IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In re PATRIOT COAL CORPORATION, *et al.*, Debtors.	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **April 29, 2013 at 10:00am** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

NOTEHOLDERS' OBJECTION TO MOTION TO REJECT COLLECTIVE-BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§ 1113 AND 1114

Aurelius Capital Management, LP ("**Aurelius**"), and Knighthead Capital Management, LLC ("**Knighthead**"), solely on behalf of certain funds and accounts that they manage or advise and that hold a substantial amount of certain Patriot Coal Corporation notes (collectively, the "**Noteholders**"),[1] as creditors and parties in interest in the above-captioned jointly-administered Chapter 11 cases, file this objection (the "**Objection**") to the Motion To Reject Collective Bargaining Agreements And To Modify Retiree Benefits Pursuant to 11 U.S.C. § 1113 and 1114 (the "**Termination Motion**") (Dkt. 3214) filed by all ninety-nine debtors here (collectively, the "**Debtors**"). In support thereof they state as follows:

1 The notes are the 3.25% Convertible Senior Notes due 2013 (the "**3.25% Notes**") and the 8.25% Senior Notes due 2018 (the "**8.25% Notes**") (collectively, the "**Notes**"). Entities managed by Aurelius or Knighthead are, collectively, the beneficial owners of a majority of the 8.25% Notes. Entities managed by Aurelius alone are also the beneficial owners of a substantial amount of the 3.25% Notes. None of the Noteholders has any fiduciary duties to any party in interest in this case, nor is any Noteholder an insider of Patriot Coal Corporation or any of its subsidiaries or affiliates.

PRELIMINARY STATEMENT

1. Amid the hundreds of pages of briefing that will be submitted both for and against the Termination Motion, one of the most important points is hidden in plain sight on the very first page of that motion. It is the definition of the term "Patriot"—a term central to the story the motion tells. *See, e.g.*, Dkt. 3219 at 2 ("This motion is about Patriot's ability to survive."). Though the term is singular, its definition is plural: It refers to "Patriot Coal Corporation and its affiliated debtors." *Id.* at 1. And while the term is purportedly used "[f]or convenience" (*id*. at 1 n.1), it in fact obfuscates a fundamental point: There is not one debtor in this action; there are *ninety-nine*.

2. Each of those ninety-nine debtors has its own separate assets and liabilities.[2] Thirteen of them (the "**Obligors**" or "**Obligor Debtors**") are liable for the salary, pension, and healthcare benefits of union members and retirees. The other eighty six (the "**Non-Obligors**" or "**Non-Obligor Debtors**"), however, including parent Patriot Coal Corporation itself, are not.[3] Nevertheless, all ninety-nine are movants on the Termination Motion. If the motion asked simply for this Court to abrogate the Obligor Debtors' existing union agreements, the presence of the Non-Obligor Debtors as movants—despite not being parties to any of those agreements—would be distracting, but ultimately inconsequential.

3. But the Termination Motion asks this Court to do more—much more. In exchange for abrogating the Obligor Debtors' agreements with the United Mineworkers of America (the "**UMWA**") and its pension funds, the Motion asks this Court to transfer to the UMWA a significant portion of the *Non-Obligor Debtors'* current and future assets. In return,

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2 *See* http://www.patriotcaseinfo.com/sofa.php (schedules of assets and liabilities for each of the ninety-nine Debtors)

3 The Obligor and Non-Obligor Debtors are listed in Exhibit A to Dkt. 3423.

the Non-Obligor Debtors will receive nothing. Literally, nothing. Moreover, the Debtors ask this Court to approve that proposal even though they fail entirely to explain how they determined the scope of relief they seek to give the UMWA, why that relief is commensurate with the UMWA's claims at the Obligor Debtors, or how that relief will impact those Obligors' many other creditors, the Noteholders among them.

4. This Court should reject the Debtors' proposal. It violates the "bedrock principle of corporate law . . . that courts must respect entity separateness." *In re Teleglobe Comm'ns Corp.*, 493 F.3d 345, 371 (3d Cir. 2007). Indeed, by attempting to satisfy the contractual obligations of some Debtors (*i.e.*, the Obligors) with the assets of others (*i.e.*, the Non-Obligors), the proposal represents a "cross-creep of liability" that violates "a fundamental ground rule" of bankruptcy. *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). Neither Section 1113 nor Section 1114 authorizes such actions. By their plain language they apply only to debtors, such as the Obligors, that are actually parties to collective-bargaining or retiree-benefit agreements. These sections are entirely inapplicable to debtors, such as the Non-Obligors, that have no such obligations. And they certainly do not authorize a Court to use the assets of one group of debtors to satisfy the obligations of an *entirely different* group of debtors. No wonder, then, that the Debtors' proposal fails even under the terms of those (inapplicable) sections: The proposal is neither "necessary to permit the reorganization" of the Non-Obligor Debtors, nor does it "assure[] that all creditors . . . are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A); *id.* § 1114(g)(3).

5. The Noteholders are not opposed, in principle, to the Debtors' requests to abrogate their existing collective-bargaining and retiree-benefit agreements pursuant to Section 1113 and Section 1114—so long as the treatment for those agreements is commensurate with the

rights of all creditors. An integral part of the Termination Motion here is a Proposal this Court cannot accept. It misappropriates Non-Obligor assets to satisfy liabilities that do not run to those entities. That defect is exacerbated by the Debtors' failure to demonstrate that—or provide others with information sufficient to evaluate whether—the magnitude of relief they propose to provide the UMWA is even warranted. Such a Proposal is to the indisputable detriment of other creditors and must, in its current form, be rejected.

BACKGROUND

6. Of the ninety-nine debtors in this jointly administered action, only thirteen employ or have legacy relationships with union labor (*i.e.*, the Obligor Debtors). The remaining eighty six, including Patriot Coal Corporation itself, do not (*i.e.*, the Non-Obligor Debtors). *See* Declaration of Mark N. Schroeder (Dkt. 4) ¶ 15. *Only* the Obligor Debtors, however, and *not* the Non-Obligor Debtors, are liable for the salary, pension, and healthcare benefits owed to union members and retirees (the "**Union Debt**") that are the subject of the Termination Motion. Union members and retirees possess no claims against the estates of Patriot Coal Corporation or the other Non-Obligor Debtors, nor do union employees or retirees have any other rights to the assets of those Debtors.[4] This limit on the Union Debt is undisputed. Indeed, the Schedule of Financial Affairs for each and every one of the ninety-nine Debtors—both Obligor and Non-

[4] The sole exceptions may be obligations under both the Coal Act and a 1974 agreement with the UMWA concerning pensions (the "**1974 Pension Fund**"). The Coal Act liability cannot be modified under the Bankruptcy Code, and the Debtors have stated their intent to pay this liability going forward. Should the Obligor Debtors withdraw from the 1974 Pension Fund—as the Termination Motion seeks permission for them to do (*see* Dkt. 3219 at 47)—certain obligations may become due immediately. *See* 29 U.S.C. § 1399. Those obligations may run to all of Patriot's subsidiaries, including the Non-Obligor Debtors. *See id.* § 1301(b). The Debtors' proposal with respect to the 1974 Pension Fund is addressed further *infra* n.14.

Obligor alike—takes care to note that only the Obligor Debtors have liabilities to union members and retirees.[5]

7. As relevant here, the Termination Motion asks the Court to implement a proposal ("the **Proposal**")—the most recent version of which was made public ***yesterday***—that would terminate the Union Debt owed by the Obligor Debtors and, in its stead, transition responsibility for union-retiree healthcare benefits into a Voluntary Employee Beneficiary Association trust (the "**Trust**").[6] *See* Dkt. 3219 at 5. That Trust would, in turn, be funded almost entirely by (1) "a direct 35% equity stake in the reorganized enterprise"; (2) a "Profit-Sharing Contribution"; and (3) "a Royalty Contribution." *See* April 11 Proposal at 1-2.[7]

8. The April 11 Proposal, while different in some details from its predecessor, suffers from the same fundamental defect: The Trust would be funded not only by assets of the Obligor Debtors, but *also* by assets of the Non-Obligor Debtors (including Patriot), *i.e.*, Debtors that currently hold no liability for union retirees' healthcare, or for any other part of the Union Debt. While the full amount of the Non-Obligors' proposed contribution has not been quantified, the Debtors intend it to be commensurate with union-retiree healthcare benefits that

5 *See* http://www.patriotcaseinfo.com/sofa.php. Those Schedules also list nine Non-Obligor Debtors with limited, non-union related legacy healthcare obligations.

6 Notwithstanding the various proposals referenced in the Termination Motion itself, the "Proposal" described in this Objection is the combination of the Debtors' Fourth Section 1113 Proposal and Fifth Section 1114 Proposal, which were filed yesterday, April 11, 2013 (the "**April 11 Proposal**"). *See* Dkt. 3583 (notice of proposals). Given that the Noteholders had mere hours to review these new proposals, they reserve the right to amend this Objection if further analysis or developments so warrant.

7 Patriot also plans to fund the Trust with (1) a $15 million lump-sum cash payment and (2) a portion of any proceeds secured from pending litigation against Peabody Energy Corporation and Arch Coal ("the **Litigation Proceeds**"). *See* Debtors' April 11 Proposal at 1, 6. The Debtors' formula for distributing the Litigation Proceeds is inscrutable. It calls for 80% of such proceeds to be distributed to unsecured creditors—without identifying what portion of that 80% will go to the Trust and what portion to other creditors—while at the same time providing that 100% of all proceeds will go to the Trust if the action producing the proceeds "involv[ed] the obligation to provide UMWA retiree healthcare" (whatever that means).

carry a face value of approximately $1 billion. *See* Declaration of Paul P. Huffard ("**Huffard Decl**.") (Dkt. 3224) ¶ 68.

1. The Proposal Would Give The Trust An Equity Stake In Non-Obligor Debtors That Have No Obligations To Union Retirees

9. As described in the Proposal, "a significant source of funding for the Trust would include an equity stake in the emerging enterprise." April 11 Proposal at 3. Specifically, "the UMWA would be granted a 35% share of the stock of reorganized Patriot" (*ibid.*) that the Debtors "expect[] to be worth hundreds of millions of dollars" (*id*. at 2). The stock of Patriot, of course, reflects the value of *all* of its subsidiaries—Obligor and Non-Obligor alike.

10. Notwithstanding what the Debtors concede is the enormous value of the stock they intend to gift to the UMWA, their April 11 Proposal is conspicuously silent on the critical question of whether the Obligors are even worth "a 35% share of the stock of reorganized Patriot." Given the Debtors' concession that the Non-Obligors are currently much more profitable than the Obligors, there is ample reason to doubt this is the case.[8] *See* Declaration of Seth Schwartz (Dkt. 3225) at ¶ 5 (bullet 2), ¶ 52. Therefore, to the extent the Obligors are worth less than 35% of the reorganized entity, the Trust will be funded by assets of *the Non-Obligors*—Debtors that are not in any way obligated for union-retiree healthcare.[9]

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[8] The April 11 Proposal is entirely silent on other critical issues. In particular, the Debtors have provided this Court with no basis to evaluate whether the UMWA's retiree-health claim against the Obligors is actually worth 35% of the reorganized entity. Among the many crucial pieces of information the Debtors' have not provided the Court are: their estimated enterprise value for each of the Debtors and the reorganized entity as whole; the value of any post-petition intercompany claims as between the Debtors; the size of the UMWA's rejection claim; and whether the Proposal takes into account liabilities caused by withdrawing from the 1974 Pension Fund, among many others.

[9] Moreover, the UMWA is not the only creditor of the Obligor Debtors. The Noteholders, among others, are substantial creditors too. *Even if* the Obligors were worth 35% of the reorganized entity, it could hardly be called "fair and equitable" to give *all* of that value to

2. The Proposed "Profit-Sharing" and "Royalty Contribution" Further Siphon Assets From The Non-Obligor Debtors

11. The Termination Motion attempts to misappropriate the assets of the Non-Obligor Debtors to satisfy the Union Debt in another way. In addition to the equity stake that the Debtors seek to transfer to the Trust, the Debtors also propose to fund it by having the Obligor Companies "contribute to the [Trust] an amount equal to 15 percent of net income earned by Patriot above $75 million in 2014 and 2015 and an amount equal to 15 percent of net income earned by Patriot above $150 million in 2016 and subsequent years." Dkt. 3219 at 53. *See also* April 11 Proposal at 5 (same). As the Debtors explain it, "[t]his profit-sharing component will allow the UMWA to share in any upside should Patriot's financial performance improve in years to come." Dkt. 3219 at 53. But to the extent Patriot's future profitability comes from Non-Obligor Debtors—as may well be the case—this proposal would simply further siphon value from those Non-Obligor Debtors (which have no obligations to the UMWA) to the Obligor Debtors (which do).[10]

12. And that is not the only such transfer of wealth that the Proposal seeks to give the Trust. In their April 11 Proposal, the Debtors propose, for the first time, *also* to pay a per-ton royalty to the Trust . . . for each ton produced from ***all*** existing mining complexes." April 11 Proposal at 5 (emphasis added). Putting aside the dubious notion of imposing what is essentially an excise tax, ***in perpetuity***, on a business with razor-thin margins, the Proposal contemplates

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the UMWA to satisfy what is only a portion of the Obligors' total liabilities. *See infra* pp. 12-14.

[10] Although the Proposal states that the Obligors specifically will make these profit-sharing payments to the Trust, the Proposal is silent as to whether the Obligors will avail themselves of revenue generated by or cash held at the *Non-Obligors* if and when the Obligors themselves are unable to make those payments. Such a situation is quite likely to arise because the payment amounts the Obligors are committing to the Trust are based not on their own profitability, but on *Patriot as a whole*.

giving the Trust a share of mining proceeds from every single Debtor—Obligor and Non-Obligor alike—notwithstanding that most of the Debtors have no obligations to the UMWA.[11]

3. The Non-Obligor Companies Receive **Nothing** *In Return For Their Contributions Under The Debtors' April 11 Proposal*

13. Of critical importance, the Termination Motion does not call for the Non-Obligor Debtors to receive ***anything*** in return for their proposed contributions to the Trust. By using the assets of the Non-Obligor Debtors to satisfy liabilities to the UMWA that are currently held solely by the Obligor Debtors—without providing the Non-Obligor Debtors any value in return—the Termination Motion severely compromises the interests of the Noteholders. Right now, the Noteholders are one of the few creditors that can secure a recovery from Patriot Coal Corporation and, in the case of the 8.25% Notes, the other eighty-five Non-Obligor Debtors. The Proposal severely diminishes the Non-Obligor assets from which that recovery might come. That is not what the respective parties bargained for or received from Patriot: The Noteholders received guarantees from the Non-Obligor Debtors; the UMWA did not.

ARGUMENT

A. The Debtors' Proposal Violates Bedrock Principles of Corporate Law

14. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quotation marks omitted). Nor are "all businesses associated within a holding company structure . . . liable for each other." *Torain v. AT&T Mgmt.*

[11] As noted above (*supra* n. 8), the Debtors have provided this Court with no basis to evaluate whether the UMWA's claim for retiree-healthcare against the Obligor Debtors is worth 35% of the reorganized enterprise. The Debtors leave unexplained whether this proposed 35% has been adjusted to account for the value of profit sharing and perpetual rights to royalties—or whether those are, effectively, *additional grants of ownership* in the new enterprise. If the latter, why is the Trust entitled to them at all, let alone to the exclusion of the Obligors' other creditors?

Services, LP, 353 F. App'x 37, 38 (7th Cir. 2009) (citing *Bestfoods*). It is for that reason that "[t]he general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness." *Owens Corning*, 419 F.3d at 211. The assets and liabilities of one entity are its and its alone; one "could . . . cite[] oodles of decisions for that proposition." *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 771 (7th Cir. 2007).

15. The Debtors' Proposal violates these bedrock principles. By attempting to satisfy the contractual obligations of some Debtors (*i.e.*, the Obligors) with the assets of others (*i.e.*, the Non-Obligors), the Proposal represents a "cross-creep of liability" that violates "a fundamental ground rule" of bankruptcy. *Owens Corning*, 419 F.3d at 211. *See also In re Teleglobe Comm'ns Corp.*, 493 F.3d 345, 371 (3d Cir. 2007) ("Treating members of a corporate family as one fails to respect the corporate form.").

16. The Debtors fail to acknowledge—let alone address—any of this. Instead, they simply assert that their Proposal is "in full compliance with Sections 1113 and 1114 of the Bankruptcy Code." Dkt. 3219 at 6. But neither Section 1113 nor Section 1114 abrogates the "presumption that a corporation, even when it is a wholly owned subsidiary of another, is a separate entity," *Mellon Bank v. Metro Communications, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991), nor do those sections authorize a Court to reapportion assets and liabilities as between legally distinct debtors. By their very terms, both sections deal only with the rights of union members and retirees as against particular debtors that are signatories to collective-bargaining agreements or responsible for retiree benefits (*i.e.*, the Obligor Debtors). They are entirely inapplicable to the Non-Obligor Debtors here, which are neither.

17. Section 1113 "governs the rejection or modification of a CBA by a Chapter 11 trustee or debtor-in-possession." *In re Family Snacks, Inc.*, 257 B.R. 884, 890 (B.A.P. 8th Cir.

2001). It provides that "[t]he court shall approve an application for rejection of a collective bargaining agreement" if certain criteria are met. 11 U.S.C. § 1113(c). The section simply has no bearing on debtors who are not signatories to collective-bargaining agreements.

18. Section 1114 is no different. "It requires a debtor to pay in a timely fashion and refrain from modifying any retiree benefits until a determination is made as to what modifications are "'necessary to permit the reorganization of the debtor.'" *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 523 (Bankr. S.D.N.Y. 1991) (quoting 11 U.S.C. §§ 1114(e)(1) and (g)). To that end, it provides that "the court . . . may order modification of [retiree benefit] payments" only if certain criteria are met. 11 U.S.C. § 1114(e)(1)(a). *See also id.* §§ 1114(g)-(h) (identifying those criteria). By its terms, however, Section 1114 too is largely inapplicable here: It applies only to debtors who are obligated to make "payments . . . under [a] plan, fund, or program . . . [that they] maintained or established." 11 U.S.C. § 1114(a) (defining "retiree benefits"). The Non-Obligor Debtors have no such obligations. *See In re CF&I Fabricators of Utah Inc.*, 163 B.R. 858, 862 (Bankr. D. Utah 1994) ("[S]ection [1114] would be applicable in this case only if [the debtor] had retiree benefits that it was obligated to pay when it filed its petition under Chapter 11.").

19. The Debtors may argue that there is no cause for concern because the Termination Motion applies only to Debtors with collective-bargaining agreements and retiree-benefit obligations, and will not affect those Debtors that do not. But the proposed relief under the Motion reallocates assets held by *precisely those Debtors* that are not parties to the agreements or obligations being terminated (*i.e.*, the Non-Obligor Debtors). The Debtors fail to cite a single case—not one—in which a court has approved such a proposal pursuant to either Section 1113 or Section 1114. So far as we are aware, no such case exists—nor would it, given the text of

both sections and the fundamental principles of corporate law against which both were enacted. *Cf.*, *e.g.*, *Matter of Walway Co.*, 69 B.R. 967, 969-70 (Bankr. E.D. Mich. 1987) (in considering an application under Section 1113 made by a subsidiary, the Court cannot consider the resources of the non-debtor parent, notwithstanding "the close relationship between the parent to the sub," because "[t]he two companies have been kept separate and are identifiable entities within the strictures of corporate formalities"); *In re Colfor, Inc.*, No. 96-60306, 1997 WL 605100 (Bankr. N.D. Ohio Sept. 4, 1997) (rejecting attempt by debtor subsidiary to consider, in application made under Section 1114, the assets of its parent, "a publicly traded non-debtor company observing corporate formalities"). This alone provides ample reason for rejecting the Debtors' Proposal.

B. The Debtors Do Not Meet The Requirements Of Sections 1113 and 1114 In Any Event

20. Even if Section 1113 and Section 1114 reached the Non-Obligor Debtors—though without question, they do not—the Debtors' Proposal would still fail because it does not meet the "stringent" requirements of those sections. *In re City of Stockton, Cal.*, 478 B.R. 8, 23 (Bankr. E.D. Cal. 2012). A court can reject a collective bargaining agreement or modify a retiree-benefit plan *only* where it [1] is "necessary to permit the reorganization of the debtor" *and* [2] "assures that all creditors . . . are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A); *id.* § 1114(g)(3). See *also Family Snacks*, 257 B.R. at 896 ("These standards [in § 1114(g)] are intended to be identical to those contained in Section 1113."). "[T]he debtor bears the burden of persuasion by the preponderance of the evidence" on both of those elements. *In re Am. Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984). The Debtors here fail to carry that burden.

1. The Debtors' Proposal Is Not "Necessary To Permit The Reorganization" Of The Non-Obligor Debtors

21. "[T]he most fundamental requirement" for modifying a collective-bargaining or retiree-benefit agreement is that the proposed modifications be "necessary to permit the reorganization of the debtor." *In re Nw. Airlines Corp.*, 346 B.R. 307, 321 (Bankr. S.D.N.Y. 2006); 11 U.S.C. § 1113(b)(1)(A); *id.* § 1114(g)(3). The proposed modifications must be "necessary to accommodate confirmation of a Chapter 11 plan." *Family Snacks*, 257 B.R. at 897.

22. Though the Termination Motion speaks at length about the financial strain that the Union Debt places on "Patriot," it does not even attempt to explain how that strain affects the Non-Obligor Debtors in particular, none of which are liable for that Union Debt. To the contrary, the Motion focuses exclusively on the need for change at the thirteen debtors that are liable for union benefits (*i.e.*, the Obligor Debtors). *See, e.g.*, Dkt. 3219 at 68 ("With no other areas to cut, Patriot must secure savings from its unionized employees and retirees.") (citing Huffard Decl. ¶¶ 45-51); *see also id*. at 36-45 (describing "Patriot's burdensome obligations to its UMWA-represented employees and retirees"). The Debtors cannot meet their burden to demonstrate that the Termination Motion—let alone the Proposal in it—is "necessary to permit the reorganization" of the Non-Obligor Debtors by the studied silence in the Motion about those debtors.[12]

[12] Nor would it be a response for the Debtors to argue that the Termination Motion is necessary to the reorganization of the Non-Obligor Debtors because (1) it is necessary to the reorganization of the *Obligor Debtors* and (2) the Non-Obligor Debtors cannot emerge from bankruptcy without them. The Termination Motion is entirely (and conspicuously) silent about whether or not the Non-Obligor Debtors could emerge from bankruptcy as viable entities even if the Obligor Debtors do not. Indeed, were the Debtors' exclusivity period for proposing a plan of reorganization allowed to expire, a plan to bring the Non-Obligor Debtors out of bankruptcy could be proposed promptly.

23. Indeed, far from being "necessary to the reorganization" of the Non-Obligor Debtors, the Proposal is an affirmative *impediment* to their reorganization. A proposal that effectively creates out of thin air an entirely new group of creditors at the Non-Obligors, without providing those Debtors or their existing creditors *anything* in return, is not the basis for a confirmable plan. Suffice it to say, the Proposal does nothing but *create* obstacles for reorganizing the Non-Obligor Debtors—the exact *opposite* of what Section 1113 and Section 1114 require.

2. The Debtors' Proposal Does Not Treat All Creditors "Fairly And Equitably"

24. The Debtors' Proposal fails another requirement of both Section 1113 and Section 1114: It does not ensure that "all creditors . . . are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A); *id.* § 1114(g)(3). Once again, the Debtors do not even attempt to meet their burden: Though the Termination Motion speaks at length about why the Proposal would be "fair and equitable" to union members and retirees, it is entirely silent on the impact the Proposal would have on other unsecured creditors—among them, the Noteholders.[13]

25. As the many footnotes to this Objection make clear, there are myriad respects in which the Debtors simply fail to provide this Court with the basic details necessary to evaluate this Proposal. Among them:

- The Debtors entirely fail to explain why the Trust is entitled to 35% of the stock in the reorganized enterprise. Why not less? This number has a direct and obvious impact on creditors—who may well become equity holders in the reorganized entity too. *See supra* nn.8-9. Indeed, given how central the size of the equity grant is to the larger Proposal, it is simply remarkable that the Debtors have not disclosed the enterprise valuations for each of the Debtors separately, or the size of the UMWA claim against the Obligor Debtors for which the equity

[13] Indeed, with respect to fifteen of the Debtors, holders of the 8.25% guaranteed notes are the *only* unsecured creditors of those entities, and in the case of seventy-nine of the ninety-nine Debtors, holders of the 8.25% notes constitute a majority of the unsecured claims of those entities.

stake is compensation. *See also infra* n.14 (describing the Debtors' failure to explain whether the UMWA's proposed equity stake does or does not assume that 1974 Pension Fund obligations will be annuitized).

- The Debtors fail to explain whether or not the 35% equity stake they propose to give to the Trust is in addition to the profit and royalty sharing they *also* propose to give the Trust. *See supra* n.11. If it is, why is the Trust entitled to these additional ownership stakes in the enterprise? And why aren't other creditors entitled to these benefits? Again, this has a direct and obvious impact on other creditors (of the Obligors and Non-Obligors alike)—particularly because these commitments are transfers of wealth outside the enterprise, the royalty portion of which will last *in perpetuity*.

- The Debtors fail to explain how the Obligors will pay the profit and royalty sharing obligations to which the Proposal commits them. Will they use funds generated by or cash held at the Non-Obligors? *See supra* n.10.

- The Debtors propose to split 80% of any Litigation Proceeds among unsecured creditors. How much of that will go to the Trust and how much will go to other creditors? *See supra* n.7. The Debtors' also intend to give *all* of the Litigation Proceeds to the Trust if those proceeds arise out of a litigation that "involve[es] the obligation to provide UMWA retiree healthcare." What does that mean? *Ibid*.

These are not minor details—they go to the very essence of whether the Proposal treats all creditors "fairly and equitably."[14] Without clear answers to these questions, the Court would be

[14] These are hardly all the material respects in which the Debtors' Proposal is lacking in requisite detail. Here is another: As noted earlier, if the Obligor Debtors withdraw from the UMWA's 1974 Pension Fund, certain obligations may become due immediately, and liability for those obligations may run to all Debtors, including the Non-Obligors. *See supra* n.4. In their Fourth Section 1113 Proposal (at 6), the Debtors propose "to seek to negotiate a mutually agreeable post-emergence payment stream with the [Fund] or, absent such agreement, withdraw from [it] and pay the resulting withdrawal liability over time as provided for in section § 4219(c)(1)(A) of ERISA." Without knowing the results of the Debtors' proposed negotiations with the Fund or the amount of the expected annuity payment under ERISA, the Debtors have once again failed to carry their burden to show that their proposal to withdraw from the Fund treats all creditors "fairly and equitably." Even more critically, the Debtors have failed to explain whether the 35% stake in the enterprise they purport to give the Trust assumes that the 1974 Pension Fund liabilities—which the Fund claims total nearly *$960 million*—are annuitized. To the extent it does not, the equity stake needs to be reduced accordingly. Similar questions arise with respect to the annuity payments themselves: The Debtors have provided this Court with no information upon which it could evaluate whether those payments are to be commensurate with the liabilities actually owed to the Fund.

forced to speculate about the Proposal that the Debtors offer. Consistent with the burden that Section 1113 and Section 1114 place on the Debtors, the Court cannot do that.

26. To be sure, the Debtors' silence is unsurprising, as the Proposal is the antithesis of equity. The Noteholders have claims against Patriot Coal Corporation and, in the case of the 8.25% Notes, guarantees from all of its subsidiaries; the UMWA has neither. There is nothing unusual about this difference in structural priority among various creditors.[15] This Court should not rewrite the various agreements to try to effect equal treatment as between the Noteholders (who are creditors of the Non-Obligors) and union members and retirees (who are not). *See Matter of Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986) ("The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."). Indeed, doing so would turn the equity requirements of Section 1113 and 1114 on their head. As Judge Friendly once observed, "[e]quality among creditors who have lawfully bargained for different treatment is not equity but its opposite." *Chem. Bank New York Trust Co. v. Kheel*, 369 F.2d 845 (2d Cir. 1966) (Friendly, J., concurring).

CONCLUSION

27. For the foregoing reasons, to the extent the Termination Motion seeks approval of the Debtors' Proposal, it should be denied.

[15] The kinds of guarantees made on the 8.25% Notes, for example, are common in modern commercial lending. *See, e.g.*, Douglas G. Baird, *Secured Credit and Its Uncertain Future*, 25 CARDOZO L. REV. 1789, 1797 n.16 (2004).

Dated: April 12, 2013

Respectfully submitted,

By: /s/ Alan D. Strasser
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