respect to employee premium payments and deductibles for the medical plan.
- For employees with one or more years of continuous service, CA will make available a defined contribution retirement plan with a 401(k) feature into which eligible employees may make elective deferrals.
- CA shall have an omnibus paid time off ("PTO") policy. An employee's PTO allotment can be used for the observance of holidays, vacation days, sick days, and personal days, in accordance with applicable policy. Regular full-time employees with one or more years of continuous service will be eligible for PTO in the following amounts:

<u>Length of Continuous Employment</u>	<u>PTO</u>
1 year to 7 years	15 days
8 years to 13 years	20 days
14+ years	25 days

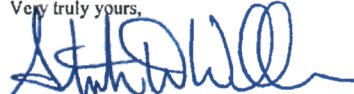
- Whenever years of continuous service are relevant, employees may, at CA's discretion, receive credit for all years of service with JWR, or any other affiliate or subsidiary of Walter Energy, Inc.
- The attendance policy enclosed herewith as Attachment B shall apply to all employees.
- Other terms and conditions of employment will be governed by the Employee Handbook to be provided to all employees who receive offers of employment with CA.

Please be advised that CA reserves the right to add, modify or eliminate these and other terms and conditions at its sole discretion.

All offers of employment with CA for non-exempt hourly employees at Mines Nos. 4 and 7, preparation plants, and surface facilities will be contingent upon acceptance of terms and conditions consistent with those set forth above. For the avoidance of doubt, any offers of employment made by CA for a position at Mines Nos. 4 and 7, preparation plants, and surface facilities are contingent upon CA purchasing substantially all of the assets at Mine Nos. 4 and 7, and operating those assets in a non-idle state.

Cecil E. Roberts
Page 3

Very truly yours,



Stephen D. Williams

CC: Darryl Dewberry, International Vice President, District 20, UMWA
Larry Spencer, Field Representative, District 20, UMWA
James Blankenship, Field Representative, District 20, UMWA
Johnny Jordan, #4 Mine President, Local 2245, UMWA
Dwight Cagle, #7 Mine President, Local 2397, UMWA
Walter Parker, #5 Mine President, Local 2368, UMWA
C.W. Turner, Central Shop President, Local 2427, UMWA
Sharon Levine, Lowenstein Sandler LLP

ATTACHMENT A

Schedule of Job Classifications and Applicable Wages

Underground at Deep Mines:

Job Classification	Hourly Wage Rate
Electrician	\$29.50
In-By	\$24.50
Out-By	\$23.00

Preparation Plants/Surface Facilities:

Job Classification	Hourly Wage Rate
Maintenance Crew	\$27.50
Equipment Operator	\$23.50
Surface Employee	\$22.50

ATTACHMENT B**Coal Acquisition LLC Attendance Policy**

Coal Acquisition LLC (the "Company") shall administer a three-strike attendance policy for all absences (whether excused or unexcused). Progressive discipline under the attendance policy shall proceed as follows:

- Strike 1 = verbal warning
- Strike 2 = written warning
- Strike 3 = suspension (minimum 2 days)
- Strike 4 = discharge

Employee strike counts will be reset annually on the anniversary of the employee's hire date (the "Reset Date"). However, if an employee received a strike within 90 days of the Reset Date, the employee's strike count will only be reduced by 1 strike.

Consecutive absences caused by illness will be considered 1 absence. However, an employee must provide a doctor's note in order for consecutive absences caused by illness of 3 days or more to be counted as 1 absence. The Company shall be permitted to contact the doctor solely to verify the legitimacy of the note provided by the employee. If it is determined that the doctor's note is not legitimate, the employee will be subject to discipline up to and including discharge. An employee's failure to provide a doctor's note will result in each day of the absence being considered a separate strike under the policy.

Absences resulting from jury duty, military leave, funeral leave, FMLA, pre-approved vacation, and pre-approved leaves of absences will not result in strikes or other disciplinary action.

All employees must arrive dressed and ready to work by their scheduled starting time. Any employee who arrives after their scheduled starting time and/or unprepared may be sent home and the occurrence shall be considered a strike under this policy.

Probationary employees may be disciplined for absences up to and including discharge without regard to the strike system. Strikes accrued during an employee's probationary period shall remain part of the employee's attendance record following the completion of the probationary period.

The Company may waive any discipline or the assessment of a strike under this policy in its sole discretion, however, no such waiver shall preclude the Company from taking disciplinary action or issuing a strike in the future for the same or similar absences.

Discipline for pattern absenteeism may be issued separately and in addition to strikes assessed under this policy in the Company's sole discretion. Pattern absenteeism includes repeated absences in any of the following categories within a 12 month period:

- Absences on recurring days of the week

ATTACHMENT B

- Multiple absences during a single workweek
- Absences on weekend days/nights
- Absences on holidays
- Absences on days immediately preceding and/or following holidays
- Absences on days immediately preceding and/or following an employee's scheduled days off

Absences from any of these categories may be combined to constitute pattern absenteeism. An employee will receive a written warning for the second pattern absence within a 12 month period. A third occurrence will result in discharge.

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

In re:

WALTER ENERGY, INC., et al.,¹

Debtors.

Chapter 11

Case No. 15-02741-TOM11

Jointly Administered

**MEMORANDUM OPINION AND ORDER
GRANTING DEBTORS' MOTION FOR AN ORDER
(I) AUTHORIZING THE DEBTORS TO (A) REJECT COLLECTIVE
BARGAINING AGREEMENTS, (B) IMPLEMENT FINAL LABOR PROPOSALS, AND
(C) TERMINATE RETIREE BENEFITS; AND (II) GRANTING RELATED RELIEF**

This case came before the Court for hearing on December 15 and 16, 2015 on *Debtors'* *Motion for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief; and Establishing Other Deadlines* (hereafter "1113/1114 Motion") [Doc. No. 1094] dated November 23, 2015, and objections to the 1113/1114 Motion filed by the United Mine Workers of America (hereafter "UMWA") [Doc. No. 1189] and the United Mine workers of America 1974 Pension Plan and Trust and its Trustees, United Mine Workers of America 1992 Benefit Plan and its Trustees, United Mine Workers of America 1993 Pension Plan and Trust and its Trustees, United Mine Workers of America 2012 Retiree Bonus Account

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.

Trust and its Trustees, United Mine Workers of America Cash Deferred Savings Trust of 1988 and its Trustees, United Mine Workers of America Combined Benefit Fund and its Trustees (hereafter “UMWA Funds”)[Doc. No. 1198] (collectively “objections”).²

INTRODUCTION

At the outset, the Court notes and recognizes the impact any ruling on the pending Motion and objections has on multiple stake holders in these Chapter 11 cases. As noted on the record during the hearing, the dollar or quantitative monetary impact on each employee or retiree may not be as high an amount as to other creditors. However, the impact on each employee and each retiree is huge, and may be difficult for many, if not all, to understand, much less accept as fair, equitable or just.

In *In re Patriot Coal*, the following was noted:

[T]here is unquestionably no dispute that the lives and livelihood of Debtors’ employees, both, union and non-union, current, and retired, depend on the outcome of Debtors’ reorganization. “The retirees’ health and access to health care depend on the outcome of these cases. Indeed, without the dedication and sacrifice of the coal miners and their families, there would be no coal, and there would be no Patriot Coal.”³

The *Patriot Coal* court also noted, without “men and women willing to bend their knees to excavate coal” there would be no need for the Chapter 11 cases or the mines.⁴

This Court recognizes that the miners are the backbone and crucial workforce in these mining operations. Essentially, the dilemma facing the Court is whether to shut down the mines or allow the possibility that the mining operations continue in the hopes that coal prices will

² Objections to the 1113/1114 Motion were also filed by the Retiree Committee and the Steel Workers, but those were resolved as noted on the record in open court.

³ *In re Patriot Coal Corp.*, 493 B.R. 65, 78 (Bankr. E.D. Mo. 2013) (quoting *In re Patriot Coal Corp.*, 482 B.R. 718, 722 (Bankr. S.D.N.Y. 2012).

⁴ *Patriot Coal*, 493 B.R. at 78.

rebound in time and the miners keep valuable jobs, and are able to benefit when better times and better coal prices occur.

FINDINGS OF FACT⁵

1. The Debtors produce and export metallurgical coal (“met coal”) for the global steel industry with mineral reserves in the U.S., Canada and the United Kingdom. The Debtors also extract, process, and market thermal and anthracite coal and produce metallurgical coke and coal bed methane gas. [Zelin Decl. ¶ 7.] The No. 4 and 7 mines at Jim Walter Resources, Inc. (“Jim Walter”), with depths over 2,000 feet, are the heart of the Debtors’ operations. [Zelin Decl. ¶ 8.] However, despite the high quality of met coal that the Debtors sell, the Debtors, like many other U.S. coal producers, were unable to survive the sharp decline in the global met coal industry and filed for Chapter 11 relief on July 15, 2015 (the “Petition Date”), commencing these cases (the “Chapter 11 Cases”). After a failed attempt to restructure pursuant to a Chapter 11 plan process and a restructuring support agreement, the Debtors are now liquidating their assets pursuant to a going concern sale to an entity owned by their first lien creditors (the “First Lien Creditors”). The proposed buyer, however, will not take the Debtors’ assets subject to their legacy and current labor costs. Accordingly, pursuant to sections 1113 and 1114 of the Bankruptcy Code, the Debtors are seeking to reject their collective bargaining agreements (the “CBAs” as further defined below) to eliminate the successorship provisions and to implement their final proposals pursuant to which, upon the closing of the proposed sale, the Debtors will terminate their retiree benefit obligations and any other obligations remaining under the CBAs, so the Debtors’ assets may be sold free and clear any obligations pursuant to the CBAs or otherwise required.

⁵ Pursuant to Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of the contents of its own files. See *ITT Rayonier, Inc. v. U.S.*, 651 F.2d 343 (5th Cir. Unit B July 1981); *Florida v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975).

2. The Debtors' filed a motion on November 9, 2015 to approve bidding procedures and for the sale of all or substantially all of its assets. The bidding procedures have been approved, there is a Stalking Horse Bidder, an auction is scheduled for January 5, 2016 and a hearing on the sale set for January 6, 2016. The record in this case, as well as the testimony offered at this hearing, indicate the proposed going concern sale is the best chance for selling the Debtors' Alabama mines and to provide potential future employment for the Debtors' represented employees. If the sale is not approved or the sale fails to close, the Debtors will have no choice but to immediately pursue shut downs of the mines and/or convert to Chapter 7, thereby destroying the going concern value of the mines and eliminating future employment opportunities.

A. The Debtors' Labor Obligations.

3. The Debtors are party to two collective bargaining agreements and a memorandum of understanding. Specifically, (a) Jim Walter is party to the June 2011 Contract between the United Mine Workers of America and the Bituminous Coal Operators Association (the "BCOA") (together with any side letters of agreement and closing agreements and the memorandum of understanding between Jim Walter and the UMWA, the "UMWA CBA"); and (b) Walter Coke, Inc. ("Walter Coke") is party to an Agreement dated March 25, 2010, between the USW on behalf of Local Union No. 12014 and Walter Coke (the "USW CBA").⁶ The UMWA CBA covers approximately 700 active employees.

4. In addition, the Debtors owe retiree benefits (as such term is defined by section 1114 of the Bankruptcy Code, the "Retiree Benefits") to approximately 3,100 retirees and spouses represented by either the UMWA or the USW, together with approximately 100

⁶ As noted on the record, the Debtors' and the USW stipulated that all relief requested in the Debtors' 1113/1114 Motion was withdrawn, therefore no relief is granted in this Order as to the USW or the USW CBA.

non-Union retirees and spouses represented by the statutory committee of retirees appointed in these Chapter 11 Cases (the “Section 1114 Committee”). These Retiree Benefits include those owed under: (i) the UMWA CBA (the “UMWA Retiree Medical Plan”) which, as of December 31, 2014, had approximately \$579.2 million in unfunded liabilities; (ii) a collective bargaining agreement that does not cover any active employees with the UMWA (the “Taft Retiree Medical Plan”) that, as of December 31, 2014, had approximately \$3.4 million in unfunded liabilities; (iii) the USW CBA (the “Walter Coke Retiree Medical Plan” and the “Walter Coke Retiree Life Plan”) that, as of December 31, 2014, had approximately \$11.0 million and \$0.5 million in unfunded liabilities, respectively; and (iv) the medical plan for non-Union retirees⁷ (the “Salaried Retiree Medical Plan”) that, as of December 31, 2014, had approximately \$4.3 million in unfunded liabilities. (See Scheller Decl. ¶ 4; Farrell Decl. ¶ 4; Zelin Decl. ¶ 27.)

5. The Debtors are also responsible for numerous forms of pension liabilities and retiree benefit obligations arising from the Debtors’ relationship with the UMWA, including, as defined below, the 1974 Pension Plan, the Coal Act Funds, the 1993 Benefit Plan, the Account Plan, and the CDSP (collectively, the “UMWA Funds”). Specifically, in 2014, Jim Walter Resources contributed (a) over \$17 million to the 1974 Pension Plan;⁸ (b) over \$80,000 to the CDSP⁹; and (c) approximately \$3.6 million to the 1993 Benefit Plan.¹⁰ The Debtors also have an

⁷ A separate Stipulation and Order has been entered (Doc. No. 1333) resolving all non-union retiree issues.

⁸ The United Mine Workers of America 1974 Pension Plan and Trust (the “1974 Pension Plan”) is a multiemployer, defined-benefit pension plan established pursuant to 29 U.S.C. § 186(c)(5). The 1974 Pension Plan is responsible for pension and death benefits to approximately 90,000 retired or disabled miners and their eligible surviving spouses. See *Objection of UMWA Health and Retirement Funds to the Debtors’ Motion for an Order (A) Approving the Debtors’ Key Employee Retention Plan and (B) Granting Related Relief* (the “UMWA Funds KERP Objection”)[Docket No. 1148], ¶¶ 7-8.

⁹ The United Mine Workers of America Cash Deferred Savings Plan of 1988 (the “CDSP”) is a multiemployer savings plan established by the 1988 CBA between the UMWA and the BCOA. The CDSP is funded by both

annual premium of approximately \$170,000 (payable monthly) owed to the Combined Benefit Fund,¹¹ and currently administer a Coal Act individual employer plan (an “IEP”) that provides retiree health benefits to approximately 572 retirees and their dependents.¹² Finally, in 2014, Jim Walter contributed approximately \$5.1 million to a retiree bonus Account Plan.¹³

6. In aggregate, the Debtors pay approximately \$25-30 million per year on account of their Retiree Benefits.

B. The Chapter 11 Cases and Going-Concern Sale.

7. The decline of the global met coal industry since 2011 is well established and has devastated the industry. Fundamental downward shifts in the Chinese economy, coupled with the increase of low-cost supply of met coal from Australia and Russia, have driven met coal prices down from their historic high of \$330 per metric ton in 2011 to their current low of \$89 per metric ton. [Zelin Decl. ¶ 8.] The spot price for met coal is currently less than \$80 per

voluntary employee wage deferrals and numerous contributions from employers. *See* UMWA Funds KERP Objection, ¶ 12.

¹⁰ The United Mine Workers of America 1993 Benefit Plan and Trust (the “1993 Benefit Plan”) provides retiree health benefits to approximately 10,837 retired coal miners and dependents. *See* UMWA Funds KERP Objection, ¶ 13; Declaration of William G. Harvey in Support of First Day Motions (the “Harvey Declaration”)[Docket No. 3]; ¶ 85.

¹¹ The United Mine Workers of America Combined Benefit Fund (the “Combined Benefit Fund”) provides health and death benefits to coal industry retirees who, as of July 20, 1992, were receiving benefits from the 1950 Benefit Trust or the 1974 Benefit Trust. The Combined Benefit Fund is financed by an annual premium assessed every October and certain transfers from the federal government. UMWA Funds KERP Objection, ¶5; Harvey Declaration, ¶83.

¹² The United Mine Workers of America 1992 Benefit Plan (the “1992 Plan,” and, together with the Combined Benefit Fund, the “Coal Act Funds”) provides benefits to (a) those who, based on their age and service record as of February 1, 1993, could have retired and received benefits under the 1950 Benefit Trust or the 1974 Benefit Trust if those trusts had not been merged by statute, and who actually retired between July 20, 1992 and October 1, 1994; and (b) those who would be covered by an IEP maintained pursuant to the Coal Act but who no longer receive such coverage. *See* UMWA Funds KERP Objection, ¶ 6, Harvey Declaration, ¶ 83.

¹³ The United Mine Workers of America 2012 Retiree Bonus Account Plan (the “Account Plan”) was established in the 2011 NBCWA to make annual single-sum payments to beneficiaries on November 1, 2014, November 1, 2015, and November 1, 2016. Depending on the beneficiary’s pension under the 1974 Pension Plan, a beneficiary receives either \$455 or \$580 from the Account Plan. *See* UMWA Funds KERP Objection, ¶ 11, Harvey Declaration, ¶ 86.

metric ton. As met coal prices began to decline, the Debtors' management responded to the changing industry environment by implementing numerous operational and cash-flow savings measures.¹⁴ [Zelin Decl. ¶ 9.]

8. Despite these efforts, the burden on the Debtors of their funded debt obligations and labor-related liabilities was unsustainable. With cash reserves of as of July 15, 2015, of approximately \$250 million, inclusive of cash at their Canadian and U.K. entities, the Debtors continued to suffer substantial losses from operations despite the far-reaching cost cuts already taken. Accordingly, the Debtors' investment banking and financial advisors began negotiating with advisors to an informal committee that comprises the holders of a majority in amount of the Debtors' first lien senior secured debt (the "Steering Committee"). The negotiations culminated in a Restructuring Support Agreement (the "RSA") and the terms of an agreed order approving the Debtors' use of the First Lien Creditors' cash collateral. [Zelin Decl. ¶ 12.]

9. The RSA created a dual-track framework for the Debtors' restructuring: the Debtors would first seek to confirm a debt-for-equity Chapter 11 restructuring plan (the "Plan"), but at the same time, the Debtors would also pursue a going-concern sale in the event that the Debtors could not confirm the Plan. [Zelin Decl. ¶ 12.] In fact, one of the milestones in the RSA mandated that the Debtors commence the marketing of their assets on or before August 19, 2015, in case a going-concern sale became the only viable option. [Zelin Decl. ¶ 12.]

10. The Court held contested hearings on the Debtors' motion to assume the RSA on September 2 and 3, 2015. On September 14, 2015, the Court entered an order approving

¹⁴ These included a reduction of SG&A by 20% (\$32 million), 25% (\$33 million) and 28% (\$28 million) in 2012, 2013 and 2014 respectively. The Debtors also cut their capital expenditures by 10% (\$45 million), 61% (\$238 million), and 28% (\$28 million) in 2012, 2013 and 2014 respectively. Among other things, the Debtors idled numerous mines and implemented significant reduction in force initiatives. [Zelin Decl. ¶ 9.]

the RSA on amended terms. [Doc. No. 723.] Subsequently, on September 18, 2015, the Steering Committee filed a motion, which the Debtors later joined, seeking confirmation that the RSA had terminated on its own terms. [Doc. Nos. 746, 774.] Following a hearing on September 24, 2015, the Court entered an order confirming that the RSA had terminated. [Doc. No. 796.]

11. When the RSA terminated, the Debtors were left with its cash resources and liquidity running out and no viable source of funding. The Debtors evaluated all of their options but could not find a feasible path towards consummating a Plan. [See Zelin Decl. ¶ 13.] In addition, no third party buyer had come forward for the Debtors' core assets. [See Zelin Decl. ¶ 14.] As a result, the Debtors commenced negotiations with the Steering Committee and its advisors with respect to a going-concern sale. [See Zelin Decl. ¶ 14.] In particular, the Debtors were focused on (i) preserving the Debtors' Alabama Coal Operations (as defined below) to the greatest extent possible, (ii) maximizing potential for future employment for the Debtors' workers, and (iii) ensuring that the Debtors' estates after a sale closing would retain sufficient assets to wind-down in a safe and orderly manner. [See Zelin Decl. ¶ 15, 29.]

12. After two months of negotiations, on November 5, 2015, the Debtors executed an asset purchase agreement (the "Stalking Horse APA") with Coal Acquisition LLC, an entity owned by the First Lien Creditors (the "Proposed Buyer"). [Zelin Decl. ¶ 15.] Under the Stalking Horse APA, the Debtors will sell their core Alabama mining operations (i.e., the Jim Walter No. 4 and 7 mines, related methane gas operations, and certain additional assets incidental thereto) (the "Alabama Coal Operations") to the Proposed Buyer for \$1.15 billion (the "363 Sale"). The consideration for the purchase price will be a credit bid by the First Lien Creditors of their prepetition liens and their adequate protection claims. In addition, the

Proposed Buyer will (a) purchase the Debtors' avoidance actions for \$5.4 million in cash (subject to certain reductions); (b) fund various wind down trusts to safely liquidate the Debtors' assets remaining after consummation of the sale to the Proposed Buyer; and (c) assume an estimated \$115 million in liabilities, including Black Lung obligations, reclamation, trade payables, cure costs and professional fees and expenses. The Stalking Horse APA is subject to higher or better offers and an open auction at which other qualified bidders may seek to purchase the Alabama Coal Operations and other assets on higher or better terms.

13. The testimony presented at this hearing indicated that the discussions between the Debtors and their advisors and the Proposed Buyer and its advisors were protracted, difficult, contentious, frustrating, but at arm's-length. [See also Zelin Decl. ¶ 15.] To facilitate continued negotiations, the Steering Committee agreed to extend the Debtors' use of Cash Collateral twice during this time: first on October 8, 2015, extending the use of Cash Collateral to November 20, 2015, and again on November 17, 2015, extending the use of Cash Collateral to December 1, 2015.¹⁵ [Doc. Nos. 857, 1053.] In response to the Debtors' deteriorating financial condition, the Steering Committee also agreed to defer the adequate protection payments due on October 15 and November 15 that the Debtors were otherwise obligated to make to the First Lien Creditors. [Doc. Nos. 890, 1037.]

14. The Proposed Buyer refused to acquire the Alabama Coal Operations burdened by the Debtors' legacy and current labor costs. The Stalking Horse APA thus requires a sale "free and clear" of legacy union liabilities. [Zelin Decl. ¶ 16.] Towards that end, the Stalking Horse APA requires the elimination of any clause or provision imposing on the Debtors the requirement that any buyer assume the Debtors' CBAs or any of the Debtors' liabilities or

¹⁵ On December 1, 2015, the Steering Committee granted an additional extension, permitting the Debtors' use of Cash Collateral to January 8, 2016. [Doc. No. 1158.]

obligations under their CBAs (collectively, the “Successorship Provisions”) or alternatively, rejection of the Debtor’s collective bargaining agreements.

15. Successorship clauses are contractual provisions in collective bargaining agreements that seek to require an employer to bind a purchasing employer to all the terms and conditions of an existing collective bargaining agreement in the event of a sale or assignment of the business. The UMWA CBA provides, for example:

This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union’s execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer’s obligations under this Agreement. Immediately upon the conclusion of such sale, conveyance, assignment or transfer of its operations, the Employer shall notify the Union of the transaction. Such notification shall be by certified mail to the Secretary-Treasurer of the International Union and shall be accompanied by documentation that the successor obligation has been satisfied. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

UMWA CBA, p. 5.

16. Because the Proposed Buyer is unwilling to purchase the Alabama Coal Operations subject to the CBAs, with respect to the UMWA CBA, the Stalking Horse APA provides:

On the Closing Date, the Acquired Assets shall be transferred to Buyer and/or one or more Buyer Designees, as applicable, free and clear of all Encumbrances and Liabilities (including, for the avoidance of doubt, all successor liability, ***including any successorship obligations under any Collective Bargaining Agreement***, and/or with respect to any Benefit Plan that is not an Buyer Benefit Plan), other than the Permitted Encumbrances and the Assumed Liabilities, including any Reclamation obligations that are Assumed Liabilities.

Stalking Horse APA § 7.12 (emphasis added).

17. The Stalking Horse APA further requires as a closing condition that:

(i) the Bankruptcy Court shall have determined that Sellers can sell the Acquired Assets free and clear of any successor clause in the UMWA Collective Bargaining Agreements, (ii) the UMWA shall have agreed to waive or remove the successor clause in the UMWA Collective Bargaining Agreements, or (iii) ***the Bankruptcy Court shall have granted a motion acceptable to Buyer filed by the applicable Seller pursuant to Section 1113(c) of the Bankruptcy Code authorizing the applicable Seller to reject the UMWA Collective Bargaining Agreements.***

Stalking Horse APA § 9.9(a)(i) (emphasis added).

18. Despite extensive efforts, the Debtors did not find any buyer willing to purchase the Debtors' assets subject to the CBAs. In fact, no buyer other than the Proposed Buyer expressed any interest in the Alabama Coal Operations at all. This was true even though, as of the date of the Section 1113/1114 Motion, the Debtors' investment banking advisor PJT Partners LP ("PJT") had contacted 47 strategic acquirers (including domestic coal producers, international coal producers and integrated steel companies) and 37 financial sponsors. Throughout the marketing process, PJT did not receive a single indication of interest to purchase all of the Debtors' Alabama Coal Operations although PJT did receive a few proposals with respect to certain of the Debtors' other assets. [Zelin Decl. ¶ 25; *see also* Tab 10, Zelin Trial Notebook.]

19. Today, the Debtors continue to rapidly lose cash, even excluding interest expenses and notwithstanding substantial cash conservation initiatives the Debtors implemented. If the Stalking Horse APA is not approved, and if no alternative successful bidder emerges, the Debtors will run out of cash by early 2016 and will have no choice but to liquidate. [Zelin Decl. ¶ 29; *see also* Tab 1, Zelin Trial Notebook.] In addition, if the proposed 363 Sale is

consummated, the Debtors will be left with insufficient funds to make payments on the Retiree Benefits and any ongoing obligations under the UMWA CBA. [Zelin Decl. ¶ 16.]

C. The Debtors' Labor Negotiations with the UMWA.¹⁶

20. Starting before the Petition Date, the Debtors have met and negotiated with the UMWA concerning proposed modifications to the UMWA CBA. [Scheller Decl. ¶ 5.] When the Chapter 11 Cases first commenced, the Debtors negotiated with the UMWA intending to reorganize and confirm a Chapter 11 plan consistent with the RSA. [Scheller Decl. ¶ 11.] Prior to the Petition Date, on July 8, 2015, the Debtors met with the UMWA to provide the UMWA with an overview of market conditions, the Debtors' historical financial performance, and the reasons and goals for the Debtors' anticipated restructuring. [Scheller Decl. ¶ 6.]

21. On August 26, 2015, the Debtors presented the UMWA with their first proposal (the "First UMWA Proposal") for a set of terms and conditions to effectuate a reorganization as contemplated in the RSA, including deletion of the Successorship Provisions. [Scheller Decl. ¶ 13.] In the First UMWA Proposal, the Debtors also sought aggregate annual savings of approximately \$150 million which they then believed was the minimum needed to eventually return the Debtors to profitability. [Scheller Decl. ¶ 12.] Even with those savings, the Debtors' financial advisors projected that the feasibility of any Chapter 11 plan would require significant capital investment over a period of years. [Zelin Decl. ¶ 17.]

22. The Debtors met with the UMWA to discuss the First UMWA Proposal five times in September 2015. The First UMWA Proposal included elimination of Retiree Benefits and modifications to healthcare, all of which were discussed in these meetings.

¹⁶ "The UMWA is a labor union which was formed in Columbus, Ohio on January 22, 1890 with the stated purpose of 'educating all mine workers in America to realize the necessity of unity of action and purpose, in demanding and securing by lawful means the just fruits of our toil.'" *Patriot Coal*, 493 B.R. at 80 (quoting Mair B. Fox, *United We Stand: The United Mine Workers of America 1890-1990* 22 (International Union, United Mine Workers of America 1990, in turn citing the UMWA Preamble, 1890).

[Scheller Decl. ¶ 14.] Following those discussions, on October 1, 2015, the UMWA made its first counter-proposal to the First UMWA Proposal. [Scheller Decl. ¶ 15.]

23. When the RSA was terminated and confirmation of a plan of reorganization proved impossible, the Debtors switched their focus to a sale path and continued to meet with the UMWA to discuss the Debtors' options in light of the sale process. [Scheller Decl. ¶ 17.] As the Stalking Horse APA was crystallizing, the Debtors engaged again with the UMWA to discuss the UMWA CBA. [See Scheller Decl. ¶¶ 19-21.] Specifically, the Debtors met with the UMWA twice in October to provide status reports on the Stalking Horse APA negotiations and the Debtors' deteriorating liquidity position. [Scheller Decl. ¶¶ 20-21.]

24. Five days after entering into the Stalking Horse APA, the Debtors met with the UMWA, withdrew their First Proposal and presented their final proposal (the "Final UMWA Proposal"). [Scheller Decl. ¶ 23 & Ex. 2.] The Final UMWA Proposal included the following terms:

- (a) Successorship clause. Deletion of the successorship clause in its entirety to comply with the terms of the Stalking Horse APA and facilitate the 363 Sale process. [Scheller Decl. ¶ 24.]
- (b) Healthcare for laid-off employees. Elimination of the requirement to provide healthcare benefits for employees who are laid off for up to 12 months after the month in which the layoff occurs, providing instead that no healthcare or other welfare benefits will be provided to any active or laid-off employee after the sale of the mines under the 363 Sale closes. [Scheller Decl. ¶ 24.]
- (c) Termination of agreement. Termination effective as of the date the 363 Sale closes, on which date all of the Debtors' obligations to make any payment that arises from any contractual requirement, grievance settlement, arbitration decision or other obligation that vested or was incurred prior to the date of the sale of the mines to the Proposed Buyer under the Stalking Horse APA would also terminate. [Scheller Decl. ¶ 24.]

- (d) Effects bargaining. Continued good faith discussions regarding any proposal that the UMWA may have concerning the effects of the sale of the mines on the UMWA's members. [Scheller Decl. ¶ 24.]
- (e) Health and welfare benefits for retirees. Termination of health and welfare benefits, including the UMWA Retiree Medical Plan and Taft Retiree Medical Plan, for all of the UMWA's retirees effective no later than the closing date of the Section 363 Sale, as the Buyers are not agreeing to assume responsibility for such healthcare benefits for retirees under the Stalking Horse APA, and the Debtors will no longer have any funds available to provide any benefits to the UMWA retirees post-closing. [Scheller Decl. ¶ 24.]
- (f) Coal Act retirees. Coordination with the UMWA and with the UMWA 1992 Plan officials to arrange for the transition of retirees entitled to Coal Act Benefits to the UMWA 1992 Benefit Plan with no loss of benefits. (The Coal Act provides that when an employer becomes financially unable to provide healthcare benefits to its Coal Act-eligible retirees, the UMWA 1992 Benefit Plan will enroll the impacted retirees and provide their benefits.) [Scheller Decl. ¶ 24.]

25. On November 20, 2015, the UMWA rejected the Debtors' Final UMWA Proposal. [Scheller Decl. ¶ 27 & Ex. 3.] The UMWA response was that it would agree to facilitate the termination or modification of the UMWA CBA obligations "as appropriate for the winding down of JWR and its exit from the coal industry" but "only upon" ratification of a new collective bargaining agreement with the Proposed Buyer that, among other things, addresses healthcare for retired Jim Walter miners. [*Id.*]

26. The testimony at the hearing showed that the UMWA has been negotiating with the Proposed Buyer. On November 6, 2015, the day after the Stalking Horse APA was signed, Mr. Doug Williams, CEO of Coal Acquisitions, LLC, sent a letter to Cecil E. Roberts, the UMWA's President, introducing himself to Mr. Roberts and hoping to set the stage for further discussions and negotiations. Further, Mr. Williams advised that Coal Acquisition

planned to begin interviewing individuals for employment after a sale and that some of the individuals who may be interviewed are currently represented by the UMWA at Jim Walter's number 4 and 7 mines, surface facilities and preparation plants. After the letter was sent to Mr. Roberts, the advisors to the Proposed Buyer exchanged numerous emails and calls and meetings with the UMWA were scheduled for and held November 16, December 2, and December 8, 2015, and another meeting is scheduled for December 18, 2015. [Williams Decl. ¶ 5 and testimony.] At the November 16th meeting, the Proposed Buyer made an initial contract proposal to the UMWA, subject to a number of conditions, including the Proposed Buyer providing offers of employment to the bargaining unit employees previously employed at Jim Walter's mines numbers 4 and 7, preparation plants and surface facilities, and a majority of those bargaining unit employees accepting such offers. [Williams Decl. ¶ 6.] A counterproposal has since been provided by the UMWA, and the hearing, the testimony indicated the parties intend to continue to negotiate.

27. Throughout the negotiation process, the Debtors provided the UMWA with full access to extensive diligence information, including approximately 75,000 pages of the relevant operational, financial, business planning and other documents. Towards that end, the Debtors established an electronic data room to facilitate information sharing on a confidential basis. The data room was made available to the UWMA on July 14, 2015. [Scheller Decl. ¶ 8.] In addition to providing access to thousands of pages of data, the Debtors and their advisors gave the UMWA numerous detailed presentations about the Company, its businesses, financial conditions, business plan and projected performance. [Scheller Decl. ¶ 9.]

D. The Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c), and 1114(g).

28. On November 23, 2015, the Debtors filed this Section 1113/1114 Motion pursuant to sections 105(a), 1113(c), and 1114(g) of title 11 of the United States Code for an

order (I) (A) authorizing the rejection of the collective bargaining agreements of Jim Walter and Walter Coke, (B) implementing Jim Walter's and Walter Coke's final labor proposals, and (C) terminating the Debtors' retiree benefits and related obligations; and (II) granting related relief. Along with the Motion, Debtors filed declarations of Steven Zelin, a Partner at PJT Partners, Debtors' financial advisor; Walter J. Scheller, III, the CEO of Walter Energy, Inc.; and Carol W. Ferrell, President of Walter Coke, Inc. In addition, as a proponent of the Motion, the lenders filed the declaration of Stephen Douglas Williams, the CEO of Coal Acquisitions, LLC, the Stalking Horse Bidder. In addition to these declarations admitted as evidence at the hearing, Mr. Zelin, Mr. Scheller and Mr. Williams testified.

29. In the Section 1113/1114 Motion, the Debtors request the authority to (a) reject the UMWA CBA in its entirety and (b) implement the Final Proposals pursuant to which any Successorship Provision would be eliminated and upon the closing of the 363 Sale, the UMWA CBA and the other obligations remaining under the UMWA CBA, as well as the Retiree Benefits, would terminate.

30. The UMWA¹⁷ and the UMWA Funds,¹⁸ (collectively, the "Objectors") filed objections to the Section 1113/1114 Motion.¹⁹ The Objectors make the following

¹⁷ See *Objection of the United Mine Workers of America to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g) for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief* [Doc. No. 1189] (the "UMWA Objection").

¹⁸ See *Objection of the United Mine Workers of America 1974 Pension Plan and Trust, the United Workers of America 1993 Benefit Plan, the United Mine Workers of America 2012 Retiree Bonus Account Plan, the United Mine Workers of America Cash Deferred Savings Plan of 1988, the United Mine Workers of America Combined Benefit Plan and the United Mine Workers of America 1992 Benefit Plan to (I) Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g) for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief* [Doc. No. 1198] (the "UMWA Funds Objection").

¹⁹ The USW also filed an objection to the Section 1113/14 Motion. See *Opposition of the United Steelworkers to the Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g)* [Doc. No. 1195] (the "USW Objection"). The Debtors filed a notice of withdrawal of the Section 1113/14 Motion as it relates to the USW

arguments: (a) relief under sections 1113 and 1114 of the Bankruptcy Code is not appropriate here, where the Debtors are selling substantially all of their assets only to then possibly liquidate in a Chapter 7, as opposed to restructuring or reorganizing; (b) even assuming that a liquidating debtor can seek relief under sections 1113 and 1114 of the Bankruptcy Code, at a minimum, these sections require the Debtors to demonstrate an ability to confirm a Chapter 11 plan, which the Debtors cannot do here because they lack the funding needed to satisfy accrued but unpaid administrative claims, including environmental, pension, and certain other legacy retiree/employee liabilities; (c) the Section 1113/1114 Motion inappropriately seeks to terminate the Debtors' obligations to its employees and retirees under the Coal Act statutory obligations that the Debtors cannot modify under section 1114 of the Bankruptcy Code; and (d) the Section 1113/1114 Motion fails to satisfy the substantive requirements of sections 1113 and 1114 of the Bankruptcy Code for a plethora of other reasons, including that termination of the Successorship Provisions is not necessary to permit the reorganization of the Debtors as contemplated by the Bankruptcy Code and that the requested relief is otherwise not fair and equitable.

JURISDICTION²⁰

31. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b).

32. The statutory and legal predicates for the relief sought herein are sections 105(a), 1113(c), and 1114(g) of the Bankruptcy Code and Bankruptcy Rules 2002 and 6004.

[Doc. No. 1227]. The Court confirmed with USW counsel that he had no objection to the withdrawal and that essentially the withdrawal constituted a stipulation of dismissal as to the USW provisions of the Motion.

²⁰ This Memorandum Opinion and Order constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

33. On July 30, 2015, the Bankruptcy Administrator for the Northern District of Alabama appointed an eleven member Official Committee of Unsecured Creditors (the “Creditors Committee”). [Doc. No. 268.] On August 4, 2015, the Bankruptcy Administrator appointed two additional members to the Creditors Committee [Doc. Nos. 336, 342.]

34. On July 30, 2015, the Court entered an order authorizing the formation of a committee of retired employees pursuant to sections 1114(c)(2) and 1114(d) of the Bankruptcy Code (the “Section 1114 Committee”). [Doc. No. 264.] Both the UMWA and the United Steelworkers (the “USW,” and, together with the UMWA, the “Unions”) are members of the Creditors Committee and each serves as the authorized representative of the retirees of their respective Unions on the Section 1114 Committee. [Doc. Nos. 268, 264.] No trustee or examiner has been appointed in the Chapter 11 Cases.

CONCLUSIONS OF LAW

A. Sections 1113 and 1114 of the Bankruptcy Code.

35. Congress enacted section 1113 of the Bankruptcy Code in response to the Supreme Court’s decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Supreme Court “held that a debtor may unilaterally reject a collective bargaining agreement under section 365(a) of the Bankruptcy Code by showing that the agreement ‘burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.’”²¹ To address concerns that the Supreme Court’s decision would permit debtors to use bankruptcy as a weapon in the collective bargain process, Congress enacted section 1113 to “replace the *Bildisco* standard with one that was more sensitive to the national policy favoring collective bargaining

²¹ *In re AMR Corp.*, 477 B.R. 384, 405 (Bankr. S.D.N.Y. 2012) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984)).

agreements”²² Section 1113 accordingly is intended “to ensure that well-informed and good faith negotiations occur in the market place, not as part of the judicial process.”²³ It does so by imposing more stringent standards and rigorous procedures for rejecting a collective bargaining agreement than apply to an ordinary executory contract. Section 1113 thereby encourages the debtor-employer and the union to reach a negotiated settlement. *See Collier on Bankruptcy* ¶ 1113.01 (citing the language and history of section 1113).

36. Section 1113 provides in relevant part:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this Chapter, other than a trustee in a case covered by subChapter IV of this Chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b) (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section “trustee” shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on

²² *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1089 (3d Cir. 1986).

²³ *New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.)*, 981 F.2d 85, 90 (2d Cir. 1992).

the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

37. “Section 1113(b) requires that a debtor take a number of procedural steps prior to rejecting a collective bargaining agreement.”²⁴ At the outset, the debtor must provide the union with its proposed modifications to a collective bargaining agreement prior to filing an application with the court to reject the agreement. Moreover, the proposed modifications must be (a) “based on the most complete and reliable information available at the time of the proposal,” (b) “necessary to permit the reorganization of the debtor,” and (c) “assure[] that all creditors, the debtor and all of the affected parties are treated fairly and equitably.”²⁵ The debtors must also provide the union with the relevant information necessary for the union to evaluate the proposal.²⁶ Finally, “the debtor must bargain in good faith with the union in an attempt to reach an agreement” between the time that the section 1113 proposal is made by the debtor and the date that any section 1113 application is set to be heard.²⁷

²⁴ *AMR Corp.*, 477 B.R. at 406.

²⁵ 11 U.S.C. § 1113(b)(1)(A); *AMR Corp.*, 477 B.R. at 406 (citing 11 U.S.C. § 1113(b)(1)(A)).

²⁶ *Id.*

²⁷ *AMR Corp.*, 477 B.R. at 406.

38. Section 1113(c) also requires that a debtor establish the following three substantive requirements to reject a collective bargaining agreement: (a) that the debtor's section 1113 proposal fulfills the requirements of the statute, (b) that the union refused to accept the proposal without good cause, and (c) that the balance of the equities favors rejection of the agreement.²⁸ "The debtor bears the burden of proof by the preponderance of the evidence on the elements of section 1113."²⁹

39. Similarly, the debtor may modify or terminate retiree benefits upon satisfying the following conditions:

- (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);
- (2) the authorized representative of the retirees has refused to accept such proposal without good cause; and
- (3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f)

...

40. Subsection (f) requires as follows:

- (1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—
 - (A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for

²⁸ 11 U.S.C. § 1113(c); *AMR Corp.*, 477 B.R. at 406.

²⁹ *AMR Corp.*, 477 B.R. at 406 (citing *Truck Drivers Local 807 v. Carey Transp., Inc. (Carey Transp. II)*, 816 F.2d 82, 88 (2d Cir. 1987); *In re Nw. Airlines Corp.*, 346 B.R. 307, 320-21 (Bankr. S.D.N.Y. 2006)).

³⁰ 11 U.S.C. § 1114(g).

those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.³¹

41. The statutory “requirements for modification of retiree benefits are . . . substantially the same as the requirements for rejection of collective bargaining agreements.”³² Thus, the nine-part analysis found in *In re American Provision Company*, discussed below, applies equally to both.³³ Courts thus routinely analyze motions for relief under sections 1113 and 1114 together, and the Court will do so here.³⁴ Accordingly, the following discussion relating to the requirements under section 1113 also applies to the relief the Debtors request under section 1114 and as applicable to the UMW and UMW Funds.³⁵ Applicable Standard Under Sections 1113 and 1114 of the Bankruptcy Code.

³¹ 11 U.S.C. § 1114(f).

³² *In re Horizon Natural Res. Co.*, 316 B.R. 268, 281 (Bankr. E.D. Ky. 2004).

³³ *In re Horizon Natural Res.*, 316 B.R. at 280-81. See *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

³⁴ See, e.g., *Horizon Natural Res.*, 316 B.R. at 279-83; *In re Horsehead Indus., Inc.*, 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003).

³⁵ Thus any reference in this Opinion to the UMW also, if applicable, shall be a reference to the UMW Funds.

42. The requirements of section 1113 were restated in a nine-part test in *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984).³⁶ The test requires that the following be met:

- (a) The debtor in possession must make a proposal to the union to modify the collective bargaining agreement;
- (b) The proposal must be based on complete and reliable information available at the time of the proposal;
- (c) The proposed modifications must be “necessary to permit the reorganization of the debtor;”
- (d) The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably;
- (e) The debtor must provide to the union such relevant information as is necessary to evaluate the proposal;
- (f) Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union;
- (g) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;
- (h) The union must have refused to accept the proposal without good cause; and
- (i) The balance of the equities must clearly favor rejection of the collective bargaining agreement.

43. Before turning to this nine-factor *American Provision* test, the Court addresses the Objectors’ arguments that (a) relief under sections 1113 and 1114 of the Bankruptcy Code is not appropriate here where the Debtors are selling substantially all of their

³⁶ *In re Alabama Symphony Ass’n*, 155 B.R. 556, 573 n.38 (Bankr. N.D. Ala. 1993) (“This test is almost universally followed in the bankruptcy courts.”), *rev’d on other grounds*, *Birmingham Musicians’ Protective Ass’n, Local 256-733, of the Am. Fed. Of Musicians v. Alabama Symphony Ass’n (In re Alabama Symphony Ass’n)*, 211 B.R. 65 (N.D. Ala. 1996).

assets and liquidating, (b) the Debtors must demonstrate the ability to confirm a liquidating Chapter 11 plan, which the Debtors cannot do because they lack the funding needed to satisfy accrued but unpaid administrative claims, including environmental, pension, and certain other legacy retiree/employee liabilities, and (c) the Section 1113/1114 Motion inappropriately seeks to terminate the Debtors' obligations to its employees and retirees under the Coal Act, statutory obligations that the Debtors cannot modify under section 1114.

B. Sections 1113 and 1114 Apply in a Liquidating Chapter 11 Case and the Debtors Need Not Demonstrate an Ability to Confirm a Liquidating Chapter 11 Plan.

44. The Objectors argue that sections 1113 and 1114 do not apply in a liquidating Chapter 11 case, and accordingly, the Debtors' relief should be denied.³⁷ The Bankruptcy Code does not limit liquidation to Chapter 7 cases.³⁸ To the contrary, Chapter 11 expressly provides for liquidating Chapter 11 plans of reorganization.³⁹ As a result, when a Chapter 11 debtor is being sold or is liquidating rather than reorganizing, courts apply the requirements for section 1113(c) relief "contextually, rather than strictly," and "with the impending liquidation of the Debtor firmly in mind."⁴⁰ And while some courts have found that

³⁷ UMW Obj. at ¶¶ 70-76.

³⁸ See e.g., *In re Chicago Constr. Specialties, Inc.*, 510 B.R. 205, 214-16 (Bankr. N.D. Ill. 2014).

³⁹ 11 U.S.C. § 1129(a)(11) (enumerating as a confirmation requirement that "[c]onfirmation of the plan is not likely to be followed by . . . liquidation . . . unless such liquidation . . . is proposed in the plan"); see also 11 U.S.C. § 1123(b)(4) (Chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests[.]"); *Chicago Constr. Specialties*, 510 B.R. at 215.

⁴⁰ *Chicago Constr. Specialties, Inc.*, 510 B.R. at 217-18; *In re U.S. Truck Co. Holdings*, 2000 Bankr. LEXIS 1376, at *26-28 (Bankr. E.D. Mich. Sept. 29, 2000) ("[A]pplying § 1113 to a liquidating Chapter 11 . . . is somewhat problematic because many of the § 1113 requirements and the case law interpreting them focus on or presuppose efforts to rehabilitate an ongoing business [but] . . . these standards must necessarily be construed, if possible, in a way that gives them meaning in this liquidation setting."); *United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.)*, 257 B.R. 884, 893 (8th Cir. B.A.P. 2001) ("[E]ach court that has addressed the meaning of the phrase 'reorganization of the debtor,' as found in § 1113(b)(1)(A), has held or assumed that § 1113 applies in a case where the debtor will not be engaged in business because it is selling its assets.").

“the procedural requirements imposed by § 1113 appear ill-suited to a liquidation proceeding,”⁴¹ courts have routinely applied the provision in liquidating Chapter 11 cases.⁴² Moreover, neither section 1113 nor 1114 require that the debtor establish the feasibility of a liquidating Chapter 11 plan as a condition precedent to relief.

45. The placement of sections 1113 and 1114 “in Chapter 11 requires its application to liquidating Chapter 11 cases.”⁴³ Even though Congress uses the term “reorganization” in both sections 1113 and 1114, the Bankruptcy Code does not define the term.⁴⁴ Courts, however, interpret “reorganization” to include all types of debt adjustment, including going-concern asset sales pursuant to section 363 of the Bankruptcy Code.⁴⁵ Permitting a debtor to avail itself of section 1113 and 1114 relief to consummate a going-concern sale where the debtor cannot confirm a Chapter 11 comports with Congressional intent that sections 1113 and 1114 serve a rehabilitative purpose.

⁴¹ *Chicago Constr. Specialties*, 510 B.R. at 215 (quoting *Carpenters Health and Welfare Trust Funds v. Robertson (In re Rufener Constr., Inc.)*, 53 F.3d 1064, 1067 (9th Cir. 1995)).

⁴² See, e.g., *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 91 (2d Cir. 1992) (“The union . . . contends that the debtor has not shown that a collective bargaining agreement may be rejected to serve the interests of a purchaser of assets. The two lower courts believed that 11 U.S.C. § 1113 applied to this transaction because what is to emerge, if the sale is consummated, is the Daily News reorganized as an ongoing business. We agree.”); *In re Hoffman Bros. Packing Co., Inc.*, 173 B.R. 177, 186-87 (9th Cir. B.A.P. 1994) (“We agree, and hold that § 1113 does not preclude rejection of CBAs where the purpose or plan of the debtor is to liquidate by a going concern sale of the business.”); accord *Chicago Constr. Specialties*, 510 B.R. at 215; *In re Karykeion, Inc.*, 435 B.R. 663, 679 (Bankr. C.D. Cal. 2010); *Family Snacks*, 257 B.R. at 893. Indeed, this well-established proposition is even supported by a case that the UMWA cites liberally in its objection. See *In re Lady H. Coal Co.*, 193 B.R. 233, 240-43 (Bankr. S.D.W.Va. 1996) (denying the debtor’s section 1113 motion but noting that “a collective bargaining agreement (‘CBA’) may be rejected in contemplation of the sale of a substantial portion of a debtor’s assets as such sale is effectively the reorganization plan of a debtor”).

⁴³ *In re Ionosphere Club, Inc.*, 134 B.R. 515, 524 (Bankr. S.D.N.Y. 1991).

⁴⁴ 11 U.S.C. §§ 1113(b)(1)(a), 1114(f)(1)(A).

⁴⁵ See, e.g., *In re Karykeion, Inc.*, 435 B.R. 663, 679 (Bankr. C.D. Cal. 2010) (“[T]he only reorganization option for the debtor is the sale of [its hospital] to [buyer] and that sale is contingent on the court approving the debtor’s rejection of these CBAs.”).

46. Sections 1113 and 1114 do not require the Debtors to establish that the requested relief will result in a confirmable Chapter 11 plan of liquidation.⁴⁶ The Objectors confuse the rehabilitative effect of a going concern sale of the Debtors' Alabama Coal Operations to a new owner with the attendant wind-down and liquidation of the remaining bankruptcy estates, a process that occurs *after* the sale of the Debtors' Alabama Coal Operations as a going concern. Applying the "necessary to permit the reorganization of the debtor" requirement of section 1113(c) relief "contextually, rather than strictly," sections 1113 and 1114 apply in a liquidating Chapter 11 case regardless of the debtor's ability to confirm a liquidating Chapter 11 plan.

C. Benefits Under the Coal Act May Be Modified or Terminated Pursuant to Section 1114 of the Bankruptcy Code.

47. The Objectors also argue that the Section 1113/1114 Motion cannot be granted because the Final Proposals are inconsistent with federal law to the extent they seek to terminate healthcare coverage for retirees and dependents eligible for such coverage under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act").⁴⁷ Modification of Coal Act retiree benefits may be permitted if such modifications are necessary to facilitate a going concern sale, rather than a piecemeal liquidation. For the reasons set forth below, the Debtors' Final Proposals meet this standard.

48. By way of background, the Coal Act contains three "vehicles" to provide healthcare benefits for certain coal industry retirees. *First*, the Coal Act merges the 1950 and 1974 benefit plans into the "UMWA Combined Fund." *Second*, the Coal Act requires signatory operators who are obligated under the 1978 or any later NBCWA to provide benefits under an

⁴⁶ UMWA Obj. at ¶ 77; 1114 Committee Obj. at ¶ 11, 62.

⁴⁷ 26 U.S.C. §§ 9701-22. *See also Patriot Coal*, 493 B.R. at 83-84 for an explanation of the Coal Act and its predecessors.

IEP to continue to provide such coverage to certain retirees. *Third*, the Coal Act establishes the UMWA “1992 Benefit Plan to cover two classes of beneficiaries who are not covered under the Combined Fund or [an IEP]: (a) those who, based on age and service as of February 1, 1993, would otherwise have been eligible for benefits from the 1950 or 1974 plans were it not for the merger of those plans and the cut-off date set forth in the Coal Act, and (b) any person with respect to whom coverage under an [IEP] is required but is not provided.”⁴⁸ The Combined Fund and the UMWA 1992 Benefit Plan are financed by monthly and annual premiums.⁴⁹

49. Only one published decision, *In re Horizon Natural Resources Co.*, 316 B.R. 268 (Bankr. E.D. Ky. 2004), squarely addresses whether a debtor may modify or terminate Coal Act obligations pursuant to section 1114 and concludes that it does.⁵⁰ In *Horizon*, the debtors initially pursued a plan of reorganization by which they would retain their operating assets, but later changed their focus to liquidating through Chapter 11.⁵¹ The debtors moved under sections 1113 and 1114 to reject their collective bargaining agreements and modify or terminate retiree benefits because “[t]he unrefuted evidence . . . is that the debtors’ assets cannot be sold subject to the collective bargaining agreements and retiree benefits”⁵²

50. The Coal Act Funds objected, arguing that regardless of section 1114 of the Bankruptcy Code, which permits modification of retiree benefits, section 9711 of the Coal Act expressly prohibits the modification of retiree benefits for as long as the employer or its successor remains in business.⁵³ The Coal Act Funds maintained that the term “retiree benefits”

⁴⁸ *Holland v. Double G Coal Co., Inc.*, 898 F.Supp. 351, 354 (S.D.W.Va. 1995).

⁴⁹ *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 576-77 (4th Cir. 1996).

⁵⁰ *In re Horizon Natural Res.*, 316 B.R. at 276.

⁵¹ *Id.* at 271.

⁵² *Id.* at 282.

⁵³ *See id.* at 275.

as used in the Bankruptcy Code includes only benefits received pursuant to contract, not statutory benefits like those provided under the Coal Act.⁵⁴ The court disagreed, finding that the Bankruptcy Code defines “retiree benefits” to include both statutory benefits (*i.e.*, those arising under the Coal Act) and non-statutory benefits (*i.e.*, those arising under a collective bargaining agreement).⁵⁵

51. Section 1114 expressly “contemplates the modification of non-contractual obligations, because it authorizes the appointment of a committee of retirees to serve as the authorized representative . . . of those persons receiving any retiree benefits *not covered by a collective bargaining agreement*.”⁵⁶ Moreover, in reconciling the Coal Act with the Bankruptcy Code, the *Horizon* court found that the Coal Act does not expressly contradict section 1114 of the Bankruptcy Code. Rather, section 1114 deals with “a narrow, precise, and specific subject: it governs the modification of retiree benefits only when the former employer is a debtor in a Chapter 11 case and only to the extent necessary for the reorganization effort. The Coal Act, on the other hand, . . . ‘covers a more generalized spectrum’ in that it does not specify whether the former employer is or is not a debtor in possession.”⁵⁷ In other words, application of section 1114 to retiree benefits covered by the Coal Act “does not deprive the Coal Act of ‘any meaning at all’; the Coal Act would remain fully applicable where the last signatory operator is not a Chapter 11 debtor in possession or cannot satisfy § 1114’s requirements.”⁵⁸

52. The *Horizon* court relied on *In re Lady H Coal Co.*, 199 B.R. 595 (S.D.W.Va. 1996), a decision addressing the relationship between the Coal Act and section

⁵⁴ *See id.*

⁵⁵ *Id.* at 275-76

⁵⁶ *Id.* at 275 (emphasis in original).

⁵⁷ *Id.* at 276

⁵⁸ *Id.*

363(f) of the Bankruptcy Code. In *Lady H*, the Court considered the debtors' motion seeking a piecemeal liquidation of their assets free and clear of all liabilities, including those under the Coal Act.⁵⁹ The Coal Act Funds objected, but the *Lady H* court held that assets may be sold free and clear of Coal Act obligations under section 363(f) of the Bankruptcy Code.⁶⁰ The *Lady H* court reasoned that "[i]f Congress wished to exclude Coal Act liabilities from the reach of bankruptcy law, it could have done so . . . by providing express language in the Coal Act that liabilities remain unaffected by operation of the Bankruptcy Code."⁶¹

53. Based on *Lady H* and the reasoning above, the *Horizon* court granted the debtors' motion under section 1114 to modify retiree benefits arising under the Coal Act, holding that "the Coal Act imposes a general prohibition against certain retiree benefit modifications, [and] the Bankruptcy Code agrees with that general prohibition but establishes an extremely limited exception."⁶² The *Horizon* court further justified its holding by noting that "[i]t is in the best interests of the Coal Act Plan and Fund and their beneficiaries and creditors generally that the debtors' assets be sold for the best possible price, not on a piecemeal basis. If the modification of the Coal Act retiree benefits is necessary to accomplish that goal and the other requirements of § 1114 are satisfied, modification must be permitted."⁶³

54. The Objectors rely on *In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998) and other similar cases that consider the treatment of Coal Act claims in bankruptcy (but

⁵⁹ *Lady H*, 199 B.R. at 599-600.

⁶⁰ *Id.* at 603.

⁶¹ *Id.*; see also *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996) ("[T]he Bankruptcy Court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5)."); *Horizon Natural Resources*, 316 B.R. at 279 ("[A]ny additional financial problems encountered by the 1992 Fund resulting from the application of § 1114 to Coal Act obligations should be addressed by Congress and do not justify 'disturb[ing] the statutory scheme as we have found it.'" (quoting *Leckie Smokeless Coal Co.*, 99 F.3d at 586).

⁶² *Horizon Natural Resources*, 316 B.R. at 277.

⁶³ *Id.* at 279.

do not directly address whether a debtor can terminate Coal Act obligations under Section 1114), to argue that the Debtors cannot use Section 1114 here to terminate these obligations. Their reliance on these cases, none of which are binding on this Court, is misplaced. In *Sunnyside*, for example, the Court of Appeals for the Tenth Circuit held that Coal Act premiums under section 9712 of the Coal Act are “taxes incurred by the estate”⁶⁴ a conclusion with which the Court of Appeals for the Fourth Circuit agreed.⁶⁵ As is evident, these cases focus on the priority to which claims under the Coal Act are entitled in bankruptcy, an issue that is not before the Court.

55. The UMWA Funds cite to the bankruptcy court oral ruling in *Sunnyside* as “directly on point,” noting that the court there denied the debtor’s application under Section 1114 to terminate its Coal Act obligations.⁶⁶ This case is readily distinguishable. At the time the *Sunnyside* debtor sought termination of the Coal Act obligations, the debtor had ceased its active mining operations. It had shut off power and let the mine fill, thereby foreclosing any possibility of reopening the mine and conducting operations. Nor did the debtor intend to engage in active coal mining. In short, the *Sunnyside* debtor was liquidating and at issue in the Section 1114 application was whether the Coal Act claims could be terminated or were entitled to priority in payment from the liquidating estates. That is not the case here. Moreover, the *Sunnyside* bankruptcy court ruling does not analyze why Section 1114 cannot modify Coal Act obligations of such obligations constitute “retiree benefits.” It simply states its conclusion. *Sunnyside* is not

⁶⁴ *In re Sunnyside Coal Co.*, 146 F.3d 1273, 1280 (10th Cir. 1998).

⁶⁵ *Adventure Resources Inc. v. Holland*, 137 F.3d 786, 794 (4th Cir. 1998) (focusing primarily on “the question of whether the taxes levied by the Coal Act were . . . ‘incurred by the estate[s].’” (quoting § 503(b)(1)(B)(i)).

⁶⁶ *In re Sunnyside Coal Co.*, No. 94-12794-CEM (Bankr. D. Colo. July 29, 1994) (slip opinion).

helpful to the analysis here, and in any event, that ruling is not binding on this Court.⁶⁷

56. For the reasons set forth in *Horizon*, the Debtors may use section 1114 to modify Retiree Benefits arising under the Coal Act if the other requirements of section 1114 are satisfied. For the reasons set forth below, the Debtors have met the statutory standard of sections 1113 and 1114 to terminate the Retiree Benefits on the terms set forth in the Final Proposals.

D. The Debtors Have Satisfied the Statutory Requirements of Sections 1113 and 1114 of the Bankruptcy Code.

(1) The Debtors Made Proposals to the UMWA to Modify the UMWA CBA.

57. Section 1113 requires the Debtors to provide the UMWA with proposed modifications to the UMWA CBA *prior to* filing an application to reject the agreement.⁶⁸ The bar for satisfying this requirement is low because in most cases, this factor is a “routine formality.”⁶⁹ The Debtors made numerous proposals to the UMWA throughout the Chapter 11 Cases. When the RSA terminated and the Chapter 11 Cases pivoted to a sale track, the Debtors had no alternative but make the Final Proposal to the UMWA. The Debtors’ Final Proposal to the UMWA post-dated the filing of the Chapter 11 Cases and pre-dated the filing of the Section 1113/1114 Motion, which was filed on November 23, 2015. The statute requires submitting a proposal before filing the Section 1113/1114 Motion, which the Debtors did. However, neither section 1113 nor 1114 require completion of negotiations before filing the motion. To the contrary, section 1114 expressly contemplates that negotiations may take place

⁶⁷ Even the bankruptcy court was not convinced of its own conclusion. *Id.* at 18 (“The reality is that it is a point subject to argument, but you are here asking for my judgment in this proceeding and that’s what you get. I’m sure that this problem will haunt other Courts . . .”).

⁶⁸ 11 U.S.C. § 1113(b)(1)(A); *see also In re Nw. Airlines Corp.*, 346 B.R. 307, 320 (Bankr. S.D.N.Y. 2006).

⁶⁹ *See, e.g., Chicago Constr. Specialties*, 510 B.R. at 218.

after the filing of the motion, and the testimony and the evidence demonstrates that is what happened here,⁷⁰ so the Final Proposal to the UMWA met this requirement.

58. The Objectors argue that the Final Proposal to the UMWA was a “take it or leave it” unilateral rejection of the UMWA CBA and Retiree Benefits dictated by the Proposed Buyer under the Stalking Horse APA. Even if the Objectors are correct that the Final Proposal was necessitated by the Stalking Horse APA and the Debtors’ financial circumstances, and even if these exigencies preclude further negotiations with the UMWA and Section 1114 Committee, the Final Proposal in and of itself was not improper. First, the Final Proposal included those modifications necessary to consummate the Stalking Horse APA. This includes elimination of the Successorship Provisions or rejection of the UMWA CBA. The Debtors had no choice about including these terms in the Stalking Horse APA. The Debtors’ investment banker testified that after an extensive marketing process, no buyers emerged willing to purchase the Alabama Coal Operations as a going-concern, let alone as a going-concern burdened by the UMWA CBA. No contrary testimony or evidence was offered. Certainly, no entity is more familiar with coal operators than the UMWA, and if they had been aware of any potential purchasers, surely their representatives would have made that known.⁷¹ The fact that certain terms of the Final Proposal were non-negotiable for reasons beyond the Debtors’ control does not render the Final Proposals defective or proffered in bad faith.

59. Second, by its terms, the Final Proposal to the UMWA made clear that the Debtors were submitting proposals and were willing to negotiate, notwithstanding the dire

⁷⁰ Even counsel for the UMWA noted that a court may stop the 1113/1114 hearing and request or require the parties to negotiate.

⁷¹ See *Lady H*, 199 B.R. at 607 (“Therefore, it is now time for the UMWA and the 1992 Plan to do what every creditor has a right to do at such a sale; encourage bidders who they would like to have operate these properties, consider investing in or becoming an owner of the enterprise, or enter into an agreement with a buyer to assure that some of the profitability problems of the past are solved upon purchase of the Debtors’ assets.”)

circumstances in which the Debtors find themselves. Thus, for example, the UMWA Final Proposal provides:

JWR confirms that, in addition to the foregoing [proposals], it is willing to discuss any proposal that the Union may have concerning the effects of the sale of the mines on the Union's members.⁷²

60. Finally, not unlike many Chapter 11 cases, but even more so in these cases, the Debtors have had to move at “warp” speed. From day one, the Debtors, and every witness for the Debtors, at every hearing, have repeatedly made it known that the “cash burn” was occurring faster even than anticipated. Repeatedly the Debtors have advised that they had to move the cases quickly to get to an end before the cash was completely gone. Also, as in any Chapter 11, Debtors, their counsel and advisors, and the management, are not only dealing with ongoing routine business issues, but are attempting to deal with, negotiate and resolve issues on multiple fronts with multiple players. The UMWA labor issues are clearly not the only party or problems being addressed, all simultaneously.⁷³

61. In sum, the Objectors ignore the express language of the Final Proposal, which clearly invites further discussion, and in fact, such discussions took place. The extent to which the Debtors' circumstances may limit the opportunity to negotiate does not, of itself, determine whether the first factor of the nine-part *American Provision* test has been satisfied.⁷⁴

⁷² Scheller Decl. ¶ 26 & Ex. 2.

⁷³ The court notes that even while preparing for this hearing, the Debtors resolved the 1114 Non-Union Retiree issues. Further, a settlement was reached with the Unsecured Creditors Committee. The UMWA attorney tried to turn these accomplishments around by suggesting that everyone was getting something but the UMWA. The court disagrees, in a complex “mega” Chapter 11, every resolution counts and all help the Debtors reach the goal line.

⁷⁴ See *In re Alabama Symphony*, 155 B.R. 556, 573 (Bankr. N.D. Ala. 1993) (noting that the Bankruptcy Code “requires only that a debtor make *one* proposal, and that proposal must occur after the filing of the petition and before the application for rejection is made.”) (emphasis in original); see also *Chicago Constr. Specialties*, 510 B.R. at 219 (“[I]t may indeed be the case that opportunity to negotiate is limited by the facts. That, however, is not a consideration in determining whether the first factor of the nine-factor test has been satisfied.”).

Here, the Debtors submitted the Final Proposal within the timeframe the Bankruptcy Code contemplates, and the Court thus finds that the Final Proposal to the UMWA meets the standard required and that this factor is satisfied.⁷⁵

(2) **The Debtors' Final Proposal Was Based on the Most Complete and Reliable Information, and the Debtor Provided Relevant, Necessary Information to the UMWA.**

62. Both the second and fifth factors of the *American Provision* test pertain to the information necessary to support rejection of a collective bargaining agreement or retiree benefits under sections 1113 and 1114. The second factor addresses the information upon which the Debtors base their decision to reject the UMWA CBA or terminate benefits. The fifth factor, on the other hand, addresses the information the Debtors provide to the union or retirees.⁷⁶ In both cases, a debtor must gather the “most complete information at the time and . . . base its proposal on the information it considers reliable,” excluding “hopeful wishes, mere possibilities and speculation.”⁷⁷ “The breadth and depth of the requisite information will vary with the circumstances, including the size and complicity of the debtor’s business and work force; the complexity of the wage and benefit structure under the collective bargaining agreement; and the extent and severity of modifications the debtor is proposing.”⁷⁸ To satisfy the second and fifth

⁷⁵ Contents of 67

⁷⁶ 11 U.S.C. §§ 1113(b)(1)(A) and (B), 1114(f)(1)(A) and (B); *Chicago Constr. Specialties*, 510 B.R. at 219; *AMR Corp.*, 477 B.R. at 409.

⁷⁷ *Chicago Constr. Specialties*, 510 B.R. at 219 (quoting *AMR Corp.*, 477 B.R. at 409); see also *In re Karykeion, Inc.*, 435 B.R. 663, 678 (Bankr. C.D. Cal. 2010) (“Just as section 1113 precludes a debtor from altering union contracts based on wishful thinking and speculation, a debtor facing imminent closure cannot base its rejection of its only suitor on a speculative white knight with greater riches.”); *In re Patriot Coal*, 493 B.R. 65, 119 (Bankr. E.D. Mo. 2013) (debtors must provide “sufficient information for the UMWA to evaluate the [p]roposals.”).

⁷⁸ *AMR Corp.*, 477 B.R. at 409 (quoting *In re Mesaba Aviation, Inc. (Mesaba I)*, 341 B.R. 693, 714 (Bankr. D. Minn. 2006), *aff’d in part, rev’d in part sub nom. Ass’n of Flight Attendants – CWA-AFL-CIO v. Mesaba Aviation, Inc. (Mesaba II)*, 350 B.R. 435 (D. Minn. 2006)).

procedural requirements, a debtor need only provide that information that is within its power to provide.⁷⁹

63. The Final Proposal to the UMWA meets the second and fifth factors of the *American Provision* test. The evidence establishes that the Debtors filed these Chapter 11 Cases fully expecting to reorganize pursuant to a Chapter 11 plan. The Debtors' proposals to the UMWA sought relief tailored to that objective.⁸⁰ Once the RSA was terminated and reorganization through a Chapter 11 plan was no longer a possibility, the Debtors formulated the Final Proposal to the UMWA based on the requirements needed to consummate the sale(s). The Final Proposal was a result of the Debtors' severe and increasingly liquidity constraints which show that the Debtors did not, and would not, have any cash to fund operations after January 2016, and that once the sale(s) closes, the Debtors will not have any money to pay for obligations remaining under the UMWA CBA.⁸¹ No credible evidence was offered that this information is incomplete or unreliable.

64. Similarly, the Debtors provided the UMWA all the relevant information necessary to evaluate their proposals.⁸² The relevant time for evaluating the sufficiency of the information is early November 2015 and thereafter, when the Chapter 11 Cases pivoted to a sale process. By the time the Debtors filed the sale motion on November 5, 2015, (a) there was no escaping the fact that reorganization under a plan was an impossibility, and (b) the Proposed Buyer had committed to purchasing the Alabama Coal Operations as a going-concern. It was not until the Debtors had no other choice but to pursue the Stalking Horse APA that they filed the

⁷⁹ See *In re Pinnacle Airlines Corp.*, 483 B.R. 381, 411 (Bankr. S.D.N.Y. 2012).

⁸⁰ See Scheller Decl. ¶¶ 11, 13.

⁸¹ See Zelin Decl. ¶ 16.

⁸² See 11 U.S.C. §§ 1113(b)(1)(A) and (B), 1114(f)(1)(A) and (B).

Section 1113/1114 Motion. By this time, the “relevant information” was simple and apparent for all to see: the Debtors could not survive absent a sale in the near term, the Proposed Buyer had emerged as the only viable bidder that would purchase the Alabama Coal Operations as a going-concern, the sale of the Alabama Coal Operations as a going-concern provides the best chance for future employment of the Debtors’ employees, and the Stalking Horse APA requires elimination of the Successorship Provisions or rejection of the UMWA CBA. Moreover, upon closing of the sale(s) (or outright liquidation), the Debtors will have no money to pay Retiree Benefits.

65. Under these facts and circumstances, the UMWA received from the Debtors all the relevant information necessary for them to evaluate the Final Proposal. Beginning July 2015, the Debtors provided the UMWA’s members and advisors with access to an electronic data room that contains more than 75,000 pages of operational, financial, business planning and other documents relevant to the Objectors’ evaluation of the Debtors’ various proposals throughout these Chapter 11 Cases.⁸³ Once the RSA terminated, the Debtors continued to meet with the UMWA to apprise it of the status of the Chapter 11 Cases. Importantly, no party has challenged the reliability of the financial basis for the Debtors’ decision to sell the Alabama Coal Operations as a going-concern, although the Objectors take issue with terms of the proposed sale(s). But no party has come forward willing to purchase all of the Debtors’ Alabama Coal Operations burdened with the UMWA CBA and Retiree Benefits.⁸⁴

66. The Objectors argue that they are entitled to “a thorough analysis of all of the incidents of income and expense that would bear on the [debtor’s] ability to maintain a going-concern in the future” and that the union’s objections must “go to whether the Debtor

⁸³ Zelin Decl. at ¶ 28.

⁸⁴ Zelin Decl. at ¶ 30.

mustered a sufficiently comprehensive, detailed portrait of its financial posture and prospects before it formulated its proposals.”⁸⁵ The Objectors suggested by their cross examination of witnesses, that because no business plan for the Proposed Buyer had been provided, that the information was insufficient to evaluate the proposals. The Court finds otherwise, the Proposed Purchaser was formed almost simultaneously with the signing of the APA, little over one month ago. The Proposed Buyer, Coal Acquisitions, selected Mr. Williams as its CEO. He had been an advisor to the Lenders, and had been observing Debtors’ operations. It is clear to this Court from Mr. Williams’ testimony, that other than further streamlining and pairing expenses wherever it can, the operations are expected to continue much the same. Also, Objectors claim that the Debtors have failed to provide the information sections 1113 and 1114 require because the Debtors made the Final Proposal without providing a wind-down plan for the payment of accrued and/or vested administrative expenses owed under the UMWA CBA and without leaving sufficient assets to pay accrued post-petition obligations owed to represented employees and retirees.⁸⁶

67. The Debtors formulated the Final Proposal to facilitate the 363 Sale, a going-concern sale of their Alabama Coal Operations the Debtors entered into because their only other alternative is to shut down the mines, unlikely leaving an opportunity to be reopened, and to liquidate. This alternative seems the more dire and severe – it would preclude almost to a certainty, any future job opportunities for the UMWA and its members. The Debtors provided the Objectors with clear and comprehensive financial, business and operational information detailing the Debtors’ cash needs and the likelihood that the Debtors would run out of money in January 2016 unless the 363 Sale closed before then. This information was far more detailed and

⁸⁵ UMWA Obj. at ¶ 95, 99 (quoting *Mesaba I*, 341 B.R. at 712-13); 1114 Committee Obj. at ¶¶ 57-60.

⁸⁶ UMWA Obj. at ¶ 98; 1114 Committee Obj. at ¶ 63.

substantive than just a “snap-shot of current finances.”⁸⁷ In these circumstances, that information suffices to demonstrate the necessity of the section 1113 and 1114 relief. The Debtors are not required to state what the “gap” is between their current financial performance and the performance needed to emerge, as the UMWA maintains, or what proportion of the gap is filled by the proposed labor concessions.⁸⁸ By definition, in a going-concern sale, the Debtors are *not* emerging from Chapter 11 in their current form, and the purpose of the proposed labor concessions is to enable the sale, not to fill some hypothetical financial void.

68. For the same reason, the Debtors need not demonstrate the cost savings necessary to fund their post-sale wind-down.⁸⁹ Sections 1113 and 1114 require only that the Debtors demonstrate that the Final Proposal is “necessary to permit the reorganization of the Debtors,” which in this context means those modifications necessary to consummate the going-concern sale of their Alabama Coal Operations. Whether the labor concessions suffice to fund the subsequent wind-down of the estates, after the Debtors’ Alabama Coal Operations have already been sold to a new owner, has no bearing on the section 1113 standard.

69. Here, the irrefutable evidence establishes that the Debtors have no reasonable or good alternative but to sell the Alabama Coal Operations to the Proposed Buyer. Based on the above, the Court finds that the Debtors based their Final Proposal on the most complete information available at the time and that the Debtors provided the UMWA with the relevant information necessary to evaluate the Final Proposals.

⁸⁷ UMWA Obj. at ¶ 105.

⁸⁸ UMWA Obj. at ¶ 103.

⁸⁹ UMWA Obj. at ¶ 106.

(3) **The Final Proposals are Necessary to Permit the
Going-Concern Sale and the Debtors' Reorganization.**

70. A debtor's proposed modifications to its collective bargaining agreements or retiree benefits must be "necessary to permit the reorganization of the debtor."⁹⁰ In the context of a liquidation or sale of substantially all of a debtor's assets, the phrase "'necessary to an effective reorganization' means . . . necessary to the Debtor's liquidation."⁹¹ This factor is the most debated among the nine *American Provision* factors, and its interpretation now exists in two divergent forms: the "absolutely essential" view espoused by the Court of Appeals for the Third Circuit in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, AFL-CIO-CLC*, 791 F.2d 1074 (3d Cir. 1986), and the "necessary, but not absolutely minimal" view formulated by the Court of Appeals for the Second Circuit in *Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Carey Transportation, Inc.*, 816 F.2d 82 (2d Cir. 1987).

71. In *Wheeling-Pittsburgh*, the Third Circuit tracked the legislative history of section 1113 at length and concluded that the "necessary" language required that the debtor's proposal contain only the "minimum modifications . . . that would permit the reorganization."⁹² The Third Circuit found this consistent with the purpose behind section 1113, which was to overturn the lenient *Bildisco* standard in favor of a more stringent standard.⁹³ It considered whether the modifications were intended to foster the debtor's ability to reorganize for the long-

⁹⁰ 11 U.S.C. §§ 1113(b)(1)(A), 1114(g)(3).

⁹¹ *Chicago Constr. Specialties*, 521 B.R. at 221; see also *Karykeion*, 435 B.R. at 678-79 (finding rejection of the CBA is "necessary to permit the debtor's reorganization" where "the only reorganization option for the debtor is the sale of [its hospital] to [buyer] and that sale is contingent on the court approving the debtor's rejection of these CBAs"); *Ionosphere Clubs*, 134 B.R. at 522 (discussing inability to apply literally section 1114's analogous "necessary to permit the reorganization of the debtor" language to a debtor liquidating in Chapter 11).

⁹² See *Alabama Symphony*, 155 B.R. at 574 (quoting *Wheeling-Pittsburgh*, 791 F.2d at 1087).

⁹³ *Id.* at n.42.

term, or whether they were only those that allowed the debtor to avoid liquidation. Based on its understanding of the legislative history, the Third Circuit determined that section 1113 required application of a stricter standard and that “necessary” modifications were only those that served the short term goal of preventing the debtor’s liquidation.⁹⁴

72. The Second Circuit, on the other hand, takes the view that “necessary” does not equate with “essential.”⁹⁵ Thus, the Second Circuit’s test formulates the “necessary” requirement as putting the burden on the debtor to make a proposal in good faith that includes necessary changes that will enhance the debtor’s ability to successfully reorganize.⁹⁶ Under either the *Wheeling-Pittsburgh* standard or the *Carey Transportation* standard, the Debtors have satisfied their burden under the third factor of the *American Provision* test. The Final Proposal – by eliminating the Successorship Provisions – seek only those modifications necessary to consummate the sale(s), thereby selling the Alabama Coal Operations as a going-concern and preventing the Debtors’ piecemeal liquidation and/or shut down of the coal mines.

73. More specifically, the unrefuted evidence before the Court is that the Debtors’ Alabama Coal Operations cannot be sold subject to the collective bargaining agreements and Retiree Benefits. The Debtors have engaged in and continue to engage in active efforts to sell their assets subject to the obligations, but no such offers have been received and none are anticipated. The amount of the employee legacy costs, including the costs of medical benefits for hourly rate retirees and for Coal Act beneficiaries and the liability arising from the Debtors’ withdrawal from the 1974 Pension Plan, are substantial. The testimony and evidence shows that even if the Debtors obtained savings of \$150 million from the Unions, the Debtors

⁹⁴ *Id.* at 574 (discussing *Wheeling-Pittsburgh*, 791 F.2d at 1089).

⁹⁵ *Id.* (discussing *Carey Transp. II*, 816 F.2d at 89).

⁹⁶ *See id.*

would have required hundreds of millions of dollars in new capital on emergence to remain viable. The Court finds credible that no potential buyers have an interest in assuming such obligations, let alone assuming such obligations *and* investing such new capital. The Debtors have, accordingly, carried their burden of showing that, absent the rejection of the UMWA CBA and the termination of the Retiree Benefits, the sale(s) will not close and conversion of these cases to Chapter 7 and a piecemeal liquidation would ensue. Therefore, the relief sought is necessary to permit the Debtors' reorganization within the meaning of sections 1113 and 1114.

74. The UMWA argues that there is no way the Debtors can establish that any of their present demands are necessary to the sale(s) transaction until the UMWA concludes its negotiations with the Proposed Buyer. The UMWA submits that it is only after the UMWA and the Proposed Buyer have had sufficient time to bargain that it would be appropriate to consider whether it is necessary to eliminate the Successorship Provisions. But the Stalking Horse APA states unequivocally that termination of the Successorship Provisions in the UMWA CBA or rejection of the UMWA CBA is a condition *precedent* to completion of the sale(s).⁹⁷ Unless the Debtors' obtain the requested relief, there will be no Proposed Buyer with whom the UMWA can bargain. Moreover, the Debtors will run out of cash by early January 2016. No time exists to delay the sale(s) solely for purposes of maximizing the UMWA's leverage in their negotiations with the Proposed Buyer.

75. Sections 1113 and 1114 only require that the Debtors' Final Proposal be necessary to permit the *Debtors'* reorganization – *i.e.*, in these Chapter 11 Cases, those modifications necessary to consummate a going-concern sale. The Bankruptcy Code does not impose any obligation on the Debtors to ensure that the UMWA can negotiate the best possible

⁹⁷ See Stalking Horse APA § 7.12.

deal with the new owner of the Debtors' Alabama Coal Operations. The section 1113 inquiry focuses solely on the proposal made by the Debtors, not the other parties, and the UMWA is not entitled to a veto power over a going concern sale when the undisputed evidence establishes that it is the best way to maximize value for all creditors and provide the best chance for future employment for the Debtors' employees, including, but not limited to, UMWA-represented employees.⁹⁸ Section 1113 was never intended to give unions such power. Its purpose is to prevent the Debtors from unilaterally rejecting the UMWA CBA, to encourage negotiations with the UMWA, and to plainly articulate the process for seeking rejection. Here, the Debtors have complied with these requirements and established that the modifications are necessary to permit their reorganization within the meaning of sections 1113 and 1114.

76. The Debtors' situation in these Chapter 11 Cases is very similar to that of the debtor in *In re Karykeion, Inc.*, 435 B.R. 663 (Bankr. C.D. Cal. 2010), and the reasoning of that case is persuasive. In *Karykeion*, the Chapter 11 debtor operated a community hospital that was almost out of money, and moved to reject its collective bargaining agreements with its unions in order to facilitate a going-concern sale to a third party. As is the case here, in *Karykeion*, the sale of the hospital as a going-concern to a third-party buyer was the only reorganization option for the debtor, and the sale was contingent on the court approving the debtor's rejection of the collective bargaining agreements, including the successor clauses.⁹⁹ Given these circumstances, and having found that the Debtors satisfied the requirements for rejection set forth in section 1113, the *Karykeion* court authorized the debtor to reject its

⁹⁸ See *AMR Corp.*, 477 B.R. at 414 (noting that "courts have rejected attempts to focus the Section 1113 inquiry on a proposal made by a party other than the debtor")

⁹⁹ *Karykeion*, 435 B.R. at 679.

collective bargaining agreement.¹⁰⁰

77. The Objectors' reliance on *In re Bruno's Supermarket, LLC*, 2009 WL 1148369 (Bankr. N.D. Ala. Apr. 27, 2009) is misplaced given the facts and circumstances of each case. The Debtors' situation differs markedly from that of *Bruno's*. As the *Karykeion* court noted:

In *Bruno's*, the evidence showed that the debtor was seeking to reject a similar CBA successorship clause because it felt it could more effectively market itself without such a requirement. There was no specific sale identified and all buyers were still just potential suitors. While a number of prospective buyers had expressed concern about the successorship clause, there was testimony that certain potential buyers might still be willing to negotiate parts of the union contract. The debtor here is not simply seeking to "enhance the market value" of its assets, as the court concluded in *Bruno's*. The debtor tried to find a buyer who would assume the CBAs and tried to reorganize its existing structure without rejecting any CBAs. It is now pursuing the only course of action left to it other than shutting down immediately and has already exhausted negotiations with the only prospective buyer still willing to proceed. Whether the debtor could have avoided being painted into this corner can be debated, but it is now crowded into the corner along with the other interested parties in the case.¹⁰¹

78. The same reasoning articulated by the *Karykeion* court applies here. The Debtors have presented overwhelming evidence that the deal with the Proposed Buyer will collapse unless the Successorship Provisions are terminated or the UMWA CBA is rejected. The Proposed Buyer refused to agree to a sale transaction without that requirement and, given the depressed condition of the coal industry and the Debtors themselves, no other potential buyers have emerged to purchase the Debtors as a going-concern. In addition, once the sale(s) close, the Debtors will have no money to pay the Retiree Benefits or any other obligations remaining under the UMWA CBA. The "wisdom" of the Proposed Buyer's position regarding which of the

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.* at 679.

Debtors' liabilities it is willing to assume or pay is irrelevant.¹⁰² The only consideration is whether the Debtors' proposed elimination of the Successorship Provisions or rejection of the CBAs is necessary to permit the going-concern sale of the Alabama Coal Operations. The 363 Sale will not close unless the Successorship Provisions are eliminated or the CBAs are rejected, and consequently, this requirement has been met.

(4) The Final Proposals Assure That All Parties Are Treated Fairly and Equitably.

79. Sections 1113 and 1114 also require that a debtor's proposed modifications affect parties in a fair and equitable manner.¹⁰³ This requirement "spread[s] the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree."¹⁰⁴ "Courts take a flexible approach in considering what constitutes fair and equitable treatment due to the difficulty in comparing the differing sacrifices of the parties in interest."¹⁰⁵ A debtor can meet the requirement "by showing that its proposal treats the union fairly when compared with the burden imposed on other parties by the debtor's additional cost-cutting measures and the Chapter 11 process generally."¹⁰⁶

80. Bankruptcy Courts display significant discretion with respect to this part of the *American Provision* test. For example, courts have found the requirement fulfilled where non-union employees and managers received increased responsibilities as a result of a reduction-

¹⁰² *Id.*

¹⁰³ 11 U.S.C. §§ 1113(b)(1)(A); 1114(g)(3).

¹⁰⁴ See *AMR Corp.*, 47 B.R. at 408 (quoting *Carey Transp. II*, 816 F.2d at 90); see also *In re Century Brass Prods. Inc.*, 795 F.2d 265, 273 (2d Cir. 1986); *In re Elec. Contracting Servs. Co.*, 305 B.R. 22, 28 (Bankr. D. Colo. 2003) ("A debtor will not be allowed to reject a union contract where it has demanded sacrifices of its union without shareholders, non-union employees and creditors also making sacrifices."). Neither *AMR Corporation*, *Century Brass*, nor *Electric Contracting* discuss § 1114. However, as previously noted, "[t]he requirements for modification of retiree benefits are . . . substantially the same as the requirements for rejection of collective bargaining agreements." *Horizon*, 316 B.R. at 281; see also *Ionosphere*, 134 B.R. at 520.

¹⁰⁵ *AMR Corp.*, 477 B.R. at 408.

¹⁰⁶ *Nw. Airlines*, 346 B.R. at 326 (citing *Carey Transp. II*, 816 F.2d at 90).

in-force rather than pay cuts *per se*.¹⁰⁷ Additionally, at least one court has held that where union salaries and benefits constitute the bulk of the debtor's costs, and union employees generally earn more than their non-union counterparts, the "fair and equitable" requirement does not mandate perfectly proportionate burdens on both union and non-union employees.¹⁰⁸

81. The "fair and equitable" requirement does not mean that the non-union employees must take pay reductions in equal percentages.¹⁰⁹ To the contrary, the Bankruptcy Code requires that the Court look to how "all of the affected parties" are treated.¹¹⁰ The affected parties in this case include those who have intangible interests, such as the city, the state, the vendors who supply the Alabama Coal Operations, and most importantly, the employees who depend on the going concern sale as the best chance for future employment.

82. Here, just like the UMWA retirees, the Debtors' salaried employees are also facing termination of their Retiree Benefits upon consummation of the proposed sale(s). Other creditors are also either not getting paid or are receiving far less than the debt owed. Finally, the evidence establishes that the Debtors have undertaken aggressive cost-cutting measures across their business to address the Debtors' financial troubles and preserve jobs; management has taken steps to cut excess costs and overhead before approaching labor to request economic concessions.¹¹¹ Such cuts include significant reductions in force among

¹⁰⁷ *In re Patriot Coal Corp.*, 493 B.R. 65, 131 (Bankr. E.D. Mo. 2013) (citing *Carey Transp. II*, 816 F.2d at 90).

¹⁰⁸ *See In re Allied Delivery System Co.*, 49 B.R. 700, 702-03 (Bankr. N.D. Ohio 1985) ("Fair and equitable treatment does not of necessity mean identical or equal treatment."); *see also Carey Transp. II*, 816 F.2d at 90-91 ("[W]here . . . the employees covered by the pertinent bargaining agreements are receiving pay and benefits above industry standards, it is not unfair or inequitable to exempt the other employees from pay and benefit reductions.").

¹⁰⁹ *Alabama Symphony*, 155 B.R. at 575.

¹¹⁰ *Id.* (quoting *American Provision*, 44 B.R. at 909); 11 U.S.C. § 1113(b)(1)(A).

¹¹¹ *See In re Carey Transp.* (*Carey Transp. I*), 50 B.R. 203, 210 (Bankr. S.D.N.Y. 1985) ("It is rare that management approaches labor seeking economic concessions without being able to demonstrate that it has already taken steps to cut costs and overhead.")

salaried employees, renegotiating key contracts, and other creditor concessions. The Final Proposal thus does not discriminate against Union employees or retirees.

83. The Objectors argue that the Debtors' proposed key employee retention plan (the "KERP")¹¹² evidences that the UMWA represented parties and retirees shoulder a disproportionate share of the Debtors' financial distress. They argue that the existence of the KERP, which they claim favors senior management to the detriment of the UMWA represented employees and retirees, renders the Final Proposal inherently unfair and inequitable.¹¹³ But the mere fact that the Debtors are pursuing the KERP does not mean that the Final Proposal is not fair and equitable with respect to employees and retirees. How the Final Proposal affects employees and retirees and whether any constituent unfairly shoulders the burden of their impact under Sections 1113 and 1114 presents a separate and distinct inquiry from whether the KERP is justified under the facts and circumstances of these Chapter 11 Cases under Section 503(c)(3). The Court will address the KERP on its own merits in the context of adjudicating the KERP motion. However, the Court notes that the evidence establishes that the overriding purpose of the KERP is to ensure the retention of twenty-six employees (not senior management generally) who the Debtors' believe are critically necessary to preserve the Alabama Coal Operations as a safe and functioning operation that can be sold as a going concern. These objectives are consistent with those of the Final Proposal, and the existence of the KERP on its own therefore does not demonstrate that the Final Proposal is not fair and equitable. Further, the testimony regarding the KERP was clear, credible and unrefuted that the funds available for the KERP are not available for any other purpose. Again, the goal of the KERP is completely consistent and

¹¹² See Debtors' Motion for an Order (A) Approving the Debtors' Key Employee Retention Plan and (B) Granting Related Relief [Doc. No. 1032] (the "KERP Motion").

¹¹³ UMWA Obj. at ¶ 112; UMWA Funds Obj. at ¶ 78; 1114 Committee Obj. at ¶ 63.

promotes the fair and equitable treatment in that it further ensures Debtors continue to operate as required and necessary to accomplish the sale.

84. The evidence establishes that the Alabama Coal Operations cannot be sold without rejection of the UMWA CBA and Retiree Benefits. Thus, absent the rejection, those operations would be closed and sold on a piecemeal basis. On the other hand, if the sale(s) consummate and the Alabama Coal Operations are sold as a going-concern, Debtors' employees have the best chance of future employment. Consummating the sale(s) is also necessary to achieve fairness to creditors including the unsecured creditors (trade vendors and other businesses that provided goods and/or services to the Debtors), the secured and administrative creditors who would receive considerably less as a result of a piecemeal Chapter 7 liquidation. Finally, consummating the sale(s) also serves the public interest, here, represented by the local community in which the mines operate. For example, the Proposed Buyer is assuming responsibility under various mine reclamation laws and regulations which benefits the governmental agencies charged with enforcing such laws. Further, if the mines continue to operate, the local community and its economy benefit.

85. Based on the foregoing, that the Debtors have shown that the Final Proposal treats all affected parties fairly and equitably, without placing a disproportionate burden on the Union members. The Debtors have accordingly satisfied the fourth factor of the *American Provision* test.

(5) The Debtors Met With the UMWA at Reasonable Times and in Good Faith.

86. Sections 1113 and 1114 require that a debtor "meet, at reasonable times" to confer "in good faith in attempting to reach mutually satisfactory modifications to [their

collective] bargaining agreement.”¹¹⁴ “[O]nce the debtor has shown that it has met with the Union representatives, it is incumbent upon the Union to produce evidence that the debtor did not confer in good faith.”¹¹⁵ A failure to reach agreement may be “the result of the difficulty of the task, rather than the lack of ‘good faith’ of either party.”¹¹⁶

87. “Determining what amounts to “reasonable times” to meet depends on the circumstances of the situation”.¹¹⁷ Here, the Debtors have met repeatedly with the UMWA to bargain and negotiate with it at every step of these Chapter 11 Cases.¹¹⁸ The Debtors requested meetings on numerous occasions. Not once did the Debtors decline a single request from the UMWA to negotiate.¹¹⁹

88. The Debtors have also met in good faith with the UMWA. The good faith requirement under section 1113 has been interpreted to mean that the debtor must make a serious effort to negotiate.¹²⁰ Here, the evidence establishes that the Debtors were sincere about their efforts to plow some middle ground before resorting to the measures allowed by section 1113. Indeed, the Debtors’ willingness to meet frequently with the UMWA is itself compelling evidence of the Debtors’ good faith.¹²¹

89. The Objectors argue that the Debtors did not meet in good faith because the Final Proposal was required by the Stalking Horse APA and were not subject to

¹¹⁴ 11 U.S.C. §§ 1113(b)(2), 1114(f)(2).

¹¹⁵ *Carey Transp. I*, 50 B.R. at 211 (quoting *American Provision*, 44 B.R. at 910).

¹¹⁶ *Id.* (quoting *In re Salt Creek Freightways*, 47 B.R. 835, 840 (Bankr. D. Wyo. 1985)).

¹¹⁷ *See Karykeion*, 435 B.R. at 681.

¹¹⁸ Scheller Decl. ¶¶ 9-14, 16-17, 20-21, 23.

¹¹⁹ *Id.* at ¶ 9.

¹²⁰ *Alabama Symphony*, 155 B.R. at 576 (citing *In re Ky. Truck Sales, Inc.*, 52 B.R. 797 (Bankr. W.D. Ky. 1985)).

¹²¹ *See In re Sol-Sieff Produce Co.*, 82 B.R. 787, 795 (Bankr. W.D. Pa. 1988) (concluding that the debtor negotiated in good faith where the “Debtor ha[d] at all times been ready, willing, and able to negotiate” with its union).

negotiation.¹²² The evidence establishes, however, that the Debtors made multiple proposals to the UMWA and met with the UMWA throughout the Chapter 11 Cases. It was only when a sale was inevitable, and the Debtors were close to running out of money, that the Debtors submitted the Final Proposal seeking elimination of the Successorship Provisions or rejection of the UMWA CBA. The UMWA's reliance on *In re Lady H Coal, Inc.*, 193 B.R. 233 (Bankr. S.D.W.Va. 1996) is thus misplaced. In *Lady H Coal*, the court found good faith lacking where the debtors had already obligated themselves prior to initiating modification negotiations.¹²³ Here, however, the Debtors were not locked in at the time negotiations commenced. They approached the UMWA to discuss labor cost reductions before commencing the Chapter 11 Cases, and met with the UMWA repeatedly throughout their restructuring process.

90. Notably, once the Stalking Horse APA was executed, the Debtor encouraged the Proposed Buyer to meet and confer with the UMWA. In fact, the Proposed Buyer has met with, and continues to negotiate with, the UMWA. And while the UMWA understandably objects to the Proposed Buyer's insistence on the condition in the Stalking Horse APA requiring rejection of the UMWA CBA or termination of the Successorship Provisions, the relevant inquiry for purposes of the Section 1113/1114 Motion is the good faith of the Debtors and the UMWA, not the Proposed Buyer's negotiation of the Stalking Horse APA. The Debtors have shown that they negotiated in good faith. No evidence exists to the contrary.

¹²² See *In re Delta Air Lines*, 342 B.R. 685, 697 (Bankr. S.D.N.Y. 2006) (“[A] debtor cannot be said to comply with its obligation under Section 1113(b)(2) . . . when it steadfastly maintains that its initial proposal under subsection (b)(1)(A) is non-negotiable.”).

¹²³ *Lady H Coal, Inc.*, 193 B.R. at 242 (“[T]he Debtors could not have bargained in good faith as the Debtors were, prior to any negotiations with the union, locked into at [sic] an agreement where the purchaser was not assuming the [CBA].”) (emphasis added).

(5) **The UMWA and Section 1114 Committee
Rejected the Final Proposals without Good Cause.**

91. Sections 1113 and 1114 also require a debtor to demonstrate that its unions have “refused to accept [its] proposal without good cause.”¹²⁴ Once the debtor establishes that its proposal is necessary, fair, and in good faith, the unions must produce sufficient evidence to justify their refusal to accept the proposal.¹²⁵ “[A]lmost invariably, if a debtor-in-possession goes through the procedural prerequisites for its motion, and if the substance of the proposal ultimately passes muster . . . , its union(s) will not have good cause to have rejected the proposal.”¹²⁶

92. Where a proposal is necessary for the debtor’s viability and the other section 1114 requirements are met, no good cause exists to reject the proposal, even if the proposal requires sacrifices by the union or retirees.¹²⁷ “Good cause” does not include demands that are not economically feasible or alternatives that would not permit the debtor to reorganize successfully.¹²⁸

93. Here, the UMWA and Section 1114 Committee lack good cause for rejecting the Debtors’ Final Proposal. The Debtors’ dire circumstances require them to

¹²⁴ 11 U.S.C. §§ 1113(c)(2), 1114(g)(2).

¹²⁵ *Nw. Airlines*, 346 B.R. at 328 (citing *Carey Transp. II*, 816 F.2d at 92).

¹²⁶ *Assoc. of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc. (Mesaba II)*, 350 B.R. 435, 461 (D. Minn. 2006) (internal quotation omitted).

¹²⁷ *Mesaba II*, 350 B.R. at 462 (“While the low wages imposed by the Proposals understandably motivated the Unions to reject the Proposal, they do not constitute good cause under the Bankruptcy Code.”); see also *In re Valley Steel Products Co., Inc.*, 142 B.R. 337, 342 (Bankr. E.D. Mo. 1992) (“It is clear that the Proposals would have a negative impact on the Teamster Drivers’ incomes. It is equally clear that if the Debtors do not receive these concessions they will be forced to liquidate and the Teamsters will be unemployed.”).

¹²⁸ See *Nw. Airlines*, 346 B.R. at 328; see also *Salt Creek Freightways*, 47 B.R. at 840 (“[T]he court must view the Union’s rejection utilizing an objective standard which narrowly construes the phrase ‘without good cause’ in light of the main purpose of Chapter 11, namely reorganization of financially distressed businesses.”); *Alabama Symphony*, 155 B.R. at 577 (union rejected the proposal without good cause where it merely insisted that the debtor comply with the terms of the CBA before beginning negotiations because the union “knew that the [debtor] did not have the funds to pay them”).

undertake the 363 Sale, or else they will cease operations and all employees' jobs will be lost. And, under the terms of the Stalking Horse APA, the 363 Sale cannot be consummated unless the Successorship Provisions of the UMWA CBA are eliminated. Similarly, the other obligations remaining under the UMWA CBA and Retiree Benefits must be terminated upon closing the 363 Sale because the Debtors will not have the money to pay them.

94. When the Chapter 11 Cases pivoted from a plan to a sale process, the Debtors encouraged the UMWA and the Proposed Buyer to meet with each other to negotiate the terms of an initial collective bargaining agreement.¹²⁹ In fact, the Proposed Buyer reached out to the UMWA as a courtesy the day after the Stalking Horse APA was signed.¹³⁰ The Proposed Buyer continues to meet with the UMWA, has already made an initial contract proposal to it, and a further meeting is already scheduled with the UMWA.¹³¹ As a result, the fact that the Stalking Horse APA requires elimination of the Successorship Provisions and the other section 1113/1114 relief as a condition to close the 363 Sale does not itself provide the UMWA with good reason to reject the Debtors' proposals.¹³²

95. Nor were the Debtors required to accept the UMWA's "counter-proposal" in which the UMWA expressed a willingness to engage in further negotiations with the Debtors, but only upon ratification of a collective bargaining agreement with the Proposed Buyer, provided such agreement addresses retiree healthcare. First, given the Debtors' lack of cash, no

¹²⁹ See Scheller Decl. ¶ 25.

¹³⁰ See Williams Decl. ¶¶ 3-4.

¹³¹ See Williams Decl. ¶¶ 6-7.

¹³² Cf. *In re Bruno's Supermarkets, LLC*, 2009 WL 1148369, at *18-19 (Bankr. N.D. Ala. Apr. 27, 2009) (finding that the union refused the debtor's proposal under section 1113 with good cause where the debtor failed to encourage negotiations between potential purchasers and the union); *In re Patriot Coal Corp.*, No. 15-32450 (Bankr. E.D. Va. Sept. 1, 2015), ECF No. 1043, Hearing Transcript at 145:5-10 (adjourning section 1113/1114 hearing for two days and ordering proposed buyer and union to "sit down across a table from each other" during that period).

more time exists to simply allow negotiations to proceed in the hope that all of the UMWA's demands will be met before a going concern sale is no longer possible. Second, the Debtors must eliminate the Successorship Provisions to consummate the 363 Sale. If the Successorship Provisions are not eliminated, there will be no Proposed Buyer with whom the UMWA can reach an initial collective bargaining agreement. Third, the UMWA's "counter-proposal" provides that the sale could not close and the Debtors would have to liquidate piecemeal if, despite the good faith efforts of the Proposed Buyer and the UMWA, such parties are unable to reach agreement on an initial collective bargaining agreement and/or such initial collective bargaining agreement is not ratified prior to closing. Fourth, the UMWA is already negotiating an initial collective bargaining agreement with the Proposed Buyer and nothing precludes them from continuing those negotiations.

96. The Court finds the statutory language "without good cause" troubling and previously found and held that this is not the same as nor synonymous with "in bad faith."¹³³ Rather, this requirement imposes on the Court an objective standard consistent with goals and purposes of Chapter 11 generally. "[T]he union must indicate a willingness to work with the debtor in its attempts to reorganize."¹³⁴ In this case, for the UMWA to make a counterproposal requiring a deal with the Proposed Buyer, which was and is completely beyond the control of the Debtors, is not a sufficient effort to work with the Debtors, and without good cause. It was not, and is not, reasonable, or good cause, for the Union to outright reject a proposal by demanding conduct or action the Debtors do not control. Further, the UMWA counterproposal did not offer,

¹³³ "'Without good cause' is not synonymous with 'in bad faith.'" *Alabama Symphony*, 155 B.R. at 577 (citing *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985)).

¹³⁴ *Alabama Symphony*, 155 B.R. at 577.

suggest, or open a door to other options or alternatives other than having a new CBA with the Proposed Buyer.

97. In the end, the Debtors and the UMWA have reached a stalemate with respect to elimination of the Successorship Provisions. The existence of a stalemate, however, does not constitute “cause” to reject the Debtors’ proposal, especially when the Debtors have no other options and the UMWA is in negotiations with the Proposed Buyer to reach an initial agreement. As a result, the Debtors have demonstrated that the UMWA lacked good cause to reject the Debtors’ proposal.

(6) The Balance of the Equities Clearly Favor Rejection.

98. Finally, the balance of the equities overwhelmingly favors rejection of the UMWA CBA and termination of the Retiree Benefits, as required for approval of a motion under sections 1113 and 1114.¹³⁵ When applying this test, “bankruptcy courts ‘must focus on the ultimate goal of Chapter 11... [as the] Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.’”¹³⁶ This is a fact-specific inquiry, and courts consider the following six factors:

- (a) the likelihood and consequences of liquidation if rejection is not permitted;
- (b) the likely reduction in the value of creditors’ claims if the bargaining agreement remains in force;
- (c) the likelihood and consequences of a strike if the bargaining agreement is voided;

¹³⁵ See 11 U.S.C. §§ 1113(c)(3), 1114(g)(3).

¹³⁶ *Nw. Airlines*, 346 B.R. at 329 (ellipses in original) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)); see also *Ky. Truck Sales*, 52 B.R. at 806 (“[T]he primary question in a balancing test is the effect the rejection of the agreement will have on the debtor’s prospects for reorganization.”).

- (d) the possibility and likely effect of any employee claims for breach of contract if rejection is approved;
- (e) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and
- (f) the good or bad faith of the parties in dealing with the debtor's financial dilemma.¹³⁷

99. In addition, "[t]he balance of the equities . . . clearly favors rejection when it is apparent that a debtor is in need of substantial relief under a union contract and the bargaining process has failed to produce any results and is unlikely to produce results in the foreseeable future."¹³⁸

100. Here, the Debtors' liquidation is almost certain if this Court does not approve the rejection of the UMW CBA; the testimony on this point was clear, convincing, unrefuted, and credible.¹³⁹ The alternative to the Debtors' requested relief will be far worse for all constituencies: the Debtors will soon run out of cash with no ability to attract additional financing. Under such a scenario, the evidence establishes 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.

101. All of the remaining factors also favor granting the requested relief. As described above, the recoveries of all parties in these Chapter 11 Cases, including the unsecured creditors, administrative creditors and the Debtors' secured creditors, are at significant risk. The Proposed Buyer and the UMW are engaged in negotiations for an initial collective bargaining

¹³⁷ *Carey Transp. II*, 816 F.2d at 93.

¹³⁸ *In re Royal Composing Room, Inc.*, 62 B.R. 403, 408 (Bankr. S.D.N.Y. 1986).

¹³⁹ See Zelin Decl. ¶ 29.

agreement, each side has made a full contract proposal, and the parties have had three meetings and have scheduled a subsequent meeting, which minimizes the likelihood and consequences of a strike. If the Court does not grant the relief requested, employee breach claims are almost a certainty, as the Debtors will be unable to afford the remaining obligations under their UMWA CBA.¹⁴⁰ Finally, for the reasons discussed above, the Debtors have acted in good faith and requested only those savings and changes that they truly need, with the burden of those savings spread equitably among the Debtors' various constituencies.

102. The balance of the equities clearly favors implementing the Final Proposal and the Court finds this final factor of the *American Provision* test has been satisfied.

CONCLUSION

The Union has objected to, and strongly urges this Court to deny, the Motion. It seems the Union is hopeful that if the Motion is denied, either 1) the Proposed Buyer would close the sale anyway, or 2) the Proposed Buyer would expedite and fast track the negotiations and reach an agreed-upon CBA that could be ratified so the sale could proceed. The Court notes that the sale motion hearing is set for January 6, 2015. Many objections to the sale have been filed, some by counsel for represented parties, but many have been filed by individuals employed by or retired from Walter energy. Their concerns are legitimate and clearly they seek only to retain what they have, and hope not to lose their pay, income, medical care benefits, pension benefits, and the like. This Court has reviewed these objections, even though not filed regarding this hearing and the Court has considered these concerns, as well as those voiced by UMWA counsel at the hearing. As noted in detail in one *Patriot Coal* reported decision, these miners and retirees endured "horrendous conditions," worked hard for decades below ground, many may have

¹⁴⁰ See Zelin Decl. ¶ 16.

permanent disabilities, physical and mental limitations, and now face frightening health care issues.¹⁴¹

Even though this Court fully appreciates the enormous potential hardship on many, the Court must follow the law and in doing so must decide what is best for ALL creditors and parties, including union and non-union employees. While the Union appears willing to risk the sale by insisting the Court deny the Motion, the Court is not in position to do so. This Court must assume the terms of the APA are firm and that if any condition is not met, there will be no sale. This Court finds that maintaining the coal operations as a going concern¹⁴², keeping the mines open, offering future job opportunities and continuing to be a productive member of the business community all require this Court to overrule the UMWA and the UMWA Funds' objections.

This result is based on the Court's conclusion that the 1) Debtors are out of time to close a sale; 2) the Proposed Buyer will not close the sale unless all the conditions are met, including rejection of the UMWA CBA and elimination of any liability for the UMWA Funds' as to the Proposed Buyer; and, 3) based on the statutory and substantial case law cited: a) the elimination of CBA obligations is not new or novel in bankruptcy cases; and, b) there is substantial and persuasive case law to support the Proposed Buyer's conditions regarding the CBA and related obligations. The relief sought in the Debtor's Motion pursuant to 11 U.S.C. §§ 1113 and 1114 is due to be granted. Accordingly, it is hereby

¹⁴¹ *Patriot Coal*, 493 B.R. at 79.

¹⁴² The Court notes that many large businesses have been through bankruptcy and some are well known and have continued in business. Thus, many employees have retained jobs, local economies have benefited, other businesses have continued to stay in business, and consumers have continued to use and enjoy products and services produced. The following are some well recognized names of business that have emerged from bankruptcy and are still in business: General Motors, Chrysler, Kmart, Kodak, Wall Street Deli, as well as multiple companies owned and operated by Donald Trump.

ORDERED, ADJUDGED and DECREED that the objections by the UMWA and UMWA Funds are **OVERRULED**. It is further

ORDERED, ADJUDGED and DECREED that the Motion filed by the Debtor is **GRANTED**, the Collective Bargaining Agreement is **REJECTED**, and any Sale of Assets shall be free and clear of any encumbrances and liabilities under either the CBA or with respect to any UMWA Funds.

Dated: December 28, 2015

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

**Testimony of Braxton Wright
Member, United Mine Workers of America
Local Union 2368
Before the United States Senate
Committee on the Budget
February 17, 2022**

Chairman Sanders, Ranking Member Braun, Distinguished members of the Committee, my name is Braxton Wright and I have worked at the mines in Brookwood, Alabama for over 17 years. I come from a family of coal miners. My grandfather was injured and later died due to a mining accident at Black Diamond Mines in West Blocton, Ala.. My father worked in the mines, my father-in-law is a retired UMWA miner who retired at the time of the Walter Energy bankruptcy after more than 30 years working in the mines.

Today I would like to speak with you about how private equity firms such as Apollo, Blackstone, and other private equity who held stock in Walter Energy dictated the terms and conditions of the 2016 takeover of Walter Energy, which was renamed Warrior Met Coal, and what that means to workers, families, and communities. These private equity investors bear much of the responsibility for the cuts in pay and benefits that have led to the United Mine Workers unfair labor practice strike at Warrior Met.

The past five years working under this bankruptcy contract has affected the miners and their families drastically. These private equity groups have played a role in the exploitation of the UMWA miners as well as numerous other workers who do not have the benefit of union representation.

Due to the Chapter 11 Bankruptcy filed by Walter Energy in 2016, miners took massive concessions in order to save the company and bring it out of bankruptcy. These concessions included a six-dollar an hour pay cut depending on your grade of pay, which by itself placed a huge strain on workers and their families. When you are required to work 12 hours a day, 6 to 7 days a week you are lucky if you see your spouse or children more than a few hours a day. Before the bankruptcy contract many spouses stayed home because the pay and benefits allowed for families to live well. After the bankruptcy many spouses were forced to work outside the home while still being the primary caregiver for their home and family. So children saw BOTH parents less as a result of the cuts in the bankruptcy contract.

It would break your heart to hear how many times my oldest daughter Averi would ask me why weren't you at my game, why didn't you come to my field trip or awards day at school, why can't you go with us to the park? Everytime I had to answer, "I had to work," or "I had to sleep," knowing that my child deserved to have time with both her parents. There have been hundreds of children asking these same questions to their parents for the past five years.

While Warrior Met claims to give us 8 holidays, in actuality the only dedicated holidays we spent with our families were Thanksgiving, Christmas Eve, and Christmas Day. The others were considered floating days which had to be approved by Warrior Met. For the past five years we

have not been paid premium pay for holidays worked even though these were moments and memories taken from us and our families.

The push to increase production and profits for investors at the expense of workers was amplified more with the four-strike policy implemented with the 2016 contract. All absences, late arrivals or early outs resulted in a strike. On the fourth occurrence you would be fired. This policy was a huge source of stress and worry for families. If you arrived a few minutes late you were still required to work your shift even though a strike had been given.

If you were involved in an accident, had a medical emergency, your child was sick or hospitalized, your spouse was in labor, or hospitalized it did not matter. If you could not give 24-hours notice you would receive a strike. My brothers and sisters have been given strikes for having accidents on the way to work and being late. Our spouses learned to not call to tell us about accidents or emergencies at home until after our shift out of fear that we would receive a strike. When my own daughter was in the hospital, I was working my 12-hour overnight shift, my wife was afraid to tell me she had been admitted until my shift ended at 7 am because if I left I would receive a strike. I worked my shift in Brookwood then drove to the hospital and then drove back to the mines, back and forth for three days in order to be with my family.

These unfair practices and conditions led the UMWA rank and file membership to strike starting on April 1st of 2021. We are still fighting for a better contract for ourselves, our families, and our communities. We are waiting for Warrior Met, whose largest shareholder is BlackRock, to come to the table and offer a fair contract to those of us whose labor has been used to make them billions. This is why I am asking that you support "The Stop Wall Street Looting Act", which will help to reform the private equity industry. This Bill would help workers, families, and communities by forcing private investment firms like BlackRock to take responsibility for the actions of the companies they take over. Management at Warrior Met has stated, "we will starve them out" and "they aren't worth anything else." The investment firms that own Warrior Met need to be held accountable for these statements and the treatment workers have endured not only while on strike but for the past five years.

While the company I have helped make billions of dollars for over the past decade has turned their back on the workers during our strike, the UMWA has provided strike pay and major medical insurance for our families which has allowed us to keep holding the line and continue fighting for our rights. Other unions and other workers across the country have provided solidarity and direct support. The Auxiliary, made up of the families of the mineworkers, has worked tirelessly to bring in support for us to provide food, clothing, baby items, and holiday gifts to all striking families.

All workers deserve respect in our workplace and fair compensation for our labor. We will continue to fight for our UMWA brothers and sisters and we will continue to speak out against the exploitation of workers by companies funded by private equity groups. We will continue to stand up for ourselves but also for all the workers, families, and communities suffering under the same circumstances.

I have traveled with the UMWA to New York City to bring the strike to the doorstep of Blackrock and call on them to take action to support the workers and communities they invest in. Blackrock, Vanguard, and the other private equity owners have responded with silence. I would like to ask Congress to take action to ensure that workers and families do not continue to be the victims of these private equity firms who do not care if workers are pushed to the limits as long as they are receiving the highest return on investment possible. Thank you for allowing me to be here today and to share a glimpse of why we are striking in Brookwood.

Prepared Statement of Dr. Nomi Prins

Thank you for the privilege and opportunity to speak before you today.

My name is Nomi Prins.

I am a former managing director of Goldman Sachs. Before that, I ran the international analytics group as a senior managing director at Bear Stearns in London. I've also held positions at Lehman Brothers and the Chase Manhattan Bank.

After years on Wall Street, the levels of greed, unparalleled influence and unethical practices in the industry caused me to step away. Since then, I have worked to uncover the manner in which the global economy and our financial system has become so unequal, unjust, and fractured.

In 2008, two of the investment banks that I had once worked went bankrupt and saw their risky bets and bad practices nearly tank the global economy. Those banks no longer exist. However, the economy remains on edge.

Today, nearly a decade and a half later, we sit at another precipice of grave risk. Asset management behemoths and private equity institutions have amplified the distortion in financial markets. The magnitude of their influence over securities and companies has no historical comparison. Their unfettered access to policymakers and major institutions spans the world. These new financial giants are leaving smaller market participants from all parts of the economic spectrum exposed to concentrated systemic risk and diminished representation.

Yes, it is true that Wall Street banks remain as powerful and influential as ever.

But now, asset management firms, with trillions of dollars at their disposal, have become more influential than governments and the regulatory entities responsible for keeping them in check.

It is important to understand that at the top of this financial hierarchy stands BlackRock. The financial goliath manages \$10 trillion in assets. That's more money than the size of any other country's GDP besides China or the United States. BlackRock's meteoric rise has seen its assets triple since 2012, and nearly double from only 5 years ago.

The world's largest asset manager acts as a money manager, private equity fund, institutional investor, trading software platform, and government partner.

What's truly made it untouchable is its ability to produce and attract capital to Exchange Traded Funds or ETFs. ETFs are attractive because they offer intraday liquidity for both buyers and sellers in financial markets. But what the shock from the early days of the pandemic in 2020 showed us was that frenetic ETF activity can intensify panic in the markets. Quick outflows executed in bulk can exacerbate a falling market, which can hurt those that can afford it least, the most.

Ultimately, leveraging its government connections, BlackRock was awarded a no-bid contract to manage the Federal Reserve's corporate bond buying program. The contract allowed BlackRock the opportunity to essentially support its own investment grade bond ETFs in the midst of a pressurized environment.

BlackRock and its executives had access to confidential information and the ability to formulate business decisions for themselves and their large clients. No other institution in the world has or had such access during or since that crisis.

Currently, BlackRock, Vanguard, and State Street manage more than \$22 trillion in global assets. For comparison U.S. GDP stands just shy of \$24 trillion. The asset management industry has only grown more concentrated at the top over the last decade.

These Big Three dominate the market. Their growing stranglehold on U.S. equity participation provides them greater chances to hold veto power or directly influence business strategies for nearly all major corporate decisions.

As these institutions expand further into the world of private equity, their ability to dictate corporate control and outright ownership in every sector of the economy will have a greater human cost. Private equity business practices are largely designed to extract capital, not build it. As a result, small businesses and communities caught in the private equity crossfire will come under greater control of big finance that puts cost and job cutting ahead of worker stability.

Today, BlackRock and these other institutions have expanded to such a magnitude that they effectively are the market. This represents a monopoly sort of influence over competition, assets, and transactions. It elevates the systemic risk that the global financial system faces.

This renders everyday people, retail investors, workers and anyone with a 401(k)-retirement plan exposed to the risk that these massive trillion-dollar institutions pose. These individual shareholders of ETFs or other funds, seeking to invest their hard-earned money in the markets and build for retirement, have had their ability to obtain a seat at the table reduced.

By creating a shareholder pass through structure, similar to the kind that Wall Street has used for decades, we can strive to even the playing field and reduce the immense power of mega money managers. This would enable participants invested in ETFs or other funds to hold shareholder rights with respect to the corporations in which these vehicles are invested. Currently, these rights are retained by the asset management companies themselves.

We should enact policies focused on reducing the sheer size and concentration of asset-management institutions and private equity firms to establish a more efficient, transparent, and equitable marketplace. The risk of corporate wrong-doing, fiscal mishaps, unfair tax advantages, and conflicts of interest is too great to ignore. So is the possibility of extreme price movements due to the leverage and trading patterns of these mammoth asset management institutions. Our financial stability and security depends on addressing this.

Thank you.

Prepared Statement

**James Kwak, Research Fellow and Former Jesse Root Professor of Law
University of Connecticut School of Law¹**

“Warrior Met and Wall Street Greed,” hearing of the
United States Senate Committee on the Budget, February 17, 2022

Executive Summary

In recent decades, a few asset management firms have accumulated major ownership shares of virtually every large corporation in the economy. This development has had significant implications for the distribution of economic power in the United States.

Economic power is the power of individuals or organizations to determine how our economy functions. Today, economic power is concentrated in three types of entities: individual technology behemoths such as Amazon and Facebook; large private equity firms, which individually own more than two hundred companies; and giant asset management firms such as BlackRock, Vanguard, and State Street (also known as the Big Three), which I focus on here.

Under state law, corporations are governed by their shareholders, who elect the board of directors and vote directly on certain issues. The Big Three control more than \$20 trillion in assets, largely in mutual funds and exchange-traded funds (ETFs) that they manage on behalf of households and institutions. Many of these funds buy stock in corporations. Because these funds hold legal title to the stock, their managers generally have the power to vote the stock in corporate elections—even though the true economic owners are the investors in the funds.

The Big Three currently cast 25 percent of all votes cast in director elections for large corporations. This gives them significant influence over corporate directors and executives. The Big Three have been criticized for misusing this power in at least four different ways: (1) failing to adequately oversee corporations; (2) forcing a political agenda on companies; (3) blocking shareholder efforts to make corporations address environmental, social, and governance (ESG) issues; and (4) facilitating collusion among large players in the same industry.

The fundamental question, however, is not how these companies should use their power, but whether they should have it in the first place. In essence, economic power has been concentrated in the hands of the people who are best at administering and marketing low-cost index funds. Instead of shareholder capitalism, we have financial intermediary capitalism. Is this how we want our economy to be managed?

¹ James Kwak is a research fellow at the University of Connecticut School of Law, where until earlier this year he was the Jesse Root Professor of Law and taught corporate law and corporate finance, among other subjects. He has authored or co-authored several books, including *13 Bankers*, a *New York Times* bestselling analysis of the 2008 financial crisis. In 2001, he co-founded Guidewire Software, which has been a publicly traded company since 2012.

What Is Economic Power?

The economy is the sum total of our productive activities and the mechanisms by which the things that we produce are distributed. Ordinary people primarily interact with the economy as consumers of goods and services and as workers in the labor market. Businesses interact with the economy as buyers and sellers of goods and services. Economic power is simply the power of different people or organizations to determine how things are produced and distributed: what products are made, where they are made, how they are made, how they are sold, and so on.

The United States has a largely capitalist economic system, in which economic decision-making is widely distributed. In such a system, economic power is mainly held by big corporations. Of course, the United States has an important small business sector. However, small businesses compete on a playing field that is largely determined by large corporations. For example, it is possible to create an innovative, profitable business selling small electronic accessories—but only if you can successfully market and sell your products on Amazon.

How Are Corporations Controlled?

Corporations do not think for themselves—at least not yet. So the question of who holds economic power boils to the question of who controls large corporations. The governance of corporations is primarily a question of state corporate law. Most large corporations are incorporated in Delaware, but the basic rules are common to all states.

In principle, American corporations are governed by their shareholders. The primary justification for this system is that it is the shareholders who are directly affected by the economic fortunes of the corporation: shareholders are (indirectly) benefited by higher profits and harmed by lower profits. Lower profits also harm creditors and employees, among other stakeholders. In theory, however, because shareholders are the “residual” claimants on the corporation—the ones who get whatever is left over after all the debts are paid—they have the incentive to maximize the value of the corporation, and therefore they should decide what it does.

Things do not have to be this way. In a large German corporation, for example, workers have the right to select up to half of the members of the supervisory board. American shareholder primacy has been criticized for leading corporations to focus solely on maximizing profits, without concern for employees, customers, local communities, or the environment. At present, I simply want to note that it is widely believed in the American business community that corporations are and should be governed by their shareholders.

If a corporation has a majority shareholder, that person can make all the decisions for the corporation, or can hire a CEO who will follow their instructions. Most large corporations, however, do not have a majority shareholder. For them, shareholder governance works like this:

- Shareholders vote directly on a small number of fundamental decisions, such as whether

to merge the corporation into another entity, and on advisory resolutions. Shareholders also vote to elect members of the board of directors.

- The board directly makes certain important decisions, such as whether to pay dividends. The board also hires and oversees the chief executive officer.
- The CEO makes ordinary operational decisions along with the rest of the management team, which is hired by and responsible to the CEO.

As a result, even when there is no majority shareholder, shareholders can influence corporate directors and executives in three ways:

- By voting out directors or by voting against management on other issues
- By expressing their views to directors and executives, with the implicit threat of voting against them
- By selling their stock, which can reduce the stock price

It is possible for a single minority shareholder to effectively control a corporation. For example, if one person owns 30 percent of a corporation's stock and no one else owns more than 2 percent, the person with a 30 percent stake is likely to be able to win any vote, especially given that many investors do not bother to vote their shares.

Even when there is no controlling shareholder, corporate executives tend to be very attentive to the wishes of significant shareholders. They are concerned that major shareholders will sell their stock, lowering the share price; vote against the current board of directors; or support an activist hedge fund seeking to change the corporation's strategy or management.

Congress has recognized the significant influence that minority shareholders can have over a corporation. Section 13(d) of the Securities Exchange Act requires entities or groups holding more than 5 percent of the stock of a corporation to disclose their ownership publicly, in order to alert investors to potential changes in control. Section 16 of the Securities Exchange Act classifies as insiders not only directors and officers but also holders of 10 percent of the stock of a corporation. Such insiders must report transactions in the corporation's stock and are barred from making profits on certain short-term price swings, on the grounds that they may be benefiting from their close relationship with the corporation.

Who Controls Corporations?

If a single person owns a controlling block of stock in a corporation, they control the corporation. A few people wield considerable economic power because of their personal control of important companies, such as Jeff Bezos and Mark Zuckerberg, as did John D. Rockefeller in the nineteenth century. However, most large corporations are not controlled by a single person.

A Little Bit of History

To simplify greatly, the United States economy has seen three general models of corporate governance in the past century. From roughly the 1930s to the 1970s, the ownership of large corporations was divided up among many individual shareholders, each with inconsequential ownership shares. In this model, described by scholars Adolf Berle and Gardiner Means, dispersed shareholders with small stakes have little incentive to even try to govern the corporation, leaving economic power in the hands of directors and executives.

The second half of the twentieth century saw the consolidation of assets among large institutional investors such as pension funds, mutual funds, hedge funds, and university endowments. Institutional investors amassed significant stakes in specific large corporations and began putting pressure on directors and executives to focus more closely on the stock price as the best measure of shareholder value. Corporate managers largely complied, in part because of a shift to compensation packages based on stock options, and in part because those who failed to increase their stock price were vulnerable to takeover in a merger wave that began in the 1980s. In this model, a corporation's decision-making is significantly influenced by a small number of institutional investors with large stakes in that corporation.

The past decade has seen the development of a new model of corporate control and hence a new allocation of economic power. A few asset management firms—led by BlackRock, Vanguard, and State Street—have amassed significant ownership stakes in *virtually every large corporation*, which means that almost all corporations have the same major shareholders. Their influence over these corporations potentially gives them a breadth of economic power probably unrivaled since the age of J. P. Morgan at the beginning of the twentieth century.

This is not to say that these asset management firms are the only locus of economic power in today's economy. Amazon, for example, has tremendous power over the retail sector, shipping, publishing, and web services infrastructure, to name a few. Large private equity firms such as Blackstone, Carlyle, and KKR can each control more than 200 companies directly. Here, however, I want to focus on the specific issues presented by large asset management firms with concentrated stock ownership across the entire corporate sector.

Corporate Control Today

BlackRock, Vanguard, and State Street—sometimes known as the Big Three—have amassed their ownership positions largely because of a shift from actively-managed funds to index funds. Most individuals and institutions invest in stocks via mutual funds or exchange-traded funds (ETFs). In an actively-managed fund, the fund manager attempts to beat the market by betting on individual stocks or industry sectors. In an index fund, the fund manager simply buys every stock in an index (such as the S&P 500), ensuring that the fund will do exactly as well as the market.

Since index funds were introduced in the early 1970s, their share of total fund investments and of the total stock market has been increasing at an accelerating rate. In 2019, the amount of money in U.S. stock index funds exceeded the amount in actively-managed U.S. stock funds for the first

time.² The rise of index funds has generally been *good* for investors because (a) most actively-managed funds do worse than the market in most years, so index funds provide better returns on average, and (b) index funds have much lower costs because they are simple to administer. BlackRock, Vanguard, and State Street are by far the three largest managers of stock index funds, with a combined 90 percent market share.³ This high concentration results from natural economies of scale in asset management and in index funds in particular: the larger the fund, the smaller its operating expenses are as a percentage of fund assets, which means lower fees for investors. From 2009 to 2018, the Big Three captured more than 80 percent of all net asset flows (inflows minus outflows) into *all* mutual funds and ETFs.⁴

The Big Three offer actively-managed funds as well. At the end of 2021, BlackRock was the largest asset manager in the world, with more than \$10 trillion in assets, while Vanguard had more than \$8 trillion and State Street more than \$4 trillion.⁵ More to the point, however, is their ownership share in large corporations. Although the money in a mutual fund or ETF is contributed by outside investors, the fund itself has legal title to the shares it holds and therefore the right to vote those shares (absent a side agreement with the investors). As of 2019, BlackRock's median ownership stake of S&P 500 corporations was 7.4 percent; that is, BlackRock owned more than 7.4 percent of half of the companies in the index and less than 7.4 percent of the other half. Vanguard's and State Street's median ownership percentages were 9.5 percent and 4.5 percent, respectively. In 2017, the Big Three together cast more than one-quarter of all votes in director elections for S&P 500 companies.⁶ In aggregate, their median ownership stake in S&P 500 companies in 2019 was more than three times as large as in 2000.⁷

Consequences

What is novel about this situation is that the Big Three own significant shares of not just some corporations, but virtually all large corporations. Traditionally, a large investor would have a major ownership stake in a relatively limited number of companies and would therefore have a vested interest in their success. Because the Big Three own similar proportions of every large corporation, they have different incentives.

Different commentators have made at least four major critiques of how the Big Three use their

² Dawn Lim, "Index Funds Are the New Kings of Wall Street," *Wall Street Journal*, Sept. 18, 2019.

³ Jan Fichtner, Eelke M. Heemskerk, and Javier Garcia-Bernardo, "Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk," *Business and Politics* 19 (2017): 298–326, 304. Close to half of my family's liquid assets are invested in index funds, and most of those are managed by BlackRock or Vanguard.

⁴ Lucian Bebchuk and Scott Hirst, "The Specter of the Giant Three," *Boston University Law Review* 99 (2019): 721–41, 732.

⁵ [BlackRock Q4 2021 Earnings Release](https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/sets-us-apart/facts-and-figures.html), Jan. 14, 2022; "Vanguard at a Glance: Facts and Figures," <https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/sets-us-apart/facts-and-figures.html> (\$8.0 trillion as of Sept. 30, 2021); [State Street Q4 2021 Earnings Release](https://www.statestreet.com/press-releases/2022/01/19/state-street-q4-2021-earnings-release), Jan. 19, 2022;

⁶ Bebchuk and Hirst, "The Specter of the Giant Three," 736.

⁷ Lucian Bebchuk and Scott Hirst, "The Power of the Big Three, and Why It Matters" (working paper), Feb. 21, 2021, http://www.law.harvard.edu/faculty/bebchuk/The_Power_of_the_Big_Three_and_Why_It_Matters.pdf, 9.

economic power. All four critiques cannot be valid in the same context at the same time—at times the Big Three have been criticized for doing one thing and for doing its opposite—but all four could be valid to differing degrees in different contexts.

(In addition to these four critiques of the economic power of the Big Three, there is also evidence that excessive concentration in the asset management industry can create risks to financial stability.⁸ That is a separate topic that I will not pursue here.)

1. Failure to Govern

The Big Three may pay too little attention to corporate governance issues, allowing corporate managers to ignore the interests of their shareholders.⁹ A large proportion of their assets are held in index funds, and index funds do not compete based on returns (because all funds tracking the same index have virtually the same returns), so the fund management companies have little incentive to oversee the companies they invest in. Because index funds compete on cost, there is a disincentive to invest in corporate governance. As of 2016, the Big Three together employed only about fifty people dedicated to governance issues.¹⁰ In addition, asset management firms may defer to corporate managers because they earn revenues from managing the assets in those corporations' retirement plans. Indeed, the Big Three vote according to the recommendations of the board of directors more than 90 percent of the time; they are even more likely to vote with management against proposals initiated by outside shareholders.¹¹

2. Forcing Political Views on Corporations

In recent years, the Big Three have become sensitive to this criticism, and they now insist that they take their corporate governance responsibilities seriously. Vanguard founder John Bogle claimed, “we are the invisible hand of the marketplace,”¹² and BlackRock CEO Larry Fink regularly exhorts corporate executives to take climate change more seriously.¹³ All three companies advertise their oversight efforts loudly, particularly their attention to environmental, social, and governance (ESG) issues. As a result, some observers argue that the Big Three are using their power to advance the political agendas of their CEOs instead of focusing on

⁸ Itzhak Ben-David, Francesco Franzoni, Rabih Moussawi, and John Sedunov, “The Granular Nature of Large Institutional Investors,” *Management Science* 67, no. 11 (Nov. 2021): 6629–59; Kenechukwu Anadu, Mathias Krutli, Patrick McCabe, and Emilio Osambela, “The Shift from Active to Passive Investing: Risks to Financial Stability?” Federal Reserve Bank of Boston Working Paper SRA 18-04, last revised May 15, 2020.

⁹ See Lucian Bebchuk and Scott Hirst, “Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy,” *Columbia Law Review* 119, no. 8 (Dec. 2019): 2029–2145.

¹⁰ Sarah Krouse, David Benoit, and Tom McGinty, “Meet the New Power Brokers: Passive Investors,” *Wall Street Journal*, Oct. 24, 2016.

¹¹ Fichtner et al., “Hidden Power of the Big Three?” 317–18.

¹² Krouse et al., “Meet the New Power Brokers.”

¹³ Dawn Lim, “Larry Fink Wants to Save the World (and Make Money Doing It),” *Wall Street Journal*, Jan. 6, 2022.

maximizing shareholder value.¹⁴

3. Blocking Progress on ESG Issues

At the same time, other people criticize the Big Three for *not* using their economic power to improve society, in particular for opposing ESG-related proposals. Of the top 25 asset management firms in 2019, BlackRock, Vanguard, and State Street were among the most likely to vote against shareholder proposals addressing climate risks, political and lobbying activities by fossil fuel companies, and governance reforms at fossil fuel companies. All three voted for management-recommended directors of fossil fuel companies at least 99 percent of the time.¹⁵ (BlackRock increased its support for climate-related proposals in 2021, but still rarely votes against directors.¹⁶) BlackRock and Vanguard also vote overwhelmingly against proposals that require corporations to disclose their political spending activities.¹⁷

Obviously critiques 2 and 3 cannot both be valid in the same context, but they demonstrate the influence of these asset management companies.

4. Anti-Competitive Behavior

The Big Three may facilitate tacit collusion among large corporations in the same industry. The Big Three own stock in all of the large companies in any industry, and they could use their influence to encourage collusive policies that increase the aggregate profits of those companies but harm customers and employees. Economic studies have found that common ownership of nominal competitors by asset management firms produces higher prices in both the airline and retail banking industries.¹⁸ While there is no smoking-gun evidence of asset management firms encouraging price-fixing, corporate executives are certainly aware of the interests of their major shareholders and could adopt anti-competitive policies to make those shareholders happy.

The Special Case of BlackRock

BlackRock has also accumulated additional power through its interactions with the federal government. BlackRock is so important a player in the securities markets that it has been hired by the Federal Reserve to implement several of its programs. During the 2008 financial crisis,

¹⁴ Senator Pat Toomey and Senator Ron Johnson, Letter to David. A. Jones, Acting Chairman, Federal Retirement Thrift Investment Board, June 30, 2021.

¹⁵ *Climate in the Board Room: How Asset Manager Voting Shaped Corporate Climate Action in 2019*, Majority Action, 12, 18–21.

¹⁶ *Climate in the Board Room: How Asset Manager Voting Shaped Corporate Climate Action in 2021*, Majority Action, 4–5.

¹⁷ Leo E. Strine, Jr., “Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans’ Savings for Corporate Political Spending,” *Washington University Law Review* 97, no. 4 (2020): 1007–45, 1019–20.

¹⁸ José Azar, Martin C. Schmalz, and Isabel Tecu, “Anticompetitive Effects of Common Ownership,” *Journal of Finance* 73, no. 4 (Aug. 2018): 1513–65; José Azar, Sahil Raina, and Martin Schmalz, “Ultimate Ownership and Bank Competition,” *Financial Management*, June 15, 2021, <https://onlinelibrary.wiley.com/doi/10.1111/fima.12368>.

BlackRock was selected to manage mortgage assets previously held by Bear Stearns and AIG. During the initial phase of the COVID-19 pandemic in March 2020, BlackRock was hired to execute the Federal Reserve's purchases of mortgage-backed securities and corporate bonds and ETFs, which put BlackRock in the position of buying its own ETFs for the Federal Reserve's account.¹⁹ BlackRock executives have frequent contacts with senior government officials in both Republican and Democratic administrations.²⁰ Larry Fink was widely considered a serious contender to become treasury secretary if Hillary Clinton won the 2016 presidential election. The firm's political influence no doubt contributes to its economic power.

The Accidental Oligopoly

The best argument for American shareholder capitalism—in which shareholders govern the corporations that shape our economy—is that the owners of a company should get to decide what it does. The system may not be ideal, but the underlying justification is that the people whose money is at risk get to call the shots.

This is no longer the case. The people increasingly calling the shots in the American economy are a handful of executives of a handful of asset management firms who are playing with enormous amounts of other people's money that they accumulated by being very good at administering, marketing, and selling index funds. Instead of shareholder governance, we have financial intermediary governance. These intermediaries gained economic power because of a massive swing in investor sentiment away from actively-managed funds and toward index funds. Their executives are highly capable businesspeople, but they are increasingly becoming the unelected stewards of the American economy. (People buy index funds and ETFs from a given asset manager either because they have no other choice in their retirement plan or because of cost—not because they like how that asset manager votes its shares.) In the words of law professor John Coates, "A small number of unelected agents, operating largely behind closed doors, are increasingly important to the lives of millions who barely know of the existence much less the identity or inclinations of those agents."²¹

Take the example of climate change. Some people think that asset managers should not take a position on climate issues. Others think that they should actively push corporations to reduce their carbon footprints. But the more fundamental question is: Why do the CEOs of the Big Three, assisted by a few dozen analysts, have the swing vote on crucial questions that affect our economy and society? Do we want corporate America's attitude to climate change to depend on whether three people happen to be Republicans or Democrats? This is obviously not a

¹⁹ Jeanna Smialek, "Top U.S. Officials Consulted with BlackRock as Markets Melted Down," *New York Times*, June 24, 2021; Victoria Guida, "Massive Bailout Leaves Wall Street Giant Exposed to Fire from All Sides," *Politico*, June 7, 2020.

²⁰ Smialek, "Top U.S. Officials Consulted with BlackRock as Markets Melted Down."

²¹ John C. Coates, "The Future of Corporate Governance Part I: The Problem of Twelve," Harvard Public Law Working Paper No. 19-07, Sept. 20, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337.

democratic system. But it is not really a capitalist system, either. Corporate control is in the hands not of the people whose money is at stake—the investors in mutual funds and ETFs—but of the executives who manage the companies that manage those mutual funds and ETFs.

We are not yet at the point where Larry Fink can dictate terms to any corporation in the S&P 500, but the CEO of almost every large corporation has to listen to Larry Fink and take his views seriously. This problem is not going to solve itself. Each year, the Big Three's aggregate ownership share of the typical S&P 500 company grows by about one percentage point.²² This trend is unlikely to change anytime soon because the shift to index funds is actually *good* for investors as individuals. I hope that Republicans and Democrats can agree that this increasing concentration of economic power by a few asset management firms is not good for our economy or our country, even if we may disagree on what to do about it.

²² Bebchuk and Hirst, "The Power of the Big Three, and Why It Matters," 9.

Testimony on:
Warrior Met and Wall Street Greed:
What Corporate Raiders are Doing to Workers and Consumers

Douglas Holtz-Eakin
President, American Action Forum*

United States Senate
Committee on the Budget
February 17, 2022

*The views expressed here are my own and not those of the American Action Forum. I thank Thomas Wade for his assistance.

Introduction

Chairman Sanders, Ranking Member Graham, and members of the Committee, thank you for the opportunity to discuss financial markets in general, and in particular, the role of private equity firms. In this testimony, I hope to make several main points:

- Financial markets serve key economic functions such as intermediation between savers and investors, allocation of capital, diversification of risk, separation of ownership and management, pricing return and risk, and others.
- Participants in financial markets have myriad business models – banks, insurance companies, pension funds, hedge funds, private equity, etc. – to undertake these functions; legal, regulatory, and tax policies should be as neutral as possible with respect to the choice of business models.
- Evaluating the effectiveness of any intervention, in particular a restructuring undertaken by private equity, must be done relative to an unobserved counterfactual, as opposed to a basis of absolute performance.
- Policies that target private equity such as the Stop Wall Street Looting Act violate the neutrality principle, discriminating against public equity firms and damaging the outlook for the private equity industry and the economy as a whole.

Let me discuss each of these in greater detail.

Financial markets are a crucial component of developed economies. Well-functioning financial markets permit savers to provide their pooled savings to firms for investment in skills, technologies, and physical capital. They permit savers to diversify across risks and provide important price signals regarding the expected returns and risks of alternative investments. In the absence of financial markets, owners would be forced to also manage each firm and hold undiversifiable risk regarding its performance; financial markets permit specialization of management functions as well as diversification of risks.

These economic functions may be supplied by a variety of entities – banks, pension funds, insurance companies, mutual funds, and others offer various combinations of these desirable economic activities. In developing the legal, regulatory, and tax frameworks within which they operate, it is desirable to tilt the playing field as little as possible, allowing financial market participants to compete on the basis of performance. As noted by most economists [and this administration](#), healthy market competition leads to lower prices, higher quality goods and services, greater variety, and more innovation.

Background on Private Equity

Private-equity (PE) firms are a crucial part of capital allocation and the pricing of return and risk. PE firms invest in businesses they see as undervalued, provide additional capital and management services, and raise value. The vast majority (over [85 percent](#)) of these investments are in small businesses (under 500 employees).

PE has been very successful. For example, the American Investment Council's [2021 Public Pension Study](#) shows PE has the highest return of any asset class public pension portfolio. In 2020, PE had a median annualized return of 12.3 percent over a 10-year period.

Its success in raising value has resulted in a substantial economic footprint. According to [E&Y](#), the PE sector directly employed 11.7 million workers earning \$900 billion in employee compensation. The average employee earned roughly \$73,000 in wages and fringe benefits in 2020, while the median worker received approximately \$50,000 in wages and benefits in 2020. These workers helped the private equity sector produce \$1.4 trillion of gross domestic product (GDP), or roughly 6.5 percent of total GDP.

The PE sector has substantial backward linkages. Suppliers generated \$900 billion in GDP, employing another 7.5 million workers, and paying roughly \$500 billion in wages and benefits.

In short, PE is a very successful sector of the economy and the fruits of its success are widely shared by the investors in PE and the economy as a whole. As a corollary, unwise policies that damage PE would impose widespread harm in the economy.

Importance of Counterfactual in Evaluation

The apparent success of the PE sector (outlined above) is not a conclusive demonstration of the efficacy of any particular restructuring episode. The crucial question in this regard is what would have happened in the absence of the restructuring efforts. If a struggling company would ultimately have failed and been liquidated, any viable future is a success. Similarly, a company may be headed for bankruptcy protection and reorganization. A restructuring that generates greater employment, profits, and growth than would have happened post-bankruptcy, and does so on an accelerated timetable, would be very successful (relative to the counterfactual). In any case, it is the performance relative to the counterfactual, and not the absolute performance, that is the key.

Economic Implications of the Targeted PE Policies

Some have proposed legislation that targets the PE industry. For example, the Stop Wall Street Looting Act (SWSLA) is one such potential policy misstep. The SWSLA would impose a separate set of tax, regulatory, and legal frameworks on the PE industry. Among other provisions, it would impose:

- A 100 percent surtax on fees received from portfolio companies;
- A tax increase on carried interest capital gains;
- Limitations on interest deductibility;
- Restrictions on dividends;
- Joint and several liability on holders of economic interests in a private fund for all liabilities of a portfolio companies; and
- Alternative rules for the treatment of worker claims in bankruptcy.

It follows that the net result would be to make investments in PE less attractive, pushing capital to less productive uses, and imposing a loss on the economy. The only question is how large the losses would be.

A 2019 [study](#) by the U.S. Chamber of Commerce found that the “imposition of increased risk, taxes, and restrictions...would likely cause some (and potentially all) of the private equity industry to cease to exist.” As a result, the SWSLA would result in a loss in the range of 6.9 million to 26.3 million jobs, from \$671 million to \$3.36 billion per year in investor earnings (about half of which would be lost to pension fund retirees), and substantial tax revenue for local governments, state governments, and the federal government.

Thank you. I look forward to answering your questions.

**U.S. Senate Budget Committee Hearing
Warrior Met and Wall Street Greed: What Corporate Raiders
are Doing to Workers and Consumers**

**Thursday, February 17, 2022
Hart Senate Office Building**

Meeting U.S. Climate Goals through Critical Minerals
Duncan Wood, PhD
Vice President for Strategy & New Initiatives
Woodrow Wilson International Center for Scholars

Chairman Sanders, Ranking Member Graham, Distinguished Committee members,

I am grateful for the invitation to speak before you today and I look forward to engaging with you on these issues of vital importance for the future of the United States climate change mitigation and geopolitical goals. My testimony today focuses on the challenges facing the critical minerals supply chain and the need for concerted action by government and the private sector to address a significant and growing deficit in the availability of these resources as the global energy transition brings a dramatic increase in demand.

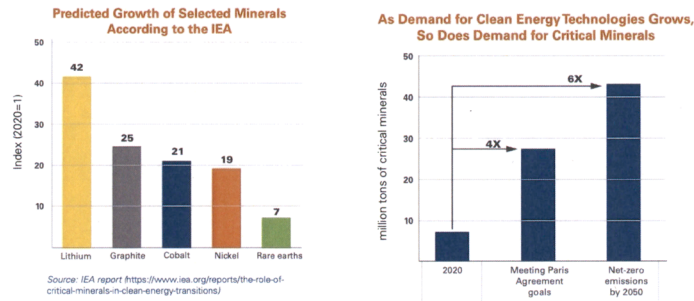
In the summer of 2021, the Wilson Center convened a Critical Minerals Working Group, made up of stakeholders from industry, academia and civil society, to examine the vulnerabilities that exist in the critical minerals supply chain, and to discuss how the private sector and government can address them. Drawing on the impressive experience and insights of the participants, the working group identified three main vulnerabilities in the supply chain:

- First, to meet its climate goals, the United States must face rapidly and dramatically rising demand for critical minerals while constrained by chronic underinvestment in mining, processing, infrastructure, and human capital.

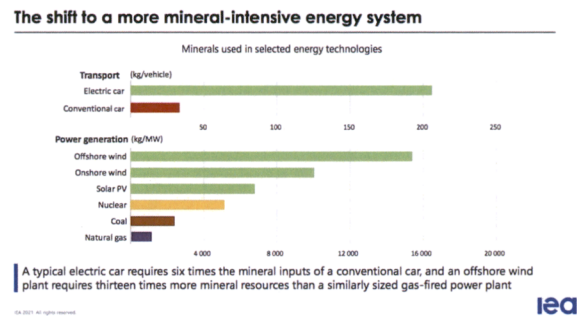
- Second, the United States must compete on a global basis against China and the European Union for access to critical minerals and must address the geographic concentration of both extractive and processing activities. To reference the most obvious example, China's dominant position in the supply chain stems not only from its ownership and control of critical minerals mines, but also processing facilities.
- Third, there is a governance challenge that impacts the first two vulnerabilities in which mining firms from the United States and other western countries must adhere to justifiably stringent compliance measures in the areas of environment, society and transparency/anti-corruption regulations, regardless of whether they are operating domestically or internationally. Permitting and legislative restrictions on U.S. mining firms place them at a competitive disadvantage compared to Chinese competitors and provide a strong disincentive for developing resources within the United States.

The first challenge is the scale and pace of rising demand. As mentioned, demand for critical minerals outpaces that of supply, and will continue to rise, particularly considering the key role that critical minerals will play in the clean energy transition. An International Energy Agency (IEA) assessment found that to reach the Paris Agreement goals of a less than 2° Celsius rise in global temperature, clean energy technologies would demand four times the current mineral input by the year 2040. The IEA foresees mineral demand specifically for electric vehicles and grid storage for EV batteries to increase at least 30 times by 2040 and estimates a tripling of mineral demand by 2040 for low-carbon power generation.

Rising demand for Critical Minerals



While these predictions take place over the course of decades, exponential increases in demand for lithium are already happening. In a 2021 quarterly earnings report SQM, the second largest lithium producing company in the world, predicted global lithium demand to increase by nearly 50% in 2021. Already unable to keep pace, considering lag time, permitting challenges and underinvestment in infrastructure, technological innovation, and human capital, this issue will continue to compound.



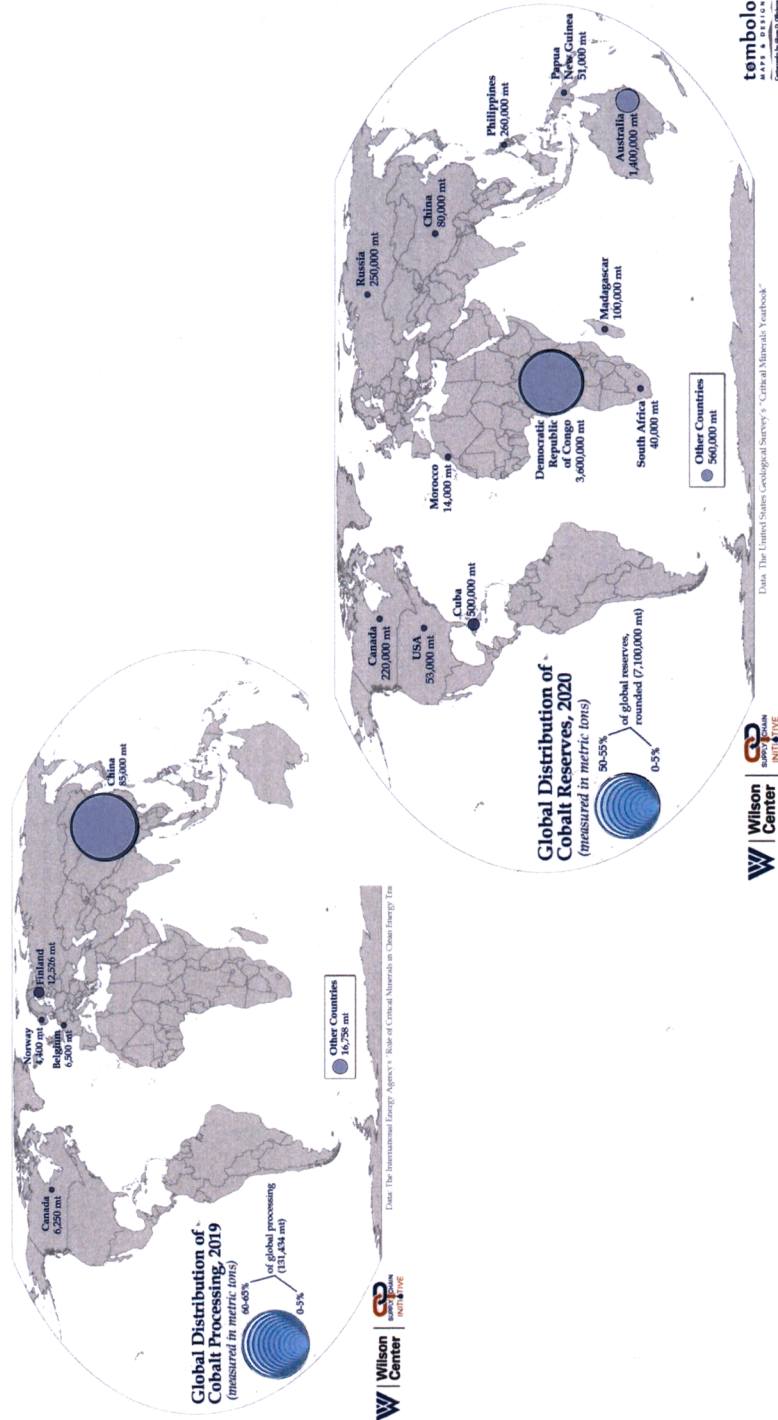
The critical minerals and rare earths industries are facing up to this challenge of limited supply and rising demand, which is complicated by underinvestment, mining's long-term orientation and associated high risk profile, and questions of human capital and R&D. However, despite best efforts to synchronize supply and demand, discrepancies remain. One reason for the mismatch relates to investors' preference for shorter-term horizons than what is possible in the long-term oriented mining industry. From the exploration and discovery phases, to permitting, and then to extraction and processing, mining is profoundly complex and nuanced which makes investment difficult and at times, risky.

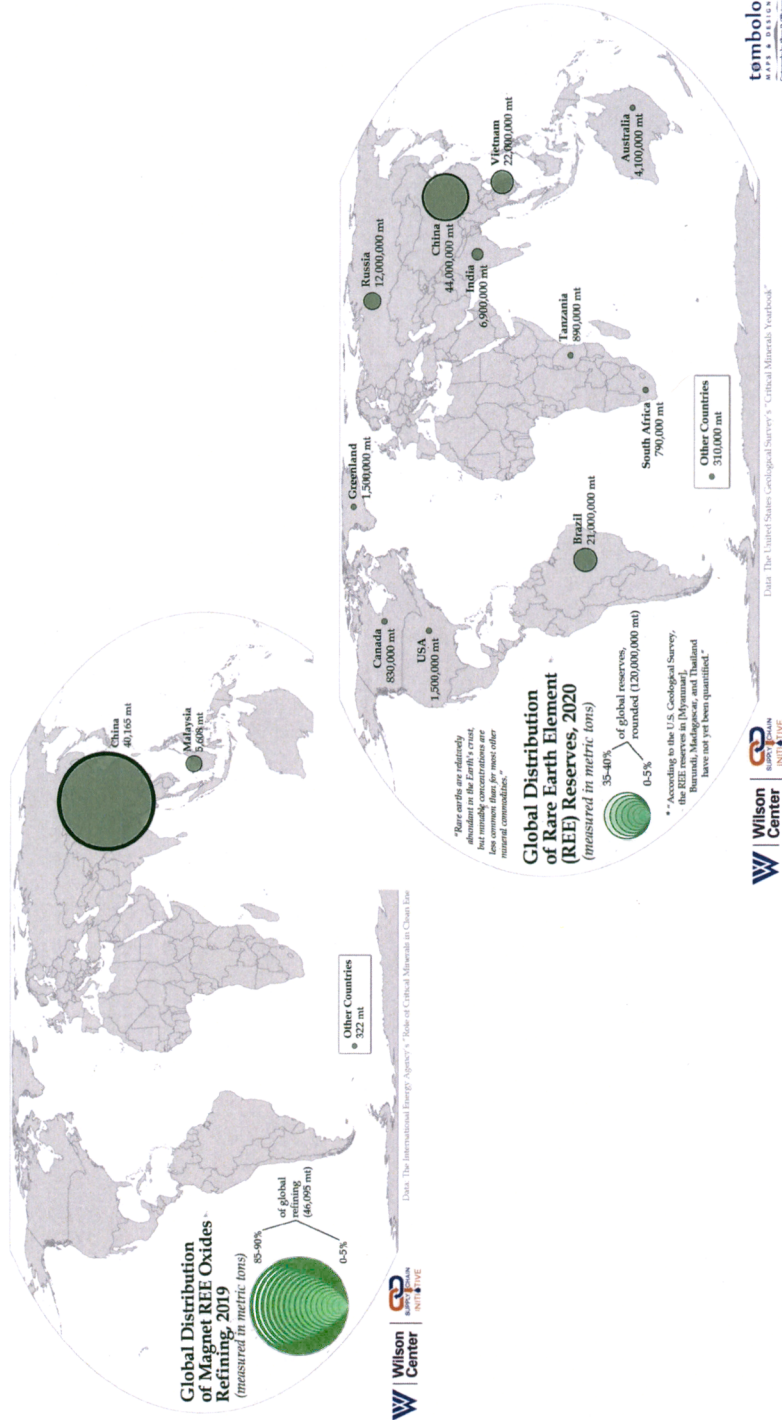
Finding and developing national resources is easier said than done. The U.S. has only mapped approximately 12% of its land in terms of metal reserves: the USGS estimates it would take 10+ years to find and map all U.S. resources, with another 7-10 years to get those resources to market, completely missing the window within which the U.S. requires critical minerals. While new discovery projects are important for the long term, the U.S. will need to address known resources for its short and mid-term strategy.

Once the minerals have been extracted from the ground, another major challenge presents itself. A lack of processing and refining capacity here in the US, and the

excessive concentration of that capacity in countries like China, make the United States especially vulnerable to interruptions in supply. The Biden administration's 100-Day review concluded: "For the second supply chain step of refining and processing, the U.S. has an even more significant deficit than in raw production capacity as critical minerals mined in the U.S. are often exported for processing. Increasing U.S. processing capacity alone would bolster the supply chain ... Currently, the U.S. has limited raw material production capacity and virtually no processing capacity."

The case of Rare Earth Elements is indicative. The United States is on the brink of a huge opportunity within the REE production space - mining and producing more rare earths in 2020 than ever, and still, estimates show that the U.S. and Canada combined have a surplus of 17.7 million tons of rare earth resources. Despite this, the U.S. remains heavily reliant on China for rare earth compounds and metals, with China providing to the U.S. an estimated 80% of imported rare earth elements between 2016 and 2019. This U.S. reliance on Chinese REEs is partially attributable to insufficient domestic processing abilities. Investment in production and processing facilities can align U.S. supply with demand and remain globally competitive where REEs are readily available.





Thinking beyond the extraction and processing of critical minerals, governance has a key role in the critical minerals supply chain to create a more equitable playing field that rewards virtue and punishes transgression. Critical minerals and REEs are viewed as commodities, with price as the determining factor for firms in choosing a supplier. For meaningful change to come about, they must be de-commoditized, and values must be integrated into the commodities themselves. To allow U.S. firms to compete, we must cultivate a mining and processing environment that is stable and that encourages investment supportive of Environmental and Social Governance (ESG). Of course, there are myriad issues around ESG, including political will, processing, and above-ground conditions. The current opacity of the critical minerals supply chain has created a significant need for new international agreements on transparency, and disclosure, especially given the dominance of countries where transparency is far from a priority.

Permitting policies play a significant role in the global competition for critical minerals, oftentimes in the context of time frame challenges. There is clear crossover between permitting and social license challenges; the extensive nature of permitting regimes in the U.S. makes them comprehensive and thorough, but also difficult, timely, and costly, thus putting U.S. firms at a distinct disadvantage as compared to competitors with less extensive permitting policies. From start to finish, including development to construction, start-up, operations, and reclamation, U.S.- based projects are required to obtain various permits, such as environmental permits, developmental and operational permits, reclamation bonding and related activities, and permits from authorizing agencies. A major mining project on federal lands may be subject to 30 or more local, state, and federal regulations and programs.

The multi-stage processes of U.S. permitting regimes, the involvement of various agencies at all levels of government, and the lack of basic, cross-agency coordination has resulted in a 7- to 10-year permit timeframe for U.S. based mining projects. This marks a stark contrast to that of Canada and Australia where the average permitting period is two years and environmental standards are equally thorough. Given the many stakeholders and the multilevel permitting process in the U.S., permitting delays pose a significant threat to mining projects in the U.S., even in states that have more generous mining policies, such as Nevada, West Virginia, and Arizona. In fact, a 2012 report published by Behre Dolbear found that the U.S. was tied with Papua New Guinea for most significant delays in mining permitting.

SNL Mining estimates that excessive permitting regimes decrease the expected value of a mine by half as a direct result of increased costs and risks directly associated with prolonged permitting requirements. Additionally, SNL Mining found that delays associated with permitting result in the loss of one third or more of the mining project. The impact of U.S. bureaucratic hurdles in the permitting process is best illustrated by the fact that the U.S. comprises only 11% of global spending on global mining exploration, meaning that the majority of U.S. investment goes toward existing mines and mining projects, thus making it exceedingly difficult for the U.S. to compete on the global scale against formidable competitors such as China. Attempts to reform permitting in the U.S. have been met with significant challenges, particularly as permitting becomes increasingly politicized and subject to multiple levels of legal challenges.

To help reduce the exceedingly long lead times for mining projects mentioned earlier in this paper, the U.S. government should look again at international best practice for regulation and permitting. Compliance costs billions of dollars and impedes the competitiveness of U.S.-based mining projects; delays in bringing resources to market are even more costly. As Canada's Fraser Institute argues, "The permitting process is costly for firms, as they must invest time and resources to comply with the permit's requirements. These costs can rise when the process lacks transparency or is uncertain, adding additional risk to firms and reducing a jurisdiction's competitiveness."

It is vital to recognize that we are not suggesting a lowering of standards. Strong environmental protections remain a priority for mining companies, in part due to the demands of investors, in part due to the demands of end users to "green" the value chain, and in part due to increased public oversight. Rather than lowering standards, it is the regulatory and permitting process that requires review. Regulatory innovation that takes firm competitiveness and national, geopolitical, and climate objectives into consideration is desperately needed to provide more transparent timelines for permitting, clearly define the roles of different agencies to avoid regulatory duplication, and to allow for shared responsibility between regulators and the firms they regulate. Again, looking to Canada, the province of Alberta has adopted what amounts to an honor system for hydrocarbons regulation, with heavy penalties for those that break the rules. Combining this approach with robust oversight would allow for speedier permitting, while providing strong incentives to respect ESG rules.

At the same time as the U.S. government addresses its own permitting challenges, it must work with industry and with its allies overseas to develop binding

international standards to level the playing field in environmental, social governance. These standards should be applied to both extractive industries and to the processing plants that transform the raw materials. Of particular importance is the issue of transparency and disclosure. This means both improving minimum standards for disclosure and developing a life-cycle approach to climate disclosure for products. As such, there must be a concerted global, cross-industry effort from the highest-level producers and suppliers all the way to consumers.

Compliance with ESG standards is costly, but rather than pursuing a race to the bottom in terms of cost, the U.S. must take the lead in encouraging other nations to raise their standards while also bearing some of the additional costs. The Energy Resource Governance Initiative (ERGI) has been a centerpiece of the successive U.S. administrations' approach to "sound mining governance and resilient energy mineral supply chains." ERGI has expanded since its launch in 2019 and is facilitating safer investment climates for western countries to invest in countries that wouldn't otherwise see investment. The initiative has made it incumbent upon government officials to seek out reformers in the mining industry and give them the tools and opportunities to succeed and effect reforms. Now, the U.S. government must work to harmonize its achievements with those of the EITI (Extractive Industries Transparency Initiative) and at the same time seek meaningful ways of ensuring compliance.

Concluding thoughts

As America moves towards a clean energy future, with massive investment in renewable energy and electrification of the vehicle fleet, we must address a deeply concerning reality. The lack of investment here in the United States in critical minerals extraction and processing leaves the country vulnerable to supply shortages and interruptions in the production of batteries, vehicles, and advanced technologies. Whereas countries such as China have invested heavily in developing national and foreign sources of these minerals, the United States has for too long neglected its own natural endowments and failed to engage with foreign allies and partners to guarantee supply.

In order to rectify this situation, the U.S. government and the extractive industries must work together to bring new resources online. Part of the solution involves new investment in mining; part in new processing facilities. To make new mining projects attractive to investors, the United States must look to international best practice for permitting, in order to streamline the regulatory process as much as possible without lowering standards of environmental protection. At the same time, the United States government must work with its partners internationally to

develop a more harmonized approach to questions of environmental and social governance (ESG) to ensure a level playing field for American firms. Furthermore, U.S. critical mineral development must be accompanied by collaborative efforts around the world to supply minerals not readily found here in the United States.

The clean energy transition cannot happen without critical minerals. To secure the critical minerals supply chain, the U.S. government must work with the extractive industries at home and abroad to facilitate responsible and environmentally conscious extraction in as efficient a manner as possible.

Responses to Written Questions of Senator Van Hollen From Cecil Roberts

Question: Warrior Met workers have been on strike since April 2021, fighting for fair compensation after they absorbed cuts to their pay and benefits when the company was struggling in 2016. Warrior Met is a big publicly-traded corporation, with access to the resources of Wall Street's largest firms. How do the mine workers keep this fight going against such a deep-pocketed corporation, and how does your union empower these workers to stand up to a corporation with that much power and resources?

Answer: The United Mine Workers of America (UMWA) and the mine workers at Warrior Met Coal have had the resources to continue the strike thanks to a Selective Strike Fund the union created decades ago. The union pays strikers \$400 per week and provides family health care coverage for hospitalizations or other catastrophic health events.

Thus far, the Union has paid more than \$17 million from the Selective Strike Fund in strike benefits and health care coverage to the strikers. In addition, more than \$1.7 million has been donated to a separate Fund by labor unions, organizations and individuals around the world. That money, too, has been distributed directly to the strikers.

Responses to Written Questions of Senator Van Hollen From Braxton Wright

Question 1: We have a tax system in this country that rewards wealth over work. Income from wealth, in the form of capital gains and dividends, is taxed at special low tax rates that top out at 23.8%. Income from work is taxed at the ordinary income rates, and workers also pay into Social Security and Medicare. For example, an unmarried worker making \$50,000 in wages is in the 22% tax bracket, and they pay an additional 7.65% in payroll taxes for Social Security and Medicare. Their employer also pays 7.65% in payroll taxes on their wages.

Defenders of low tax rates for investment income argue that wealthy people need these incentives to invest in our economy, and the benefits will trickle down to everyone else. The Wall Street investors that were involved with the Warrior Met deal in 2016 likely qualified for these special low rates on their investment profits. Did the benefits from this tax cut for Wall Street trickle down to you and the other mine workers?

Answer: Since Warrior Met was formed in 2016 by Wall Street investors, conditions at our coal mine have gotten worse. We had to accept a contract with a pay cut of six dollars an hour while working more hours, with less days off during the year and less benefits. We accepted the contract that Warrior Met offered us in order to help the coal mine continue to operate and to secure our jobs.

Question 2: The tax system's bias towards Wall Street is especially extreme when it comes to carried interest. The carried interest loophole lets wealthy managers of Wall Street investment funds pay taxes on the compensation they get from their job at the special low tax rates for investment income, while other workers pay taxes at the higher ordinary rates on their wages and salaries. So not only does Wall Street *wealth* get taxed at lower rates than Main Street work, but even Wall Street *work* gets taxed at lower rates than Main Street work. If the Wall Street fund managers involved in the Warrior Met deal paid special low tax rates on their work due to carried interest, did that help you and the other mine workers at all?

Answer: Myself and fellow mine workers at Warrior Met have seen no benefits to the Wall Street fund managers being involved in Warrior Met, in fact the pay and working conditions at the coal mine have been worse under their management.

Responses to Written Questions From Senator Luján From Nomi Prins

Question 1: The COVID-19 pandemic has stressed every sector of the health care system. However, private equity seeking to capitalize on nurse staffing shortages is particularly troubling. Nurses are the backbone of our health care system and COVID has pushed them to the brink. The demand for nurses and “traveling nurses” has been so high and lucrative that nurse staffing agencies have attracted the attention of some private equity firms. Since the beginning of 2021, at least eight private equity firms have bought at least seven staffing agencies.

Aside from the impacts on nurses including difficult working conditions, nursing agencies take a percentage-based cut of the take-home pay for every nurse they place. So not only are the nurses not getting the full rate hospitals are paying, there are perverse incentives to keep raising the prices of nursing care, gouging hospitals, the government, and patients alike.

Dr. Prins, you state in your written testimony that, “Private equity business practices are largely designed to extract capital, not build it.” How is this model detrimental when it comes to its utilization in health care?

Answer: The issue with health care and providing health-driven services as it relates to the human connections between medical staff (nurses, doctors, and other medical professionals) with patients, is that private equity capital is motivated by social returns on investment. Private equity firms overwhelmingly do not care about ensuring bed side care, providing medical professionals with the equipment they need, developing long-term patient goals or ensuring true quality of care. The modus-operandi of private equity firms is ultimately to maximize the extraction of capital in the shortest time-frame possible. That financial model is what drives private equity firms to quickly move from one business venture to the next. In the process, they rapidly purchase medical outlets, shed business costs, and have the ability to squeeze money from the people that use services like nursing agencies to then resell them for a quick profit. In many cases, private equity has served to drive up already inflated medical costs.

This entire process lies in direct opposition to the way nurses and medical staffing companies operate using the care of their patients as the primary motivating factor. Permanent nursing staff, nursing agencies and other forms of human-focused medical services should strive to optimize patient care. By focusing on retention of talent and nurse compensation for delivery of care, regardless of the length of stay, hospitals can provide for communities and even save money. In fact, one 2020 survey showed that improving nurse staffing decreased inpatient stays and decreased patient mortality: while saving \$720 million amongst Medicare patients. That has nothing to do with the “churn and burn” private equity mentality.

Question 2: One of the areas I am extremely concerned about is the investment of private equity firms in child welfare services. In some cases, foster care and other services have been almost entirely privatized as a way to lighten strained government budgets. Despite

horrific conditions at some youth behavioral health facilities and companies, their private equity owners have reaped massive profits at the expense of children's well-being. There are numerous reports of abuse, inappropriate use of seclusion and restraints, restricted outside communication, medical and nutritional neglect, degrading discipline, and violations of basic human rights in facilities owned by private equity firms.

Dr. Prins, in your written testimony you warn that, "the risk of corporate wrong-doing, fiscal mishaps, unfair tax advantages, and conflicts of interest is too great to ignore." How do private equity investments in youth services, including services for youth with intellectual and developmental disabilities, services for youth in foster care, services for youth in the juvenile justice system, troubled teen programs, and autism services, create a conflict of interest with little oversight that is fundamentally bad for child well-being?

Answer: Unfortunately, when it comes to the well-being of our nation's youth, private equity companies have put the drive for profits above all else. To these massive investment institutions, child welfare services are simply another route to profits. Based on their profit model, what ultimately happens to our younger generations, and how that generation accesses services spanning intellectual opportunities, personal development, foster care, or treatment at the hands of the juvenile justice system, comes secondary – if at all. Sadly, this can lead to an overreliance on uncertified or underqualified staff along with inadequate facilities for care and support.

To private equity firms, any company, regardless of what service is being provided, is a means to an end. That end is a quick monetary gain for their investors and themselves. There is no drive for business development, improving social infrastructure or ensuring that those that need care and compassion the most are supported. Many of these youth-oriented and deeply critical services are being viewed by private equity companies as an opportunity to leverage clinical services to extract capital and profit. This perspective does not contribute to creating a more stable, and secure generation for the future. It does not create, innovate, or seek to offer better services. This model does not provide our youth with the time and resources required to allow such services to flourish or support the next generation with the tools to become better-functioning members of society with elevated prospects for their own futures. Private equity firms perform what is akin to a hit and run on the youth-services that they acquire and 'turn around' for monetary gain. The youth of our country deserves far more than that.

Responses to Written Questions From Senator Luján From James Kwak

Question 1: In your written testimony, you noted that, “The Big Three may facilitate tacit collusion among large corporations in the same industry.” As asset managers move closer to functioning like private equity firms, are current U.S. antitrust laws able to effectively address anti-competitive?

- **If no, what changes to U.S. law are needed to ensure that these large financial firms don’t engage in collusive policies that serve only to increase profits and harm employees and consumers?**

Answer: The issue here is that the biggest asset management firms are accumulating major ownership stakes in every large company in every industry, including those that are essentially oligopolies, such as airlines. Several prominent antitrust scholars¹ believe that this practice is already actionable under Section 7 of the Clayton Act, which targets the acquisition of stock if “the effect of such acquisition . . . may be substantially to lessen competition.”² Section 5 of the Federal Trade Commission more generally gives the Commission the power to act against “unfair methods of competition.”³ Neither of these statutes has been used in this context, however.

Some other possible solutions that would require new legislation or rulemaking include:

- Limiting the percentage of a company’s shares that a single asset management firm can hold in all of the index funds managed by that firm.
- Limiting the aggregate size of the index funds managed by a single asset management firm.
- Deeming the votes of index funds to be voted in proportion to the votes of non-index fund holders of stock (although this would magnify the influence of those non-index fund holders).
- Requiring asset management firms to vote shares proportionally according to the wishes of the investors in their funds. Note that this is an incomplete solution because an investor in a S&P 500 index fund has an interest in 500 different companies and is unlikely to respond to 500 different voting solicitations every year. There would have to be a mechanism whereby an investor can designate a third party (e.g., the AFL-CIO, the

¹ Eric A. Posner, Fiona M. Scott Morton, and E. Glen Weyl, “A Proposal to Limit the Anticompetitive Power of Institutional Investors,” *Antitrust Law Journal* 81 (2017): 669–728; Fiona Scott Morton and Herbert Hovenkamp, “Horizontal Shareholding and Antitrust Policy,” *Yale Law Journal* 127 (2018): 2026–47; Einer Elhauge, “How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It,” *Harvard Business Law Review* 10 (2020): 207–86.

² 15 U.S.C. § 18.

³ 15 U.S.C. § 57a(a)(2).

Business Roundtable) to vote on their behalf in all elections.

Finally, BlackRock, Vanguard, and State Street could simply decide to vote shares proportionally according to the wishes of investors in their funds.

Responses to Written Questions of Senator Van Hollen from James Kwak

Question: In May 2021, Alden Global Capital, a New York-based hedge fund known for making drastic cuts to its newsrooms and selling company assets, acquired the parent company of The Baltimore Sun in a \$633 million deal that makes it the second-largest U.S. newspaper owner behind Gannett.

Just last year, a Department of Labor investigation found that the administrators of the employee pension fund took advantage of Alden’s newspaper workers by moving \$294 million of pension funds into Alden’s own funds rather than acting in the best interests of its workers. As a result of the investigation, Alden subsequently liquidated the pension plans’ holdings and made payments totaling \$20.7 million to make up for losses and wasted opportunities.

While the myopic drive to maximize short-term profits at the expense of long-term sustainability is nothing new to private investment funds, it can have particularly disastrous effects in industries that provide a public good. Local newspapers play an essential role in maintaining our democracy.

A) As industry consolidation trends continue in newspapers and other industries, does this make it an even more attractive target to private funds?

B) What kind of conditions can be set to prevent private equity from engaging in such predatory ownership?

Answer: Private equity funds are a major reason for consolidation in several industries, including newspapers. Higher levels of concentration in an industry are often associated with higher prices, increasing profits. One private equity strategy is to “roll up” smaller companies in an industry in order to cut costs (which can be shared across what used to be multiple companies) and increase pricing power.

Local newspapers are an attractive target for private equity funds because of the characteristics of the business. A newspaper earns revenues (both subscriptions and advertising) because of its reputation. A newspaper’s reputation is built up over decades of quality journalism and is “sticky” in the sense that it does not change quickly. A private equity firm can buy a newspaper and cut costs drastically, harming its quality, but continue to squeeze revenues out of the newspaper for years because subscribers continue to subscribe and advertisers continue to advertise essentially out of habit. (Contrast this with a company that hires people to provide services; if it lays off half its staff, customers will notice immediately.) Good journalism becomes collateral damage, and perhaps democracy with it.

In order to prevent predatory practices by private equity firms, I think the Stop Wall Street Looting Act introduced by Senator Warren and other senators and representatives would be an

important first step. This bill would limit some of the most controversial tactics of the industry, such as causing portfolio companies to take on dangerous amounts of debt and extracting large amounts of cash from portfolio companies in the form of special dividends.