

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MAPLE COAL COMPANY, a Delaware Corporation,

Plaintiff,

v.

Civil Action No. 16-C-1026
Judge Stucky

CSX TRANSPORTATION, INC., a Virginia
Corporation, and SPERRY RAIL, INC., a
Delaware Corporation,

Defendants.

SPERRY RAIL, INC.'S MOTION TO DISMISS COMPLAINT

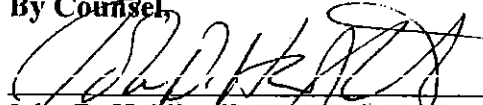
COMES NOW, the Defendant, Sperry Rail, Inc., by and through counsel, and moves this Court, pursuant to Rules 12(b)(6) and 12(b)(1) of the West Virginia Rules of Civil Procedure to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted and for lack jurisdiction as Maple Coal Company, a Delaware Corporation is a non-existent corporate entity that fails to state a claim against Sperry, Inc. and that lacks standing. Sperry Rail, Inc.'s grounds in support of this Motion are set forth in the attached Memorandum of Law.

WHEREFORE, for the reasons set forth herein and as further set forth in the attached Memorandum of Law, Sperry Rail, Inc. respectfully requests that this Court grant the instant motion and dismiss Plaintiff's Complaint, with prejudice, and award it its costs and expenses, including attorney fees, incurred in defending this action, as well as any other such relief that the Court deems appropriate.

Respectfully submitted this 26th day of August, 2016.

SPERRY RAIL, INC.

By Counsel,

A handwritten signature in black ink, appearing to read "John R. Hoblitzell", is written over a horizontal line.

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SPERRY RAIL, INC.'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS COMPLAINT

COMES NOW, the Defendant, Sperry Rail, Inc., ("Sperry"), by and through counsel, and sets forth the following grounds in support of its Motion to Dismiss:

I. Introduction

a. February 16, 2015 Mt. Carbon Derailment

This case arises out of a February 16, 2015 derailment of a CSX Transportation, Inc. ("CSXT") freight train carrying crude oil near the community of Mount Carbon in Fayette County, West Virginia. *See* Compl. ¶6. The derailment resulted in some of the cars rupturing and catching fire, resulting in the evacuation of residents in the vicinity of the derailment. *Id.*

CSXT contracted with Sperry to conduct internal rail inspections on CSXT track, including the track where the derailment occurred. *Id.* at ¶¶ 3, 8-9. Plaintiff alleges that on December 14, 2014 and January 12, 2015, Sperry tests of track near Mount Carbon showed indication of a defect known as a Vertical Split Head ("VSH") in the rail where the derailment later occurred. *Id.* at ¶¶ 10-11, 14-15. Plaintiff further alleges that Sperry's operator did not conduct visual or hand tests to confirm the presence of the defect. *Id.* at ¶16. Sperry vigorously

disputes that its test data for those dates showed indications consistent with a VSH type defect in the rail at what would later become the point of the derailment.

Plaintiff alleges it is a coal company that operates mines in the area. It alleges that due to road closures and other factors related to the derailment, it was forced to shut down its mining operations for several days resulting in economic loss and damage. *Id.* at ¶28. It also claims that it suffered physical property damage due to the derailment. *Id.* at ¶¶28, 39. Plaintiff alleges that CSXT was aware of the interruption of its business activities and that CSXT began to process and pay Plaintiff's employees' lost wages and also evaluate its business interruption claims, which it alleges CSXT acknowledged it owed. *Id.* at ¶32. This is no allegation that either Plaintiff or CSXT advised Sperry of the alleged losses, that Sperry was involved in any payment of employee wages or that Sperry acknowledged fault and responsibility for the alleged losses.

b. Maple Coal Company does not exist

Maple Coal Company (the "Corporation") is alleged to be a "Delaware corporation with its principal place of business in West Virginia. *Id.* at ¶1. However, There is no Maple Coal Company incorporated in Delaware. *See* Del. Corporate Entity Search and West Virginia Corporate Entity Search, attached hereto as **Exhibit A**. While there is a Maple Coal Company, LLC, (the "LLC") it is a separate and distinct corporate entity from the Plaintiff herein.

Further, notwithstanding the Corporation's lack of existence, significant jurisdictional questions exist about the LLC's standing to bring this cause of action. The LLC was a wholly owned subsidiary of Atlantic Development & Capital, LLC, which itself was a wholly owned subsidiary of Jim Walter Resources, Inc.. All of these entities were ultimately subsidiaries of Walter Energy, Inc. And, all of these entities are bankrupt. *See Maple Coal Co. LLC, Statement of Financial Affairs*, Case No. 15-02764-TOM-11, Dkt. #6 at 54, Attachment #24 (U.S. Bankrpt.

Court, N.D. Al., Aug. 28, 2015.), attached hereto as **Exhibit B**; Walter Energy Corp. Org. Chart, attached hereto as **Exhibit C**; *Schedule of Assets and Liabilities for Maple Coal Co., LLC*. Case No. 15-02764-TOM-11, Dkt. #5, Exhibit B-13/B-14, at 20-21 (Aug. 28, 2015)(showing ownership of Maple Coal. Co., LLC as of bankruptcy filing.), attached hereto as **Exhibit D**.¹

As part of the Walter Energy consolidated bankruptcy, certain of the LLC's assets were sold as part a non-core asset sale. See Non-Core Asset Purchase Agreement, Case No. 15-02741-Tom11, Dkt. 1785 (Feb 1, 2016), attached hereto as **Exhibit E** (referred to herein as "Non-Core APA"); and Or. Approving Sale of Certain Non – Core Assets, Case No. 15-02741-TOM11, Dkt. 1863 (Feb. 8, 2011), attached hereto as **Exhibit F**.

The assets sold were set forth in Section 2.1 of the Non-Core APA and included all "claims, demands, indemnification rights, causes of action arising under or relating solely to any of the Acquired Assets" unless those claims or causes of action were included on a Schedule 2.1(j), which listed excluded claims and causes of action. See Ex. E, Sec. 2.1(j) at Pg. 29. However, Schedule 2.1(j) is not provided with the Non-Core APA or other documents related to the Walter Energy Bankruptcy that are publicly available. Nevertheless, these claims – unless excluded from the sale – were sold as part of the Non-Core APA and, therefore, the LLC does not own the claims and has no standing to bring them.

Further, if the claims were retained by the LLC, its ability to bring them is barred by settlement and release. CSXT asserted a creditor's claim of approximately \$20,000,000.00 in the Walter Energy bankruptcy. As part of a settlement of that claim, Walter Energy and certain of

¹ On July 15, 2015, 23 Debtors file voluntary petitions under Chapter 11. The LLC was one of the entities that filed. All 23 cases are being jointly administered under the umbrella of the Walter Energy, Inc., case, Case No. 15-02741. A database of public documents relating to the proceedings is available online at <http://www.kccllc.net/walterenergy>.

its affiliates, including the LLC, released any claims they may have against CSXT and Sperry relating to the derailment. Specifically Paragraph 2.a of the "Claims Release" provides:

2. **Claims Releases.** Effective upon the entry by the Bankruptcy Court of an order pursuant to Federal Bankruptcy Procedure 9019 approving this Stipulation, the execution by Purchase and CSXT of the New Contract, and the occurrence of the Closing Date:
 - a. Each of the Debtors and Purchaser agree to waive and release any right each of them has or may have to seek compensation or damages related to the Derailment Claims against CSXT and its subsidiaries and affiliates, and their employees, agents and contractors (individually and collectively referred to as "the Released Party").

Order approving Stipulation and Stipulation at 2, No. 15-02741-TOM11, Dkt # 2233². 1863 (Mar. 31 2016), attached hereto as **Exhibit G**.

As such, like the non-existent Corporation, the LLC not only has no claims to assert against Sperry but also lacks standing to assert any threatened claims.

II. Analysis

a. Standard of Review

Under Rule(b)(6) of the West Virginia Rules of Civil Procedure a court should dismiss a Complaint where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Adams v. Ireland*, 528 S.E.2d 197, 201 (W.Va. 1999). "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Collia v. McJunkin*, 358 S.E.2d 242, 243 (W.Va. 1987)(per curiam). Where a complaint fails to

² The "Derailment Claims:" were described as "Certain of the Debtors, including Maple Coal Co., LLC, have asserted claims against CSXT and its subsidiaries and affiliates, and their agency and contractors resulting from and/or relating to a derailment that occurred on or about February 16, 2015 in connection with the rail transportation services provided by CSXT and which resulted in the temporary closing of Route 61 in West Virginia (collectively, the "Derailment Claims").

state material facts to support the elements of the claim asserted, a motion to dismiss is properly granted. *See Par Mar v. City of Parkersburg*, 398 S.E.2d 532, 536 (W.Va. 1990).

Standing is “a party's right to make a legal claim or seek judicial enforcement of a duty or right.” *Black's Law Dictionary*, 1136 (Bryan A. Garner, ed., Abridged 7th ed., West 2000). As a general and well-recognized proposition,

[s]tanding is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5 *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807, 811 (W.Va. 2002).

Additionally standing must be “gauged by the specific common-law, statutory or constitutional claims that a party presents. ‘Typically,...the standing inquiry requires careful judicial examination...to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.’” *Id.* 213 W.Va. at 94-5, 576 S.E.2d at 822-23 (quoting *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 22, 111 S.Ct. 1700, 1704 (1991))(Emphasis original).

Standing is jurisdictional. *See e.g. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (“The party invoking federal jurisdiction bears the burden of establishing [standing]”); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459(4th Cir. 2005)(district court dismissal for lack of standing, “and therefore lack of jurisdiction” is legal ruling). “Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.” Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 211

S.E.2d 705, 706 (W.Va. 1975). A court may also consider and take into account matters outside the scope of the pleadings when considering a motion to dismiss for lack of jurisdiction. *See* Syl. Pt. 4, *State ex rel. Bell Atlantic-West Virginia, Inc., v. Ranson*, 497 S.E.2d 755, 757 (W.Va. 1997).

b. The Complaint fails to state a claim upon which relief may be granted

Maple Coal Company. is a non-existent corporation. At the time of the derailment, it never owned property in West Virginia and mined no coal in West Virginia. It had no business activities that were interrupted by the derailment. As such, it has no claims against Sperry upon which relief can be granted.

If the Complaint is really brought by the LLC, the Complaint must still be dismissed. First, the LLC has not shown that it owns the right to assert the claims, as the Walter Energy consolidated bankruptcy documents indicate the claims may have been sold to third party purchasers in the Non-Core APA. *See* Ex's E., F. Or, if the claims were not sold, they have been released and discharged as part of the settlement of CSXT's creditor claims in the Walter Energy bankruptcy. *See* Ex. G. As such, the LLC fails to state a claim upon which relief can be granted

c. Maple Coal, Inc. lacks standing

As a non-existent corporation, the Corporation has no standing to assert the claims asserted herein as it has no injury in fact. There are simply no legal interests that have been invaded that are either "concrete and particular" or actual. As such, the Court lacks subject matter jurisdiction over Maple Coal, Inc.'s claims and they must be dismissed.

The same conclusion is reached with respect to the LLC. First, if it sold its right to bring the claims to a third-party, it also has no injury and no legally protected interests that have been

invaded. *See* Ex.'s E, F. If it retained the claims, they have been released. *See* Ex. G. Either way, no claims exist which Plaintiff is entitled to an adjudication of.

d. Plaintiff cannot create jurisdiction via amendment

Finally, amending the Complaint by adding a new party in lieu of an improper party to create jurisdiction is improper. It is clear that, as a matter of law, if there is no jurisdiction, the **only action** a court is permitted to take is to dismiss the case. *See* Syl. Pt. 1, *Hinkle v. 211 S.E.2d* at 706. While a party typically may amend its Complaint once as a matter of course before a responsive pleading is filed under Rule 15(a) of the West Virginia Rules of Civil Procedure, this is not the case when there is no jurisdiction in the first place.

“When a party who brought an action did not have standing to bring the action, he/she may not amend the complaint to add a party who would confer jurisdiction on the court.” Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, §15(a)[2], 452 (4th ed., Juris 2012); *see also* *Lands v. Gateway 2000, Inc.*, 84 F.Supp. 112, 116-117 (D.D.C. 1999) *aff’d* sub nom. *Lans v. Digital Equip. Corp.*, 252 F.3d 1320 (Fed. Cir. 2001)(“when a plaintiff never had standing to assert a claim against the defendant, plaintiff may not substitute a new plaintiff, a new defendant, or a new claim for the purpose of creating jurisdiction”); *Ciliv v. UXB Intern., Inc.*, 2013 WL 4040815, *1 (W.D. Va. 2013)(“...a plaintiff who lacks standing is not permitted to ‘amend the complaint to substitute a new plaintiff in order to cure a lack of jurisdiction, because a plaintiff may not create jurisdiction by amendment where none exists.’”)³. As such, an amendment will not cure the Corporation’s lack of jurisdiction and the Complaint must be dismissed.

³ Foreign jurisdiction case law is attached hereto as Exhibit H in accordance with Trial Court Rule 6.04.

III: Conclusion

There is no "Maple Coal Company, a Delaware Corporation" that exists currently, or that existed in February 2015 when the derailment occurred. As such, it has no claims against Sperry upon which relief can be granted and also lacks the requisite standing to assert any claims against Sperry.

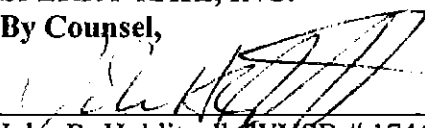
Similarly, the LLC's claims must also be dismissed. If the LLC owns the claims, it has released them via settlement. However, certain of its asserts were sold to a third-party. If the LLC sold the claims to the third-party, it may not now institute suit based on a claims it does not own or have the right to bring. In either case, dismissal is appropriate.

WHEREFORE, for the reasons set forth herein, Sperry Rail, Inc., requests that this Court dismiss Maple Coal Company's claims against it, with prejudice, aware it its costs and expenses, including attorney fees, and grant it any other relief that the Court deems appropriate.

Respectfully submitted this 26th day of August, 2016.

SPERRY RAIL, INC.

By Counsel,



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CERTIFICATE OF SERVICE

The undersigned, counsel for Sperry Rail, Inc., does hereby certify that the foregoing
SPERRY RAIL, INC.'S MOTION TO DISMISS COMPLAINT and **SPERRY RAIL,
INC.'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS COMPLAINT** were served via United States mail, postage prepaid
on counsel of record at the addresses below:

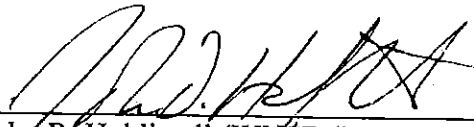
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Done this 26th day of August, 2016.



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