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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12900-scc

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In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

October 11, 2012
10:13 AM

B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

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Doc# 1043 Amended Application of the Official Committee of Unsecured Creditors of Patriot Coal Corporation et al. Pursuant to Fed. R. Bankr. P. 2014(A) for an Order Under Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Mesirow Financial Consulting, LLC as Financial Advisors, Nunc Pro Tunc to July 24, 2012 filed by Adam C. Rogoff on behalf of Official Committee of Unsecured Creditors.

Doc# 817 Notice of Presentment of Application for an Order Authorizing the Employment and Retention of Epiq Bankruptcy Solutions, LLC as the Information Agent for the Official Committee of Unsecured Creditors filed by Adam C. Rogoff on behalf of Official Committee of Unsecured Creditors.

Doc# 819 Application of the Official Committee of Unsecured Creditors of Patriot Coal Corporation et al. Pursuant to Fed. R. Bankr. P. 2014(a) for an Order Under Sections 328(a) & 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Houlihan Lokey Capital, Inc. as Advisor, Nunc Pro Tunc to July 24, 2012 filed by Adam C. Rogoff on behalf of Official Committee of Unsecured Creditors.

1

2 Doc# 820 Motion for Order Establishing Deadline for Filing
3 Proofs of Claim and Approving the Form and Manner of Notice
4 Thereof filed by Brian Resnick on behalf of Patriot Coal
5 Corporation.

6

7 Doc# 339 Motion for Relief from Stay filed by Jonathan L.
8 Flaxer on behalf of William G. Parrott Jr., Donald Petrie,
9 Patricia Willits.

10

11 Doc# 824 Motion for Relief from Stay / Certain Debtors Motion
12 for Entry of an Order Pursuant to 11 U.S.C. 362(d) Authorizing
13 Limited Relief from the Automatic Stay.

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ALSO PRESENT:
JAMES KATCHADURIAN, Epiq Systems (TELEPHONICALLY)

PATRIOT COAL CORPORATION, ET AL.
P R O C E E D I N G S

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THE COURT: All right. Patriot Coal.

All right. While you folks are assembling, let me note who I have on the phone. I believe everyone's in listen-only mode, although I have a note that Mr. -- I apologize for the pronunciation. Verhage (ph.), in-house counsel at Patriot --

MR. HUEBNER: Yes, Your Honor.

THE COURT: -- is on the phone. I'm not sure if that's on listen-only or on live. In addition, I have Ms. Chan from Aurelius; Mr. Diamond from DK Partners; Mr. Katchadurian from Epiq; Mr. Mercer from Whitebox Advisors; Mr. Resnick from Davis Polk; Mr. Thau from GMP Securities; Ms. Thompson from Barclays Capital; Mr. or Ms. Tiwana from CRT Capital Group; and Ms. Wong from the Kramer Levin firm.

Is anybody else on the phone who wishes to note their appearance?

Okay, Mr. Huebner, how are you?

MR. HUEBNER: I'm well, Your Honor. Thank you very much. Good morning. For the record, I am Marshall Huebner of Davis Polk & Wardwell on behalf of Patriot and its affiliated debtors.

Your Honor, what I would like to do, if it's okay, is actually take things slightly out of order, because there are four uncontested matters listed for today. The first three are

1 actually the committee's matters. And as I understand it, the
2 committee wants to have a little bit of a discussion on the
3 record with the U.S. Trustee about some of those retentions --

4 THE COURT: Okay.

5 MR. HUEBNER: -- which I just heard about. I'd like
6 to therefore, to be able to cede the podium to them before we
7 get to the contested matter, just hit the --

8 THE COURT: Sure.

9 MR. HUEBNER: -- bar date order, very quickly --

10 THE COURT: Okay.

11 MR. HUEBNER: -- since I think that is happily very
12 uncontested --

13 THE COURT: All right.

14 MR. HUEBNER: -- and we can get that out of the way.

15 THE COURT: So just tell me the order in which you
16 want to proceed, and I'll shuffle my papers accordingly.

17 MR. HUEBNER: Sure. If it's okay with the Court, Your
18 Honor, I think we'd like to start with number 4, which is the
19 uncontested bar date order, which will take me, hopefully, two
20 or three minutes, if there are no questions, just to --

21 THE COURT: Hold on, one moment, please.

22 All right. So -- all right. I'm just looking at what
23 I received. I received a copy of the bar date order yesterday
24 at 3:02 p.m. Is that the one that the parties -- I believe it
25 was docketed. Is that the one that we're working off of?

PATRIOT COAL CORPORATION, ET AL.

12

1 MR. HUEBNER: Yes, Your Honor, it is.

2 THE COURT: Okay.

3 MR. HUEBNER: Let me, I guess, apologize for the
4 slightly late supplemental filing. As Your Honor probably
5 knows very well, many parties have lots of views on the bar
6 date --

7 THE COURT: Sure.

8 MR. HUEBNER: -- order, and what we were trying to do
9 was --

10 THE COURT: Of course.

11 MR. HUEBNER: -- reconcile, harvest -- the comments
12 weren't always consistent with one another. But happily, what
13 I was about to report, is that as far as we know, everyone is
14 now, if not delighted, satisfied --

15 THE COURT: All right.

16 MR. HUEBNER: -- with the form of order. And I was
17 going to walk through some of the things that were found in --

18 THE COURT: Delighted and bar order in the same
19 sentence --

20 MR. HUEBNER: That's why I hedged very carefully.

21 THE COURT: All right.

22 MR. HUEBNER: Likely satisfied. Maybe only we're
23 delighted.

24 THE COURT: All right. Including Ms. Schwartz?

25 MR. HUEBNER: I believe she's satisfied.

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1 MS. SCHWARTZ: I haven't seen the one from -- I'm
2 looking at it now. But, Your Honor, the issue that was of
3 concern to the U.S. Trustee's Office --

4 THE COURT: Was addressed.

5 MS. SCHWARTZ: -- I understand has been -- yes.

6 THE COURT: Okay. All right.

7 MR. HUEBNER: So if it makes sense, I'm happy to walk
8 through the --

9 THE COURT: That would be great.

10 MR. HUEBNER: -- few changes that were made.

11 THE COURT: That would be great.

12 MR. HUEBNER: So, Your Honor, the bar date order, the
13 proposed bar date order that was filed yesterday, contemplates
14 a general bar date of December 14th, 2012, and a governmental
15 bar date of January 21st, 2013.

16 We worked with multiple parties since the filing of
17 the initial motion, certainly including Ms. Schwartz, the
18 creditors' committee, the indenture trustees, as well as the
19 union, to come up with a form, both a bar date order itself,
20 and a supplemental employee letter that I'll describe in a
21 minute, that is designed to provide hopefully effective
22 information to people, slightly different depending on the
23 constituency, that will enable them to understand what frankly
24 are sometimes pretty abstruse and esoteric topics, as best as
25 we could comfortably come up with.

1 The changes, Your Honor, or the major changes from the
2 bar date order that was initially filed are that we moved the
3 governmental bar date -- the governmental bar date from a
4 proposed date of January 7th to a proposed date of January
5 21st, with a little bit -- sort of farther past the end of the
6 New Year.

7 We clarified that the mere passage of the bar date
8 does not, itself, sort of put an injunction in place that bars
9 people forever. Obviously the bar date has very real meaning
10 and weight, but ultimately, I think the hypothetical you were
11 given was, well, what if the cases are dismissed two weeks
12 later, then people's claims aren't discharged? And we said
13 yes, we agree. When there's a plan, that that's when the
14 discharge happens, the import of the bar date, we think, is
15 clear, but it does not itself serve as a permanent injunction
16 against people prosecuting their claims.

17 Second, Your Honor, in order -- as we talked about
18 already at several hearings -- to minimize and rationalize any
19 unexpected or improper burden on employees, the bar date order
20 makes it very clear now, although I think it was arguably clear
21 before, that employees who are covered under various benefit
22 programs who don't currently have claims, because there's no
23 current change or termination of those plans, don't need to and
24 should not, in fact, file claims at this time. Those issues,
25 as Your Honor knows, they have not come to fore yet, except

1 with respect to two very specific programs that we did not
2 continue in the first-day motion, that are, I think, separately
3 discussed in the documentation.

4 Third, Your Honor, also in the name of efficiency and
5 trying to avoid unnecessary expense and duplication for
6 everybody, we worked with the indenture trustees to create sort
7 of master proof of claim language. It's not particularly
8 innovative. We've all seen it in lots of cases. We just had
9 to get people on the same page to hopefully minimize the need
10 for individual bondholders to each file claims for their
11 primary debt holdings under the indentures themselves.

12 Fourth, Your Honor, and this was an issue that Ms.
13 Schwartz brought to our attention, as did the creditors'
14 committee, and we were delighted, once we figured out how it
15 works these days, to make the changes, is that all proofs of
16 claim and any documents attached to them, will be publicly
17 available on the claims agent website. For these purposes, the
18 claims agent is, of course, the Court well knows, is an
19 extension of the Clerk's Office, and it's now the Clerk's
20 Office policy to file all claims in the cases where it docket
21 them with all their attachments. And it should -- no different
22 result should obtain here.

23 We did put in, which is also in, I think, everybody's
24 view appropriate, that nothing in the bar date order itself
25 lifts confidentiality restrictions otherwise applicable to

1 parties.

2 THE COURT: Right.

3 MR. HUEBNER: So if there are things that simply are
4 not allowed to, or breach a contract, or violate law, to see
5 the light of day, people, as they normally do, will presumably
6 file their claim saying, you know, part of it's confidential;
7 and they'll send us their proof or they won't. And if they
8 don't have proof, we'll obviously deal with the claims as we
9 think we need to.

10 THE COURT: Okay.

11 MR. HUEBNER: And then finally, Your Honor -- and we'd
12 really like to thank the Union's counsel for working with us
13 very quickly and assiduously on this topic -- we did come up
14 with a form of employee letter for employees or retirees. This
15 is bewildering stuff, frankly. It's very technical, even for
16 bankruptcy people. And simply getting this legal pleading with
17 a caption in the mail, doesn't really do very well --

18 THE COURT: Right.

19 MR. HUEBNER: -- for retirees. And so what we did was
20 try to balance sort of the vernacular with not getting it wrong
21 or omitting facts; we had a series of back-and-forths with the
22 union where we worked together to come up with a form of letter
23 that we hope appropriately explains to retirees and to
24 employees what they don't need to do at present, and what they
25 might need to do at present. It has many different concepts in

1 it, including what I discussed before, which is for things that
2 haven't changed yet, you don't have to file a claim. If you're
3 a union member and -- the union will file a claim on your
4 behalf for many categories of things. Although, if you happen
5 to have totally separate claims, something unusual happened,
6 there you do need to. That may not be the union's
7 responsibility.

8 THE COURT: Do you -- a couple questions. Has the
9 Office of the U.S. Trustee had a chance to look at the letter?

10 MR. HUEBNER: Your Honor, we filed it on the docket
11 yesterday.

12 THE COURT: Okay.

13 MR. HUEBNER: So I apologize. It sounds like that's
14 one of the things that Ms. Schwartz was looking at.

15 MS. SCHWARTZ: I haven't. I was actually in court
16 yesterday afternoon, so if you wouldn't mind --

17 THE COURT: I can vouch for her.

18 MS. SCHWARTZ: -- so if you wouldn't mind, I mean,
19 I'll look at it very quickly, so --

20 MR. HUEBNER: Absolutely. Absolutely. Why don't we
21 provide a copy if we can, right now, to Ms. Schwartz --

22 THE COURT: Is the --

23 MR. HUEBNER: -- so she has it.

24 THE COURT: -- letter an exhibit to the bar order?

25 MR. HUEBNER: It is, Your Honor.

1 THE COURT: Okay. And does the letter have a number
2 that the recipient can call to ask any questions?

3 MR. HUEBNER: It does, Your Honor. I believe there's
4 a toll-free number, if my memory serves me correctly. Yes,
5 it's a toll-free number, Your Honor.

6 THE COURT: All right. And that's a toll-free number
7 of the debtor or of the union?

8 MR. HUEBNER: I believe it is a toll-free number of
9 the claims agent. Yes, the claims agent has --

10 THE COURT: Of the --

11 MR. HUEBNER: -- personnel who are standing by in the
12 first instance to answer questions. They've a Q&A script.

13 THE COURT: Now, is that letter going to go to non-
14 union employees and non-union retirees as well?

15 MR. HUEBNER: Yes, Your Honor. There are letters that
16 go out to all retirees and all employees.

17 THE COURT: And those are customized differently?

18 MR. HUEBNER: You know, we went back and forth --

19 THE COURT: Your team is nodding yes.

20 MR. HUEBNER: -- at first. Yeah, no. At first we
21 were going to do one, and then sort of near the end of the
22 thing we decided it was easier to separate them out --

23 THE COURT: Because --

24 MR. HUEBNER: -- so that people wouldn't have stray
25 references that didn't apply to them.

1 THE COURT: Okay. So the non-union folks are going to
2 get a letter that addresses their particular issues that may be
3 slightly different from the union --

4 MR. HUEBNER: Yes, I mean --

5 THE COURT: -- employees.

6 MR. HUEBNER: -- what the non-union letter does is, it
7 removes the references to "the union may file a claim on your
8 behalf" and things like that. In other words, it's not a
9 customized letter for each person's potential claims --

10 THE COURT: Of course.

11 MR. HUEBNER: -- but it's a letter that addresses them
12 as nonrepresented employees or retirees.

13 THE COURT: Okay. All right.

14 MR. HUEBNER: And that is, I think, it.

15 THE COURT: Okay. Does anyone else wish to be heard
16 with respect to the debtors' motion for an order establishing a
17 bar date and approving the bar date notices and related
18 letters?

19 All right. Once I have had an opportunity to look at
20 all of this again and Ms. Schwartz has had an opportunity to
21 look at it for another time, we'll get it entered later today.
22 Okay?

23 MR. HUEBNER: Thank you very much, Your Honor. And
24 again, thank you to Ms. Schwartz and to the rest of the
25 parties. It was very much a group effort, and we appreciate

1 the collaboration.

2 Your Honor, what I think I'd like to do at this point,
3 is just turn the podium to Mr. Rogoff to handle items 1 through
4 3, which --

5 THE COURT: Okay.

6 MR. HUEBNER: -- are the various committee-related
7 retentions. And then we'll come back up and --

8 THE COURT: Okay.

9 MR. HUEBNER: -- deal with the one contested matter
10 for today.

11 MR. ROGOFF: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. ROGOFF: Adam Rogoff, Kramer Levin, on behalf of
14 the creditors' committee. We have three applications that are
15 on the agenda letter. And I'd like to actually take them a
16 little bit out of order, because with Your Honor's permission,
17 I think the presentation with respect to the retention by the
18 committee of Mesirov and Houlihan logically go together --

19 THE COURT: Right.

20 MR. ROGOFF: -- so I'd like to sort of combine my
21 presentation on those two. And as such, I'd like to start with
22 item number 2 on the agenda, which relates to the engagement of
23 Epiq Bankruptcy Solutions as the information agent for the
24 committee. I think as was noted earlier by Your Honor as to
25 who is participating telephonically --

1 THE COURT: Right.

2 MR. ROGOFF: -- Mr. James Katchadurian of Epiq is
3 participating telephonically. We did get permission from Your
4 Honor's chambers to have him do so.

5 THE COURT: Yes.

6 MR. ROGOFF: He's out of the country. He was a last-
7 minute exchange of affiants on behalf of Epiq, and as a result,
8 was unable to be in court today, but is on the phone.

9 With respect to Epiq, I think the application, which
10 is uncontested, is relatively straightforward. The committee
11 selected Epiq as an information agent on July 18th of this
12 year. They're going to assist the committee in performing its
13 obligations under Section 1102(b)(3), notably assisting the
14 committee in maintaining a website, which we do have up and
15 running.

16 We thought that it was particularly useful, not just
17 because it has become more of an established practice in
18 complex cases, but particularly useful in this case to have a
19 website being maintained which is independent from the debtors'
20 website, and that would be a place that creditors, employees,
21 retirees and others could go to, either to get information
22 about the case, realizing or appreciating, perhaps, that
23 they're getting it from the independent fiduciary appointed to
24 act on behalf of creditors in these cases, as well as to
25 establish a process which we will talk about in a later motion

1 before Your Honor, the sort of traditional Section 1102 motion
2 the committee's working on, that creates a process for
3 creditors to submit inquiries that we can analyze and respond
4 to.

5 And we thought it was particularly useful in the
6 dynamics of this case to make sure that creditors knew that
7 there was a forum, a website, they could go to, that while not
8 repeating what is on the debtors' website -- for example, we
9 are not uploading every document that Garden City Group is
10 uploading onto the debtors' website. We have links that allow
11 people to get that information, but we're giving them a forum
12 in which we can communicate with them as the committee's views,
13 or an opportunity to solicit from creditors, what their
14 inquiries may be, where they want to direct that to a committee
15 website as opposed to, for example, doing it through a debtor
16 website, where people may be hesitant to submit an inquiry to
17 the debtor's claims agent, on the expectation that it would be
18 delivered to the committee. So --

19 THE COURT: So I have a couple of questions. Is the
20 format going to be -- I'll compare it to the New York Times
21 website? So there's an article on the New York Times website,
22 and then there is a series of comments that people post. And
23 it's cumulative, so you can see what everybody else has to say.
24 So is an inquiry going to be viewable by anybody who visits the
25 website, and then the response, and it's all going to stay up

1 there, in the nature of a blog, or some other way?

2 MR. ROGOFF: I understand, Your Honor. I appreciate
3 it. No, it's not in the nature of a blog. It's not a
4 community forum for discussions where you have discussion
5 threads that are seen and tracked. What it is is, there's --
6 if you go to the web page, it looks very similar to the types
7 of web pages that are being used by other committees in other
8 large cases, or frankly the type of web page that a debtor
9 might have.

10 It's a status about what's going on the case. There's
11 a frequently asked questions section. There are links that
12 will take you to where you can obtain documents. And then what
13 we have is a box that says "Submit an Inquiry".

14 THE COURT: Okay.

15 MR. ROGOFF: And then you can -- and you would see
16 this on other websites.

17 THE COURT: Sure.

18 MR. ROGOFF: If you want to communicate with somebody,
19 an e-mail will open. The e-mail will then be delivered -- it's
20 a private e-mail. It's not --

21 THE COURT: Private e-mail. Okay.

22 MR. ROGOFF: -- a discussion community. We have the
23 opportunity to review the e-mail and then reach out and
24 respond. Your Honor raises an interesting question, which is
25 to the extent that we do receive an inquiry which we think

1 would be of general --

2 THE COURT: Right.

3 MR. ROGOFF: -- use and benefit to the creditors at
4 large, we would take that inquiry and say good question; I
5 think other people would like to know that.

6 THE COURT: Good.

7 MR. ROGOFF: And we can update the website --

8 THE COURT: Okay.

9 MR. ROGOFF: -- to provide an answer or at least
10 tailor it so that it's in context for people reading it, as
11 opposed to just saying, Creditor X, you've asked this question;
12 here's you discrete question.

13 THE COURT: Right.

14 MR. ROGOFF: That's a good thing we think other
15 creditors would like to know. And the website is a fluid
16 website, so we can update it and put information --

17 THE COURT: And it will be someone from your team who
18 is preparing and vetting the content?

19 MR. ROGOFF: Yes. Yes, Your Honor.

20 THE COURT: Okay.

21 MR. ROGOFF: So that is really the primary purpose of
22 what Epiq is going to be assisting us in doing. They'll also
23 assist us from time to time when the committee has a pleading
24 itself that needs to be served. We find it's more cost-
25 efficient to utilize the claims agent for the service process.

1 That's usually, obviously, less of an issue than it is on the
2 debtors' side. We have fewer pleadings that are served in that
3 manner. But they would assist us in that as well.

4 The other aspect I'd like to note, Your Honor, is that
5 the fees and expenses for Epiq were extensively negotiated.
6 First they were negotiated extensively by the committee itself.
7 And then there was a sort of second crack at the negotiations
8 by the debtors' professionals. And we believe that at the end
9 of the day we have come up with a fee structure which is no
10 greater than the fee structure that's in place at Garden City,
11 which is the debtors' information agent has.

12 Epiq has been -- waived a number of fees, waiver of
13 web set-up fees and hosting fees. They've capped maintenance
14 fees. They're not providing charge for maintaining service
15 lists. And so the point I would like to get at is that
16 economically, we don't believe that the engagement by the
17 committee of Epiq adds any additional expense, certainly not
18 any material additional expense, to the estate as a whole.

19 So we think, in short, that it is an efficient way to
20 reach out to creditors, give them some comfort, have the
21 fluidity of a dialog with them, and doesn't impose any
22 significant expense on the estate.

23 THE COURT: So there's a pricing schedule attached to
24 the application. And it looks like most of the cost is
25 concentrated around the call center?

1 MR. ROGOFF: It could be. But we've also agreed with
2 the U.S. Trustee that we're not going to be utilizing a call
3 center at this point in time.

4 THE COURT: Okay. Because the way it looks, it makes
5 the appearance that we're going to be paying seventy-five
6 dollars an hour for a call center operator --

7 MR. ROGOFF: Right.

8 THE COURT: -- which --

9 MR. ROGOFF: We have no --

10 THE COURT: -- I assume we're not going to be paying
11 seventy-five dollar an hour for someone to be sitting for eight
12 hours a day.

13 MR. ROGOFF: That's correct, Your Honor. We have no
14 expectation of using a call center in this case. And in fact,
15 the declaration was revised and the order was revised to
16 explicitly remove any reference to a call center.

17 THE COURT: Okay. I apologize for being behind in the
18 documents, then.

19 MR. ROGOFF: That's right, Your Honor.

20 MS. SCHWARTZ: No, Your Honor, you're not behind. It
21 wasn't until last night that those revisions were made. And --

22 THE COURT: Okay.

23 MS. SCHWARTZ: -- I want to let the Court know that
24 the U.S. Trustee's Office is very grateful to committee counsel
25 as well as Mr. Katchadurian, who's actually in Iceland, and

1 spoke with me at midnight last night, regarding his
2 application. And you will get a revised order, Your Honor.
3 Some of the services that were initially placed in this
4 information agent application, including the call center and
5 providing claims, noticing, balloting --

6 THE COURT: Right.

7 MS. SCHWARTZ: -- those services, are out. So they
8 are not the services that are being provided. Mr. Katchadurian
9 spoke with me extensively last night --

10 THE COURT: Okay.

11 MS. SCHWARTZ: -- to make that clear. So when you get
12 the revised order and the revised declaration, we are signed
13 off on it.

14 THE COURT: Okay.

15 MS. SCHWARTZ: And the one thing I just want to note
16 for the Court, which Mr. Katchadurian advised me of, one of the
17 services that's included in here says, "assist the committee
18 with certain administrative tasks, including but not limited to
19 printing and serving documents as directed by the committee and
20 counsel." Now, that was a question for me, because I'm
21 wondering well, why isn't committee counsel doing that?

22 What Mr. Katchadurian explained to me is it's much
23 more cost-effective for Epiq to do that service. And with that
24 understanding, I think that that's reasonable in terms of this
25 particular application. Because I looked at the affidavits of

1 service online. And the affidavits of service online are
2 application for this -- you know, typical service things that
3 the committee serves.

4 THE COURT: Right.

5 MS. SCHWARTZ: But it seems to make sense, given that
6 Epiq can do it more cost-effectively.

7 THE COURT: All right. Cost-effective is good.

8 MR. ROGOFF: Right.

9 THE COURT: So --

10 MR. ROGOFF: And, Your Honor, if I may approach the
11 bench?

12 THE COURT: Sure.

13 MR. ROGOFF: I do have a red-line and clean copy of
14 the revised declaration of Mr. Katchadurian, as well as the
15 revised proposed order. I appreciate Ms. Schwartz either has
16 or will look at these. But I do have black-lines for Your
17 Honor.

18 MS. SCHWARTZ: I have looked at them, and we have no
19 objection.

20 THE COURT: Okay. All right. Does anyone else wish
21 to be heard in -- okay.

22 All right, Mr. Katchadurian, thank you for phoning in
23 from far away. And after I've had a chance to review these,
24 we'll get the order entered.

25 MR. KATCHADURIAN: Thank you.

1 THE COURT: Okay?

2 MR. ROGOFF: Next, Your Honor, I'd like, as I said, to
3 take together the retention of Houlihan Lokey as well as the
4 retention of Mesirow as financial advisors in these cases.

5 As I start my presentation, one overriding comment is
6 that we have been working very closely with the Office of the
7 United States Trustee for this region. We're working closely
8 with Ms. Schwartz. We had initially started working with her
9 predecessor that was assigned to this case over the committee's
10 desire to retain both Houlihan and Mesirow. I'll get into the
11 specifics of what each is intended to do and why we think the
12 engagements are appropriate.

13 But we have been working with the U.S. Trustee's
14 Office. And as I said, Ms. Schwartz, in particular recently,
15 to try to resolve any issues as to the forms of the orders and
16 any concerns that the U.S. Trustee's Office may have with
17 respect to the engagement of both Houlihan and Mesirow. That
18 is a process which is still undergoing as of this morning.

19 And so, as I make my presentation, I'd like to note
20 that we have no objections that have been received from any
21 party, but we are continuing to work with Ms. Schwartz and her
22 office with respect to any comments and concerns that she may
23 have. At least Ms. Schwartz and I understand, as do both
24 Mesirow and Houlihan, that if we are unable to resolve any
25 issues that she may have -- "she" being Ms. Schwartz -- may

1 have, or her office has with respect to the proposed orders
2 themselves and are unable to resolve them, we would come back
3 to Your Honor.

4 THE COURT: Okay.

5 MR. ROGOFF: We would schedule a time --

6 THE COURT: So you're going to make a full
7 presentation today, and it remains subject to continuing dialog
8 with the Office of the U.S. Trustee?

9 MR. ROGOFF: That is correct, Your Honor.

10 THE COURT: Okay.

11 MR. ROGOFF: Our hope would be that we're able to
12 resolve any issues with the Office of the United States
13 Trustee. And if that is done, that we could submit any further
14 revised orders that the parties have agreed to, to Your Honor,
15 without the necessity of having any further hearing --

16 THE COURT: Okay.

17 MR. ROGOFF: -- to approve the engagements. And
18 obviously, if we're unable to reach an agreement, the U.S.
19 Trustee's Office and the committee, we would come back with the
20 narrow issues before Your Honor --

21 THE COURT: All right.

22 MR. ROGOFF: -- for resolution.

23 THE COURT: Okay.

24 MR. ROGOFF: So with that context, I want to kind of
25 just give our presentation.

1 THE COURT: Sure.

2 MR. ROGOFF: So as mentioned, and going back a little
3 bit, I know I've mentioned this from time to time at some of
4 the other hearings we've had -- just to make sure that Your
5 Honor knew that we were working on the engagements of both
6 Mesirow and Houlihan, and not to have it come up for the first
7 time today.

8 But on July 24th, the committee had met and had
9 undertaken an interview process of a variety of financial
10 advisors that could assist them in performing their role in
11 this case. And the committee determined that it was beneficial
12 and appropriate to them, in their business judgment, that it
13 was appropriate to have Houlihan -- and I'm using the shorthand
14 reference; I'll say Houlihan; I'll say Mesirow; the technical
15 names are in the application -- to use Houlihan as a primary
16 financial advisor in these cases, to give them strategic
17 guidance on the numerous complex issues that we know have come
18 up and will continue to come up in these Chapter 11 cases.

19 But that in addition to utilizing Houlihan as their
20 primary financial advisor, that there were certain tasks that
21 were of a sort of data analysis, data gathering, actuarial
22 accounting perspective, that the committee felt it would
23 benefit as a whole by being able to have the specialized
24 expertise of Mesirow in obtaining that data and analyzing it or
25 validating it, if it's coming from the debtor. And then once

1 we've identified the universe of what that data is, then the
2 committee would be working with Houlihan, depending upon what
3 the topic is, to help develop that data that we've obtained, as
4 to its best strategic use in the case.

5 So we had -- and particularly at the request of Ms.
6 Schwartz's predecessor in this case -- we had looked at other
7 Chapter 11 cases where the committee has engaged a dual
8 financial advisor. You'd have a main financial advisor and
9 then a sort of specialized financial advisor. And we looked at
10 the allocations that existed. We looked at American Airlines;
11 we looked at ResCap; we looked at a number of cases. And we
12 came up with a proposed allocation which is attached to the
13 applications in this case, as to what Houlihan would be doing,
14 what Mesirow would be doing.

15 And one of the things, by the way, that's evolved over
16 time, is as we continue to have a dialog with Ms. Schwartz or
17 her predecessor, we tried to further refine what the allocation
18 was. A couple of points. Number one, this allocation was not
19 taken lightly by the committee. This is something that the
20 committee members weighed over carefully as to what they felt
21 would be in their best interests in helping to guide them in
22 their fiduciary duty. So this is not something that was sort
23 of pulled off the shelf, that lawyers decided would look good
24 and let's just file this to a motion. This went through a very
25 careful vetting process by the committee members. And it has

1 continued to be refined as we've had dialog, as I've mentioned,
2 with Ms. Schwartz and her office.

3 And there are areas in the allocation where there is
4 no, what I'll call, sort of topic overlap. You know, the
5 topics themselves are, on their face, discrete and separate.
6 And there are areas where the topic itself may look to overlap,
7 but we had been guided in assuring as best as we can, that
8 there is actually no duplication of the specific service. And
9 let me give you an example of what I mean by a topic overlap,
10 and how we expect that to play out.

11 If Your Honor were to look at the allocation with
12 respect to Houlihan Lokey, you'll see a reference to Section
13 1113, 1114, overall strategic analysis.

14 THE COURT: Right.

15 MR. ROGOFF: We don't know, but it's possible the
16 debtor may file an 1113 or an 1114 motion in this case. So
17 it's possible they may come to us and discuss a strategy
18 relating to that. Were that to happen, we would look to
19 Houlihan to assist the committee in the bigger picture strategy
20 of how 1113, 1114 -- whether it's appropriate, the degree to
21 which it's appropriate, whether it's not appropriate, and how
22 that fits into the overall restructuring. But when one looks
23 at that topic, we are appreciative of the fact that underlying
24 the strategic concept, is a lot of data.

25 THE COURT: Right.

1 MR. ROGOFF: There's a lot of raw data about the
2 pension liabilities and actuarial analyses. And in order for
3 us to take comfort in developing a strategy, we needed to take
4 comfort in that the data that we are getting and the questions
5 that we're asking to analyze the data we're getting, are the
6 right questions, and it's the right data.

7 So on this example, Your Honor, although Mesirow and
8 Houlihan would both be dealing with the topic of employee-
9 related issues and 1113, 1114 or pension-related issues, the
10 specificity of the work being performed is quite different.
11 And if I were to generalize it --

12 THE COURT: So it's almost as if the Mesirow personnel
13 gets secunded to the Houlihan team for the purpose of supplying
14 the data with respect to buckets of liabilities, time frames,
15 accruals and the like. And then Houlihan puts it into a model
16 or creates -- uses that data strategically.

17 MR. ROGOFF: Right. I think that's fair -- I mean,
18 the professionals may view it differently than being secunded
19 themselves, but I think it's fair to say that the concept that
20 Mesirow is going to gather the data and say to the committee,
21 here's the data that we believe is appropriate, and then that
22 data is going to be taken and analyzed and developed into a
23 strategy, which is what Houlihan's going to be doing. So on
24 its surface --

25 THE COURT: So the tea -- there won't be a team member

1 from Houlihan going back to the source, going back to the
2 debtor and asking the same questions?

3 MR. ROGOFF: No.

4 THE COURT: That's --

5 MR. ROGOFF: There will not be.

6 THE COURT: -- that's the bottom line.

7 MR. ROGOFF: That is the bottom line.

8 THE COURT: Okay.

9 MR. ROGOFF: There will not be. And in fact, Your
10 Honor, we have weekly calls amongst the committee's
11 professionals in this case. And the purpose of those weekly
12 calls is to make sure there is a status update as to who is
13 doing what, and to make sure that we are coordinated, so that
14 if Houlihan felt, for example, that it needed a piece of data
15 that Mesirow was obtaining, that Houlihan would pass that
16 request during our call on to Mesirow, Mesirow would obtain the
17 information, so that there is not a need for Houlihan to then
18 go back and say, well, we're going to have to independently
19 obtain this. So we tried to coordinate the specific tasks and
20 the work in progress so that there is no duplication.

21 And I think, with that example, Your Honor -- and I
22 note that the other areas that we've identified are distinctly
23 different in their tasks -- what we have tried to do is satisfy
24 the business judgment need of the committee members themselves
25 that they felt they would be benefited by discrete tasks being

1 performed by Mesirow. We have tried to identify what those
2 tasks would be -- by the way, also keeping in mind, that at
3 some point, with too much specificity, you're potentially
4 giving away privilege; you're potentially giving away the
5 committee's ability to react as it thinks is appropriate.

6 And so we've tried to identify what the projects are,
7 but we haven't gone and identified necessarily individual steps
8 necessary to implement that project, because those are things
9 which the committee believes should be subject to its oversight
10 in working with the professionals.

11 THE COURT: So the Houlihan fee is the standard --
12 I'll call standard monthly fee. And then there's a backend
13 fee, right?

14 MR. ROGOFF: Right. The Houlihan fee is a monthly
15 fee. It's actually not, we think, the standard fee, in the
16 sense that they -- we asked of them and they provided to us a
17 lower fee in this case, because they knew at the time that we
18 were going to be looking to engage Mesirow for limited
19 purposes. That decision was made at the same time by the
20 committee members.

21 So when we reached out to Houlihan, we specifically
22 said we'd like to engage you, but we'd also like to bring
23 Mesirow in for discrete projects; and as a result, we'd like to
24 reduce your proposed fee to us, which they agreed to do. So
25 their monthly fee in this case is 150,000 dollars. And we have

1 been told that were they to have been the only financial
2 advisor in this case, and therefore doing greater work, that
3 monthly fee might have been greater than the 150,000.

4 THE COURT: But then the deferred fee, there's no
5 credit against that for the monthly?

6 MR. ROGOFF: There's no credit against the deferred
7 fee. And that was because the deferred fee itself was also
8 discounted from the original proposal. And we felt that given
9 the time frame of what this case looks to be, obviously nobody
10 knows how long the duration of the case is going to go, but we
11 know that it's not a thirty-, sixty-, ninety-day case. And so
12 given the projected duration of the case, we thought that the
13 deferred fee sort of amortized over the anticipated term of the
14 Chapter 11 case itself, added to the monthly fee, was an
15 overall reasonable fee.

16 THE COURT: Okay. I'm going to keep asking you
17 questions, if you don't mind.

18 MR. ROGOFF: That's fine, Your Honor.

19 THE COURT: And in the Hou -- focusing on the Houlihan
20 fee arrangement. Those are the only two fees. There's no door
21 left slightly ajar for additional performance-based fees,
22 503(b)s or anything else extra?

23 MR. ROGOFF: That is correct, Your Honor. We were --
24 just as an aside, we were mindful of the discussion that the
25 Court had had with debtors' counsel when Blackstone was being

1 retained, on calling somebody an investment banker versus a
2 financial advisor. And we actually spent quite a bit of time
3 internally, and in discussions with Ms. Schwartz, over what
4 should we call our two professionals in this case.

5 And ultimately it was -- and we were trying to
6 anticipate a concern that Your Honor may have. And ultimately
7 what we had come up with as our guiding rule is two things.
8 One, the tasks should be identified --

9 THE COURT: But --

10 MR. ROGOFF: -- and the fees should be identified, so
11 that Your Honor knows -- because one of the concerns that the
12 Court had indicated at the prior hearing with Blackstone was,
13 if they're called an investment banker, I want to know that
14 there's no transaction fee.

15 THE COURT: Right.

16 MR. ROGOFF: And so we proactively put into the papers
17 that the fees in Houlihan's instance that they're getting,
18 that's it; those are their fees.

19 THE COURT: Okay.

20 MR. ROGOFF: They get the 150,000 a month; and they
21 get the deferred fee. And there's no transaction fees.

22 THE COURT: All right. I asked you a question about
23 ten minutes ago with respect to Houlihan not doing over what
24 Mesirov was doing. But I think I had it slightly backwards,
25 given the different nature of the fee structures. What I mean,

1 is the following. If Houlihan determines that a task should be
2 done by Mesirow, that costs the estate more money than
3 Houlihan, for its flat 150,000 dollar a month fee, sending a
4 junior person out to do that.

5 I don't want to be in a situation where I've set the
6 table for this actually to work so that the fees are larger
7 because Houlihan takes the position that in a normal case it
8 might send out a first-year analyst to collect data/crunch
9 numbers, but oh, look, we have Mesirow here, so let's send them
10 out, and Mesirow gets to charge upwards of 400 dollars an hour.

11 So I'm sorry for always looking for the black cloud,
12 but I don't want to inadvertently set up a situation where out
13 of all of our caution, we're ending up setting the table for
14 the expenses -- fees and expenses to be higher. I don't want
15 to hear that Houlihan's not doing stuff that it would normally
16 do, because we happen to have Mesirow available charging at an
17 hourly rate.

18 MR. ROGOFF: I appreciate that, Your Honor. And
19 ironically, we thought about that. And in fact --

20 THE COURT: Not ironically. I would hope and expect
21 that you would think --

22 MR. ROGOFF: Right.

23 THE COURT: -- about that, because your hourly rate is
24 much higher than mine.

25 MR. ROGOFF: We thought about that, Your Honor. And

1 in fact, the ultimate allocation here -- the initial
2 allocation, I should say, had greater services that were
3 identified for Mesirow. And as I had mentioned, the committee
4 very carefully vetted through what the proposed allocation was
5 to make sure that they were getting the services from the party
6 that they thought was efficient and also best able to help
7 gather that. And as a result of that process, a number of
8 projects that had originally -- based upon other dual
9 allocation models already approved in cases, we further cut
10 that back to remove things, based upon that precedent.
11 Meaning, the precedent was broader than we have in this case.

12 And our committee members went through and we cut it
13 back to identify those very specific and narrow projects that
14 we think Mesirow has value added to the overall analysis that
15 the committee needs. This is not an opportunity, Your Honor,
16 as we appreciate, for Houlihan to say, oh good, here's all
17 these things that we're supposed to do; we don't want to go do
18 it; let Mesirow go do it for us. That is not --

19 THE COURT: Okay.

20 MR. ROGOFF: -- what the committee itself --

21 THE COURT: Well, obviously on a month-to-month basis,
22 folks are going to have an opportunity to look at the
23 statements that Mesirow submits. And to the extent that there
24 are concerns, they can be raised.

25 Ms. Schwartz?

1 MS. SCHWARTZ: Thank you, Your Honor. I actually have
2 had a very lengthy discussion with the professionals from
3 Mesirow. And in fact --

4 THE COURT: I don't want anyone to infer that I am
5 mistrusting, distrusting any firm or individual. I'm merely
6 trying to make evenhanded observations to ensure that the
7 estate gets the top -- that the committee gets the highest
8 level of professional services, but at the lowest possible cost
9 to the estate.

10 MS. SCHWARTZ: I have no reason to believe, based on
11 my discussions with committee counsel or the professionals,
12 that that's some subvert thing there that's going on. And in
13 fact, as you know, our office is always focused on overlap,
14 duplication, et cetera.

15 So I had a lengthy conversation with the actual guys
16 on the ground that are going to be doing the work. And it
17 resulted in a revised, more discrete descriptions of the
18 services, which I commented on again last night. So I think
19 it's going to be narrowed a little bit in that regard.

20 But I think everybody's really focused on the fact
21 that there's no -- everybody's very highly sensitized to the
22 fact that we would not sign off on an application where there
23 was going to be duplication of services. And I think committee
24 counsel is working really hard to make it very clear that
25 that's not going to happen.

1 The example that Mr. Rogoff gave to you with respect
2 to the employee benefit and Houlihan's going to do -- I mean,
3 that was a very big question for me as well. But as you'll see
4 on the discrete services, you're not going to have Houlihan
5 coming in and strategizing on everything that Mesirow's doing.
6 Mesirow's not just going to be the data gatherer. There are
7 things that Mesirow's doing, and they're doing it. That's it.
8 So it's not going to be duplication.

9 THE COURT: Okay. All right.

10 MS. SCHWARTZ: But I'm reserving all my rights until
11 it's all done.

12 THE COURT: Okay.

13 MR. ROGOFF: So --

14 THE COURT: All right.

15 MR. ROGOFF: -- unless Your Honor has any more
16 particular questions, I don't have anything further --

17 THE COURT: Okay.

18 MR. ROGOFF: -- by way of an affirmative presentation.

19 THE COURT: All right. Does anyone else have anything
20 they'd like to add?

21 MR. HUEBNER: Your Honor, for the debtors, you know,
22 candidly, your dialog has matched, I think, the concerns that
23 we all share.

24 THE COURT: Okay.

25 MR. HUEBNER: There is a risk in those issues. And I

1 think that it sounds like people are very focused on it in good
2 faith. We will all be watching it as the collective --

3 THE COURT: Okay.

4 MR. HUEBNER: -- resources are at issue. And with
5 that, we don't really have anything further.

6 THE COURT: All right. So Ms. Schwartz, you're going
7 to complete your office's review. And then is the notion that
8 you would file final black-line versions on the docket, and
9 that I would look at those, or did you just --

10 MS. SCHWARTZ: Yes, I mean, like we said, we're not
11 looking to take up any more of the Court's time. It is my hope
12 that these will be resolved between our office and the
13 professionals and the committee counsel.

14 THE COURT: Okay.

15 MS. SCHWARTZ: I haven't had as in-depth of a review
16 yet of the Houlihan application.

17 THE COURT: Okay.

18 MS. SCHWARTZ: So I think, as far as the duplication
19 issue, we're very far down the road on that issue. But then,
20 of course, as Your Honor knows, there's always a lot of other
21 issues that are thrown into --

22 THE COURT: All right.

23 MS. SCHWARTZ: -- retention applications.

24 THE COURT: So then I'm just going to trust that
25 you're going to complete the process with all --

1 MR. ROGOFF: Right.

2 MS. SCHWARTZ: If we can't -- if we can't reach a
3 resolution on a discrete issue, we'll have to come back before
4 the Court.

5 THE COURT: Okay.

6 MS. SCHWARTZ: But I think we're both hopeful --

7 MR. ROGOFF: Right.

8 MS. SCHWARTZ: -- that we'll be able to do that in
9 short order.

10 THE COURT: All right. So --

11 MR. ROGOFF: But on process, Your Honor, just to
12 answer the question which I think was a fair one, is yes, we
13 would propose that ultimately, we're either going to reach an
14 agreement on one or both of the orders that remain -- the form
15 of the order as well as the substance. And if so we would file
16 a black-line and a clean copy.

17 THE COURT: Okay.

18 MR. ROGOFF: We would hope not to have to come back to
19 the Court with respect to that. And Your Honor could review
20 them; and if she had no questions, we hope would enter the
21 orders.

22 THE COURT: Okay.

23 MR. ROGOFF: And of course, if Your Honor has
24 questions, we'll always address those. And then in the event
25 that there is a disagreement that remains on any portion of one

1 or both of the orders, we would come back before Your Honor.
2 What we would ask is we know that the next scheduled omnibus
3 hearing date in this case, I believe, is November 1st. And I
4 don't know if we're able to agree to disagree -- hopefully not
5 the case -- but if we were able to agree to disagree with the
6 Trustee's office in advance of that, if there was any interim
7 hearing date that Your Honor has between now and November 1st,
8 since that's another three weeks away --

9 MS. SCHWARTZ: Oh, I --

10 THE COURT: Well, why don't we do this?

11 MR. ROGOFF: -- but that it's a scheduling --

12 THE COURT: I have a very busy travel schedule
13 starting this Sunday. So why don't we just, for the moment,
14 assume that you'll agree. And if you ultimately can't agree,
15 call chambers and we'll fit you in somewhere.

16 MR. ROGOFF: Excellent.

17 THE COURT: All right?

18 MR. ROGOFF: Thank you, Your Honor. I appreciate the
19 time.

20 THE COURT: Okay. Thank you.

21 Okay, Mr. Huebner, back to you?

22 MR. HUEBNER: Yes, Your Honor, although really only
23 for a nanosecond.

24 THE COURT: Okay.

25 MR. HUEBNER: Your Honor, there's only one contested

1 matter on the agenda so far.

2 THE COURT: Two. Right? Two. We have the two
3 motions for relief from stay in the Willits, Parrott and
4 Petrie?

5 MR. HUEBNER: Yes, I'm sorry. I apologize.

6 THE COURT: Right? Okay.

7 MR. HUEBNER: There are two matters. And what I'd
8 like to do is actually just turn the podium over to
9 Mr. Resnick --

10 THE COURT: Okay.

11 MR. HUEBNER: -- to handle that part of the agenda.

12 THE COURT: All right. Thank you.

13 MR. HUEBNER: Your Honor, what I'd like to do if it is
14 okay with Court -- if not we'll proceed in the order
15 presented -- the environmental issue is really very important
16 to us, because another judge is waiting on the results of it.

17 THE COURT: Sure.

18 MR. HUEBNER: We'd like to do that one first, which is
19 number b(2).

20 THE COURT: Right.

21 MR. HUEBNER: And then have Mr. Martin come up to
22 handle b(1), when the environmental issue is --

23 THE COURT: Okay. That's fine.

24 MR. HUEBNER: -- completed to the Court's
25 satisfaction. So now I'll turn it over to Mr. Resnick.

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1 THE COURT: All right. So let's turn to the debtors'
2 motion for entry of an order authorizing limited relief from
3 the automatic stay. And that relates to the pending matter in
4 the District of West Virginia.

5 MR. MARTIN: That's correct, Your Honor. For the
6 record, it's Brian Resnick of Davis Polk & Wardwell, on behalf
7 of the movant-debtors. Let me just start by saying that the
8 movant-debtors are actually three particular subsidiaries --

9 THE COURT: Right.

10 MR. MARTIN: -- Hobet, Apogee, and Catenary, and
11 Patriot Coal Corporation, as named in the consent decree.

12 So, Your Honor, also with me is Robert McLusky of
13 Jackson Kelly, who is counsel to the movant-debtors in the
14 underlying environmental proceedings, in case Your Honor has
15 any questions that might be more appropriately answered by Mr.
16 McLusky.

17 THE COURT: Okay. And who do -- who else is here?
18 Come on up.

19 MR. WEBSTER: Your Honor, I'm here on behalf of the
20 environmental plaintiffs. I'm Richard Webster from Public
21 Justice in Washington D.C.

22 THE COURT: Okay. All right. I've read the papers.
23 Anything you want to tell me that's not in the papers?

24 MR. RESNICK: Well --

25 THE COURT: Let me restate that. Go ahead and make

1 your presentation, Mr. Resnick.

2 MR. RESNICK: Okay. Thank you, Your Honor. So, as
3 you know because Your Honor read the papers, we are here
4 seeking limited relief from the automatic stay so that the
5 movant-debtors can proceed before Judge Chambers in West
6 Virginia and seek to ask Judge Chambers to modify orders than
7 he has entered and modify compliance deadlines that he has set
8 forth in his orders in an effort to give the debtors a
9 breathing spell from complying with those orders.

10 Obtaining that relief would allow the debtors to defer
11 approximately twenty-nine million dollars through the end of
12 2013 which would allow the debtors to focus more on its
13 reorganization and preserving liquidity, and hopefully allow
14 the debtors to emerge and be able to satisfy all of its
15 environmental obligations going forward, and may have the added
16 benefit of allowing technologies to mature and develop so that
17 there would be more cost-effective ways to address the selenium
18 remediation issues.

19 As Your Honor knows, there currently is no effective
20 technology that can remediate all of the selenium issues at the
21 various movant-debtor mines. And the technology is still
22 evolving and developing. And the movant-debtors have been
23 actually at the forefront in the last two years in developing
24 these technologies. And having this breathing spell would
25 actually be very helpful.

1 Our motion is --

2 THE COURT: That's all, though, in the nature of
3 arguments that --

4 MR. RESNICK: Correct.

5 THE COURT: -- you would propose to present to Judge
6 Chambers as to why it is he should modify --

7 MR. RESNICK: Absolutely.

8 THE COURT: -- the deadlines that are currently in
9 place.

10 MR. RESNICK: Absolutely.

11 THE COURT: Right? So, first of all, it's the
12 debtors' belief that you need relief from the stay in order to
13 pursue the relief from Judge Chambers?

14 MR. RESNICK: That's not entirely clear, Your Honor,
15 and that's why we say in the order that to the extent the
16 automatic stay is applicable, we'd like relief from the
17 automatic stay. I think technically 362(a)(1) stays any act to
18 continue a proceeding against the debtors. These underlying
19 proceedings were matters that were commenced by the --

20 THE COURT: Okay.

21 MR. RESNICK: -- plaintiffs against the debtors.

22 THE COURT: And you're not suggesting that you would
23 be able to brief the issues before Judge Chambers and other
24 parties would not --

25 MR. RESNICK: That's absolutely correct.

1 THE COURT: -- be able to brief the issues.

2 MR. RESNICK: Absolutely right. The plaintiffs will
3 have a full and fair opportunity to raise whatever issues they
4 want to raise in opposition to our motion to modify. They'll
5 be able to be heard before Judge Chambers on that.

6 THE COURT: So in that sense, stay relief would be
7 required in order to make it clear that those parties have
8 clear ability to respond to anything that the debtor has to
9 say.

10 MR. RESNICK: That might be right, Your Honor, and to
11 permit Judge Chambers to actually enter an order amending his
12 existing orders.

13 THE COURT: Okay. All right. Anything else?

14 MR. RESNICK: Would you like me to respond to the
15 plain --

16 THE COURT: Why don't we hear from Mr. Webster?

17 MR. RESNICK: Sure.

18 THE COURT: And then to the extent that he raises
19 points that warrant a response, we'll have you back up.

20 MR. RESNICK: Okay.

21 THE COURT: All right? Thank you.

22 MR. WEBSTER: Thank you, Your Honor. It's a pleasure
23 to be here this morning. I am Richard Webster on behalf of the
24 environmental plaintiffs in this case.

25 First of all, I'd like to say that we're perhaps

1 slightly unusually situated, because we're not seeking money
2 from this debtor. We are seeking to ensure that the streams of
3 West Virginia achieve the standards set by the federal
4 government and that the debtor complies with the Clean Water
5 Act.

6 THE COURT: Of course. But everybody -- everybody's
7 on the same page. And I would imagine Judge Chambers, in
8 particular, is on that page, because it's his order that is at
9 issue.

10 MR. WEBSTER: Absolutely, Your Honor. And that's
11 exactly why we're here, because there's been a lot of confusion
12 in West Virginia about the effect here of the automatic stay.
13 Initially, the debtors moved forward without any reference to
14 the automatic stay. Questions came up about the automatic
15 stay. And now I think that there's a lot of confusion about
16 the extent to which the automatic stay applies to the
17 proceeding in West Virginia and the extent to which Judge
18 Chambers can hear motions with regard to the enforcement of his
19 orders.

20 And what we'd like to do today is to clarify that
21 ambiguity. The easiest way to clarify the ambiguity is for
22 Your Honor to either make clear that the automatic stay does
23 not apply --

24 THE COURT: Mr. Webster, there's a motion that was
25 filed by the debtors that asks for very narrow and specific

1 relief, and I am only going to address that request. I don't
2 view my job as giving me -- as it being appropriate for me to
3 give my views generally on issues that are not before me. So
4 you make reference to general confusion as to the applicability
5 of the automatic stay. I don't know what that might be. I
6 have a specific request that's been sent up here -- that has
7 come up here, rather, and I would observe that the debtors are
8 taking great pains to do things the right way procedurally even
9 though, frankly, I don't know that they needed to. But to make
10 clear, really, on behalf of your group vis-a-vis what they can
11 do in West Virginia and not run afoul of the automatic stay, I
12 think that they've proceeded well. I mean, they --
13 alternatively, they could have taken a shortcut and simply said
14 we're in bankruptcy now, everything's on hold. We're going to
15 wait to see what happens. And then there would have been a
16 different dialog up here.

17 So I'm happy to let you clarify or give your views.
18 But I just wanted to make clear that I have a very narrow issue
19 before me and I'm going to resolve that issue and no more.

20 MR. WEBSTER: Understood. Thank you, Your Honor.

21 THE COURT: Okay?

22 MR. WEBSTER: So let me get more specific then. With
23 regard to the form of the stay order, there are two questions
24 that we have. One is that it references the irrevocable letter
25 of credit. And we think that that reference really just adds

1 confusion. It's --

2 THE COURT: Point me to exactly what you mean, okay?

3 MR. WEBSTER: Okay. So this is in, I think, paragraph
4 3 of the proposed order -- page 3 of the proposed order.

5 THE COURT: Okay. If you would give me a moment to
6 get there.

7 The third decretal paragraph? At the top of page 3.

8 MR. WEBSTER: Top of page 3, exactly.

9 THE COURT: Okay. So let me take a moment to look at
10 that.

11 THE COURT: Okay.

12 MR. WEBSTER: So we believe it's quite clear that the
13 automatic stay does not apply to the irrevocable letter of
14 credit. Therefore, this paragraph just serves to confuse the
15 issue and add ambiguity where none need occur.

16 THE COURT: But it says that to the extent that it
17 otherwise applies. So it's not expanding anything.

18 MR. WEBSTER: No. It just leaves an ambiguity behind
19 that we believe need not be there. There's no reason to
20 reference the irrevocable letter of credit in this order.

21 THE COURT: Well, let's take these one at a time. The
22 debtors would be comfortable with removing this decretal
23 paragraph from the order?

24 MR. RESNICK: Your Honor, we think this paragraph is
25 just, as you said, it just says to the extent it otherwise

1 applies. And we want to make it very clear that this order
2 does not affect the L/C if the stay does not apply.

3 THE COURT: So let's drill down on it. So to the
4 extent that the stay doesn't apply, they can draw down on it.
5 To the extent that the stay does apply, they can't draw down on
6 it.

7 MR. RESNICK: Correct.

8 THE COURT: Right? I mean, do folks have a view as to
9 whether or not the stay precludes a draw on the letter of
10 credit?

11 MR. RESNICK: You know, this L/C does require a
12 condition precedent to be satisfied --

13 THE COURT: Okay.

14 MR. RESNICK: -- before the draw. And so, I think
15 that adds complexity to the issue. And I don't think the issue
16 is up for determination today.

17 THE COURT: Well, we could attempt to have it both
18 ways, that you could simply say that nothing in this order
19 affects in any way the parties' respective rights and
20 obligations with respect to the letter of credit. You could
21 just --

22 MR. RESNICK: Fine.

23 THE COURT: -- make clear that the entry of the order
24 doesn't affect the letter of credit in any way without
25 reference to the automatic stay. How about that? Can you

1 draft some language around that point?

2 MR. RESNICK: That's fine.

3 THE COURT: Mr. Webster, does that address your
4 concern?

5 MR. WEBSTER: That addresses one of our --

6 THE COURT: Okay.

7 MR. WEBSTER: -- concerns, Your Honor.

8 THE COURT: Come on back up.

9 MR. WEBSTER: Thank you. Thank you very much, Your
10 Honor. The other issue is with regard to enforcement of any
11 modification that the debtor would obtain through the motions
12 that are presented. There's an implication in the briefing
13 that the judge would not have full powers to enforce any relief
14 that he grants. And again, we believe that that should be
15 clarified that nothing in this order should affect the ability
16 of Judge Chambers to enforce his own orders.

17 THE COURT: I would be incredibly presumptuous to
18 suggest that other than by operation of the existence of this
19 case that I have the ability or the right to tell Judge
20 Chambers to what extent his orders are enforceable. So let's
21 drill down to make sure I understand what you're saying.

22 If this relief is granted and the briefing on the
23 motion to modify is completed and Judge Chambers modifies the
24 underlying obligations in the way that the debtors request or
25 some other way, that order stands and is enforceable. If the

1 debtors don't prevail before Judge Chambers, they have
2 indicated in their pleadings that they're reserving their
3 rights to seek other relief from the bankruptcy court
4 consistent with the Bankruptcy Code.

5 MR. WEBSTER: Well, right. As long as it's clear,
6 Your Honor, that nothing in this order will affect Judge
7 Chambers' ability to enforce his existing orders and subsequent
8 orders --

9 THE COURT: Well, but I'm --

10 MR. WEBSTER: -- then we're happy with that.

11 THE COURT: -- struggling on what you're saying. If
12 the debtors do not get the relief from Judge Chambers that they
13 are seeking, I don't think the debtors are waiving -- and I'm
14 looking at Mr. Resnick -- I don't think the debtors are waiving
15 whatever relief they may think that they can seek from the
16 bankruptcy court. So that, in that sense, it's not clear that
17 Judge Chambers would have the last word. So I just want to
18 understand --

19 MR. WEBSTER: Yeah. So what we're concerned about --
20 and I think page 5 of the debtors' briefing really raises the
21 concern which it says, "The motion would allow the
22 Debtor/Movants to seek modification compliance deadlines and
23 allow the West Virginia Court to determine whether to modify
24 and to order modification of such deadline." So the --

25 THE COURT: Right.

1 MR. WEBSTER: -- implication is that the West Virginia
2 court would have no more power than merely ordering
3 modification of such deadlines whereas we believe that, as it
4 stands, the West Virginia court has the power to both modify
5 the deadlines and to enforce those deadlines.

6 THE COURT: Well, I think that -- if you're suggesting
7 that the debtors are going to go to Judge Chambers and seek to
8 modify the deadlines, prevail there and have Judge Chambers
9 modify the deadlines and then say, never mind, we're going to
10 now go to the bankruptcy court and seek to not have to perform
11 under those new deadlines, I don't think that that's -- if
12 that's what the debtors intend, they ought to tell me. But I
13 don't think that that's what they intend. I think the opposite
14 scenario where if they're saying that if Judge Chambers
15 declines to modify, then they're saying that they're reserving
16 their rights to seek relief here from those deadlines.

17 MR. WEBSTER: Well, as long as it's clear they're not
18 seeking such relief now, and I think the indication is that
19 they may be trying to jump the gun on this.

20 THE COURT: Can you help me out, Mr. Huebner?

21 MR. HUEBNER: Your Honor, let me help further, if I
22 may, and be very clear. The relief that we sought is actually
23 quite narrow. And I don't actually think it's confusing at
24 all. We want to go have a briefing before Judge Chambers which
25 he asked for to seek relief.

1 THE COURT: Right.

2 MR. HUEBNER: If our relief is granted and he gives
3 the extensions that we ask for --

4 THE COURT: You're done.

5 MR. HUEBNER: -- that's the new deal and we're done.

6 THE COURT: Right.

7 MR. HUEBNER: There's nothing in the proposed order,
8 which is where one looks when one has a problem with something
9 that the other party is seeking, that could remotely support
10 this inference that we're sneakily seeking to have a
11 declaration that Judge Chambers has been emasculated. It's not
12 there; it's not true. In fact, the provision he read from the
13 motion, I think, reads perfectly well. We are seeking -- our
14 relief today so that both sides can fully brief an issue --

15 THE COURT: This relief is --

16 MR. HUEBNER: -- about extension before Judge
17 Chambers.

18 THE COURT: -- incredibly narrow. It's to allow the
19 debtors to complete a briefing schedule. That's it.

20 MR. HUEBNER: And the other side.

21 THE COURT: And the other side.

22 MR. HUEBNER: And that's why we wanted it clear so
23 that they wouldn't say maybe we're not allowed to respond
24 because we're bound by the stay even if they're not.

25 THE COURT: Right. And as --

1 MR. HUEBNER: What's fair is fair.

2 THE COURT: -- silly as that sounds, I have had
3 situations where people seek that relief, where they can file a
4 brief but they're not going to let the other side file a brief.

5 MR. HUEBNER: Right. And, of course, the double irony
6 here is that when we were working together, when we thought we
7 had an agreed deal on extensions, we went together to Judge
8 Chambers twice and said, here we are, please extend. Then when
9 the deal stalled -- and maybe they'll still come back but for
10 now it's stalled -- then we said, okay, well then we need to
11 ask for the relief. All of a sudden they came in and said, no,
12 no, no. Now you need stay relief. So we did what they asked.
13 So here we are.

14 THE COURT: Right.

15 MR. HUEBNER: It's very narrow and it's very
16 straightforward.

17 THE COURT: I mean, there is a bit of an irony here in
18 that instead of coming here first, the debtors are seeking to
19 have this resolved locally by the judge presiding over the
20 environmental case which is as it ought to be. So I believe
21 that your opportunity to address your substantive issues
22 regarding the need to continue to have the debtors perform are
23 going to be heard loud and clear by Judge Chambers. But I'm
24 performing a clerical function here today to simply state that,
25 yes, both sides have relief from the automatic stay in order to

1 go complete the briefing and have a resolution of this issue,
2 in the first instance, by Judge Chambers.

3 MR. HUEBNER: And, Your Honor, just one more point
4 because -- the respect that we're evincing for Judge Chambers
5 was also there in the letter of credit paragraph. And I don't
6 want Judge Chambers or the record to show that differently.
7 The way we drafted it originally --

8 THE COURT: I --

9 MR. HUEBNER: -- we think very clearly said --

10 THE COURT: I agree.

11 MR. HUEBNER: -- this is without prejudice. Mr.
12 Webster can --

13 THE COURT: I completely agree. But there's --

14 MR. HUEBNER: But we're happy to --

15 THE COURT: -- more than one --

16 MR. HUEBNER: -- redraft.

17 THE COURT: -- right way to draft language. And if
18 for whatever reasons counsel's more comfortable with a
19 different formulation --

20 MR. HUEBNER: Exactly.

21 THE COURT: -- let's do a different formulation.

22 MR. HUEBNER: And we're delighted to do that. I just
23 didn't want the record to be left with somebody reading it and
24 saying --

25 THE COURT: No.

1 MR. HUEBNER: -- maybe they were trying.

2 Absolutely --

3 THE COURT: Absolutely not.

4 MR. HUEBNER: -- not. We thought it was very clear
5 the first time.

6 THE COURT: Okay.

7 MR. HUEBNER: We're delighted to do it his way --

8 THE COURT: Okay.

9 MR. HUEBNER: -- or the Court's way, actually.

10 THE COURT: So --

11 MR. WEBSTER: Judge, perhaps I could just say that --

12 THE COURT: Sure.

13 MR. WEBSTER: -- we may be here out of an
14 overabundance of caution. But we would rather have an
15 overabundance of caution than --

16 THE COURT: That's fine.

17 MR. HUEBNER: -- a lack of caution.

18 THE COURT: You're always welcome. But to the extent
19 that your papers suggested that you were also seeking a much
20 broader relief from the stay, I assume that we're going to put
21 that off to the side.

22 MR. WEBSTER: Yes. Let's put it off to the side.
23 With the modification that I think you've requested, we'll just
24 work with counsel to get an agreed --

25 THE COURT: Okay.

1 MR. WEBSTER: -- form of order.

2 THE COURT: All right.

3 MR. WEBSTER: And then we'll come back at a later
4 date, if necessary.

5 THE COURT: But we have a timing issue so that I'm
6 going to so order the record right now so that you're free to
7 start your work. And then you can give me your draft whenever
8 you're both signed off on it.

9 MR. HUEBNER: Your Honor --

10 THE COURT: All right. Mr. Rogoff?

11 MR. ROGOFF: Yeah. Just, Your Honor --

12 THE COURT: You get to be in the loop if that's your
13 concern.

14 MR. ROGOFF: Yes. First, it is my concern. I
15 appreciate it. And also, I just wanted to state on behalf of
16 the committee, we appreciate that this is very narrow relief
17 that has been presented today before Your Honor. We've heard
18 the plaintiffs indicate an attempt to make it perhaps broader
19 relief both in their papers and even in today's oral argument.
20 It is narrow relief. We appreciate that the Court appreciates
21 that. I'm not going to get into the technicalities as to
22 whether it's the debtors' obligation to seek further relief if
23 Judge Chambers does not grant --

24 THE COURT: Well --

25 MR. ROGOFF: -- the extensions. Those are issues

1 we'll deal with if, as, and when that happens.

2 THE COURT: Exactly. And just to be clear, to the
3 extent that the papers filed by Mr. Webster can be viewed or
4 were viewed or argued to constitute a cross-motion, I want to
5 be clear that I'm not viewing them as a cross-motion. If you
6 want additional stay relief, you need to ask for it by an
7 appropriate motion.

8 MR. WEBSTER: Understood, Your Honor.

9 THE COURT: All right. So the order that gets entered
10 with respect to the debtors' motion will fully resolve this
11 matter. I didn't want to leave the impression that there was
12 something lingering out there.

13 Mr. Silverstein?

14 MR. SILVERSTEIN: Thank you, Your Honor. Very
15 briefly. Paul Silverstein, Andrews Kurth, for Wilmington Trust
16 as indenture trustee. Obviously, it's very, very narrow
17 relief. We filed a short response at docket 945 just to
18 highlight and amplify the point that there are three debtors
19 that are implicated in this --

20 THE COURT: Right.

21 MR. SILVERSTEIN: -- the selenium debtors, and that's
22 it. And we wanted to --

23 THE COURT: Okay.

24 MR. SILVERSTEIN: -- make it clear for future issues
25 that may come up on it. Thank you.

1 THE COURT: Okay. Thank you.

2 MR. HUEBNER: Your Honor, we very much appreciate, so
3 there's clarity for Judge Chambers so ordering the record.
4 What we would like to do, actually, if Mr. Webster will
5 accommodate, since we have only one paragraph to redraft, we'll
6 stay here as long as it takes -

7 THE COURT: Sure.

8 MR. HUEBNER: -- to work on the paragraph and then
9 hopefully we can just submit the order and have a physical
10 piece of paper --

11 THE COURT: Of course.

12 MR. HUEBNER: -- for tomorrow's hearing with Judge
13 Chambers.

14 THE COURT: Of course. Okay?

15 MR. WEBSTER: We're very happy to do it. Thank you,
16 Your Honor.

17 THE COURT: All right. Thank you very much.

18 Okay. So then we are up to the Willits, Parrott, and
19 Petrie motion for relief from stay.

20 MR. FLAXER: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. FLAXER: For the record, Jonathan Flaxer of
23 Golenbock Eiseman Assor Bell & Peskoe on behalf of the movants.
24 And, Your Honor, I have with me today Robert -- Robert Harken
25 of the George Barton firm --

1 MR. HARKEN: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. FLAXER: -- from Kansas City. Your Honor, there
4 are issues -- underlying issues that we don't necessarily think
5 are germane, but to the extent Your Honor has questions about
6 the underlying issues in the litigations in Kentucky and in
7 Missouri, I've asked Mr. Harken to come rather than have me --

8 THE COURT: Okay.

9 MR. FLAXER: -- spend a lot of time trying to parse
10 through them. I know sometimes the Court would prefer that
11 only one lawyer argue, but there may be a few questions that
12 Your Honor may have that I would ask Your Honor to permit Mr.
13 Harken to speak.

14 THE COURT: Okay. Well, I'm glad you did that,
15 because it may be that my very first question could best be
16 addressed by Mr. Harken.

17 If you were to prevail in the current underlying
18 proceeding, that does not, without more, give rise to a claim
19 against any of the debtors. Does it?

20 MR. HARKEN: If we prevail, it would be sent back to
21 the trial court to address our Constitutional claims against
22 the State of Missouri.

23 THE COURT: Right.

24 MR. HARKEN: And then if we win that claim,
25 essentially that would vacate the 2010 judgment and reopen --

1 for lack of a better term -- the case against the debtors.

2 THE COURT: So you've got a number of steps to go --

3 MR. HARKEN: Yes.

4 THE COURT: -- before you have a claim that you could
5 even assert against the debtors. Correct?

6 MR. HARKEN: Yes.

7 THE COURT: You just said yes.

8 MR. HARKEN: Yes. Yes, that's correct.

9 THE COURT: Yes. Okay.

10 MR. HARKEN: I want to clar --

11 THE COURT: That being said, the simple solution to
12 your problem is to drop the debtors from your current
13 proceeding, and you can then file a claim in this court, a
14 contingent claim or whatever claim you like before the bar date
15 and if, as, and when you get the relief and you accomplish the
16 other steps that you need to accomplish for there to be any
17 prospect of a claim against the debtors, you can pursue it
18 then.

19 MR. HARKEN: We looked at that possibility. The
20 problem we have with that is there's a statute, the declaratory
21 action in Missouri requires any party that's affected by the
22 judgment to be included, and there's case law that says if
23 there's a third party that's affected by a judgment and it can
24 affect their rights and obligation by that judgment, they need
25 to be included otherwise our declaratory act can be voided.

1 The judgment can be nullified. And we include that in our
2 reply. One of the case cites that --

3 THE COURT: If the party agrees that it won't assert
4 the failure to name them as a basis for avoiding the judgment,
5 then how could -- how could that possibly be the case?

6 MR. HARKEN: Well, we can certainly explore that and
7 we haven't had that agreement set yet.

8 THE COURT: They don't want to keep you from going
9 ahead, but the debtors under Sonnax should not be obligated to
10 have to spend anything in order to participate in a proceeding
11 in which they have a doubly contingent, highly contingent
12 interest, merely because there's a statute on the books that
13 arguably could be read that way. That's just not the way
14 things should work.

15 MR. HARKEN: Well, I understand that. I understand
16 that the debtors themselves may agree to that, but we also have
17 the issue with the other named defendants; can they raise that
18 same issue. And it puts us in a situation where we're
19 prejudiced where a defendant who is not a debtor and still in
20 the litigation raises that defense saying well, if you don't
21 bring in these debtors then you can't seek relief because we
22 don't have all the parties who are affected by the declaratory
23 judgment in the case. So it goes beyond just these five
24 debtors saying oh, we have no problem, we won't raise this
25 issue down the road. We still have --

1 THE COURT: Then you can go one step further and waive
2 your claims against the debtors. Just go against Peabody.
3 People make litigation decisions all the time.

4 MR. HARKEN: Well, I understand that.

5 THE COURT: Just because there's an identifiable
6 defendant there doesn't mean that you forever have to maintain
7 a right to bring an action against them.

8 MR. FLAXER: All excellent points and I'm --

9 THE COURT: I always love it when lawyers tell me that
10 I make excellent points.

11 MR. FLAXER: What else am I going to say? But I think
12 you've got to the heart of the matter because we gave this a
13 lot of thought, and Mr. Harken points out what the practical
14 problem is that we face. I don't think it's fair at this point
15 yet to ask us to release a culpable party. I think there may
16 be a way forward that works for everybody.

17 The Missouri statute does create an issue. One
18 possibility would be that if the debtors are willing to agree
19 to what Your Honor is alluding to, then we could put this off
20 for a period of time. There's briefing coming up before the
21 Missouri Appeals Court, which we mentioned in our papers, about
22 what the way forward is with this appeal in light of the
23 Chapter 11 case and the automatic stay. So I think what we
24 could try to do is if the debtors are willing to agree that we
25 will drop them as parties for now and it's without prejudice --

1 otherwise without prejudice -- and then armed with that if Mr.
2 Harken can go to the Missouri Appeals Court and say we've
3 gotten this far in the bankruptcy case, let us proceed without
4 the debtors as long as you're -- as long as the Missouri
5 Appeals Court rules or the other defendants agree that they
6 will not argue that the lack of presence of the debtors -- they
7 won't raise that issue that --

8 THE COURT: As a procedural defect?

9 MR. FLAXER: Yes, it's a little bit of a --

10 THE COURT: I do need to -- I do need to go back to
11 what you said, though, that you said releasing a culpable
12 party. Right. The debtors are not a culpable party as of this
13 moment. They are a party against whom you want to make
14 allegations. That's it. They're not a culpable party. And
15 even if they were a culpable party, as of this moment, my
16 observation sticks.

17 Folks make litigation -- strategic litigation
18 decisions all the time. And this is -- you're facing a
19 strategic litigation decision. So I'm not trying to strong-arm
20 you into letting off a "culpable party." I'm trying to balance
21 as I'm required to do under Sonnax. So if you're -- it sounds
22 like you're agreeing with what I said at the beginning which is
23 let them out. The bar date's going to apply to any claims.

24 MR. FLAXER: Absolutely.

25 THE COURT: And we're going to move on, but I need to

1 hear from the debtors as to whether or not they see any demons
2 here that I don't.

3 MR. FLAXER: Right. If I may --

4 THE COURT: Yes.

5 MR. FLAXER: -- just -- and I know --

6 THE COURT: Sure.

7 MR. FLAXER: -- I already said this but I think
8 sometimes things have to be done one bite at a time.

9 THE COURT: Um-hum.

10 MR. FLAXER: If we can -- if the debtors are
11 agreeable, the next step would be for Mr. Harken to try to work
12 it through the Missouri -- there is briefing coming up the end
13 of this month -- if the next step can be taken which is that
14 the other defendants don't have a problem with the notion of
15 proceeding without the debtors, which I think they should, I
16 can't imagine why they wouldn't, or the Missouri court could
17 simply rule that this is the way we're going to go consistent
18 with what's already been accomplished in the bankruptcy court,
19 then I think we can get past this stage.

20 THE COURT: I mean there are no -- there's, it strikes
21 me as zero risk that there would be any facts adjudicated that
22 would have --

23 MR. FLAXER: Right.

24 THE COURT: -- any sort of a res judicata, collateral
25 estoppel, issue preclusive, any kind of a collateral effect on

1 the debtors were they to be dismissed, right?

2 MR. FLAXER: It's an appeal.

3 THE COURT: It's an appeal.

4 MR. FLAXER: Right. So -- and we in trying to --

5 THE COURT: So it's not -- just to really beat the
6 dead horse -- it's not as if at a trial court level you're
7 saying go ahead and do a litigation without someone who is
8 identifiable as a necessary party.

9 MR. FLAXER: Exactly.

10 THE COURT: They have had the opportunity to appear
11 and, therefore, they're then precluded because they elected not
12 to appear.

13 MR. FLAXER: Exactly.

14 THE COURT: That's not what we have here.

15 MR. FLAXER: You're right.

16 THE COURT: Right.

17 MR. FLAXER: And because of the fluid nature of the
18 timing of what goes forth in this court and what goes forth in
19 the Missouri courts -- and I can be more specific about that --
20 we limited the relief we sought to only proceeding with this
21 appeal and, if necessary, one more appeal to the Missouri
22 Supreme Court. We didn't ask for any relief beyond that
23 because: a) once you get beyond that, now you are going back
24 to a trial court; and b) we don't know how long the various
25 events are going to take in this case.

1 For example, by the time the appellate process is
2 done, the debtor may or may not be at the plan stage. If they
3 are, then we may have an estimation hearing here. We may have
4 to because there may be no other choice. But at least Your
5 Honor will know -- will be armed with the knowledge of how the
6 appeals courts have ruled on the issues that are now before
7 those courts. More information is always better than less.

8 So I think what's evolving here may make sense and I'd
9 be happy to hear from the debtors.

10 THE COURT: Okay. Thank you. What I don't want to
11 happen is that in order to implement this fix that then the
12 debtor is forced to nonetheless expend substantial lawyer time.
13 That would be not achieving the goal.

14 MR. FLAXER: We have thoughts on that but why don't we
15 take one step at a time.

16 THE COURT: Okay. Go ahead.

17 MR. MARTIN: Good morning, Your Honor. Jonathan
18 Martin from Davis Polk & Wardwell for the debtors.

19 Your Honor raised two possibilities for how to address
20 this. The second one that you raised is the one that we
21 presented in our papers which is that they can just drop us.
22 They are litigants. They can make any decisions they want to
23 make --

24 THE COURT: Right.

25 MR. MARTIN: -- about how to proceed with their claim.

1 The one that got tossed back and forth between Your
2 Honor and Mr. Flaxer was they don't proceed against us and yet
3 we get bound by the results of the appeal in any event. And I
4 don't think that works for the debtors, because we'd be bound
5 by a proceeding in which we are not participating. I frankly
6 don't see how that works and how it could be effectuated --

7 THE COURT: But it doesn't adjudicate any of your
8 rights. It determines whether or not they have a claim against
9 the State of Missouri, period. Right?

10 MR. MARTIN: Well, Your Honor, they want to litigate
11 as well the fact that the relief that they request, vacating
12 the underlying judgments --

13 THE COURT: Right.

14 MR. MARTIN: -- is part of their claim against the
15 State of Missouri. We don't see any legal basis for that but
16 we'd want to participate in any litigation over that issue.
17 And we shouldn't have to because we're in bankruptcy.

18 THE COURT: So that's the difference between just
19 dropping you from the appeal and dropping the claims that
20 implicate the debtors' property?

21 MR. MARTIN: Yes, Your Honor.

22 THE COURT: Do you hear that? You hear the
23 distinction, Mr. Flaxer?

24 MR. FLAXER: I think so but I want to make sure just
25 everybody's on the same page and what it is that we're seeking

1 and what we're saying and nothing.

2 What's before the appellate court now is our appeal of
3 the motion to dismiss that was granted by the trial court. And
4 the motion to dismiss involves the Missouri trial court ruled
5 on judicial immunity, period. They didn't even address the
6 motion to dismiss that was based on res judicata. That wasn't
7 even addressed.

8 So the only thing that's before the appeals court now
9 is our appeal of the judicial immunity ruling on a motion to
10 dismiss. That's it.

11 THE COURT: So what --

12 MR. FLAXER: They never get to whether or not our
13 claim gets, in a sense, reinstated.

14 THE COURT: So then, if you --

15 MR. FLAXER: Until you go back to the trial court --

16 THE COURT: -- if you only -- if the relief here is
17 limited to --

18 MR. MARTIN: Your Honor, if I --

19 THE COURT: -- that narrow piece and not the
20 subsequent appeal, right, then that addresses your concern.
21 Doesn't it?

22 MR. MARTIN: Well, it doesn't, Your Honor, because I'm
23 not sure -- I mean this litigation is quirky to say the least.

24 THE COURT: To say the least.

25 MR. MARTIN: And I don't know what path this

1 litigation is going to take once we get off the train. And --
2 but I'll point out that if the relief is that limited, the
3 statute shouldn't be a problem.

4 THE COURT: I agree with you, but that's I thought we
5 were -- so to loop back, that's what I thought we were doing
6 because of the narrow nature of the issue and because it will
7 require another step after that to even begin to implicate the
8 debtors' property that, therefore, you can leave and not be in
9 the current appeal nor should you be, and none of your rights,
10 none of the debtors' rights are implicated because all it does
11 is deal with the question of judicial immunity. That's it. It
12 doesn't create a presumption that there's going to be a vacatur
13 of a prior order. It's just a narrow legal question and --
14 that has nothing to do with you. It's a if they lose they're
15 done; if they win they have to come back and ask for further
16 relief from the stay in order to keep going with you. And once
17 again, there would be a determination as to whether or not
18 either a structure works dismissing you out or they're
19 otherwise entitled to stay relief under Sonnax. But for the
20 first cut, it sounds like you can be cut loose from the
21 litigation, and there's zero possibility of there being any
22 prejudice to the debtor.

23 MR. MARTIN: Because we would not be parties to that
24 appeal.

25 THE COURT: Correct.

1 MR. MARTIN: We would be dismissed as parties --

2 THE COURT: Correct.

3 MR. MARTIN: -- from this proceeding and not --

4 THE COURT: Yes.

5 MR. MARTIN: -- bound by any ruling or any judgment.

6 THE COURT: Yes. That's what I'm talking about.

7 Dismissed as parties to that proceeding. You're talking about
8 a separate proceeding that would occur if you are successful in
9 the current appeal. Correct?

10 MR. FLAXER: That's right. I mean the only caveat
11 that I'm raising, but I keep looking to Mr. Harken to make sure
12 I'm not going too far, is that we still need to go back to the
13 Missouri appeals court just to make sure that the other
14 defendants are not going to --

15 THE COURT: I agree with that.

16 MR. FLAXER: -- claim that they're not bound --

17 THE COURT: No.

18 MR. FLAXER: -- because the debtors are not present.

19 THE COURT: I agree with that but that's your
20 procedural problem.

21 MR. FLAXER: Right.

22 THE COURT: But the point that Mr. Martin is making
23 that this is not just their relief from filing briefs; this is
24 they're out. They get dismissed as appellees. They're not
25 parties anymore.

1 MR. MARTIN: That's our position.

2 MR. FLAXER: I mean I think the thing that we would
3 have to make sure about, and I don't think this is a problem,
4 but by releasing them or by the debtors not being parties to
5 the appeal if that doesn't somehow make them not parties to
6 returning to the trial court when --

7 THE COURT: I don't think that's what they're saying.
8 They're just being very surgical about what their role would be
9 or not be and what the effect of that would be. I don't think
10 that what the debtors are saying is that they then -- and maybe
11 we should keep fleshing this out, but I don't think they're
12 saying that they want to retain a right to argue the position
13 that there is judicial immunity. I mean that's going to be
14 resolved --

15 MR. FLAXER: Right.

16 THE COURT: -- on the current appeal.

17 MR. FLAXER: Right.

18 THE COURT: Right? It's not your issue. It either is
19 or it isn't.

20 MR. MARTIN: That's correct, Your Honor.

21 THE COURT: Right. But then the next step using that
22 determination if you were to prevail as a predicate for the
23 next action, then they get -- they would have the ability to
24 say we need to be --

25 MR. FLAXER: Oh, absolutely.

1 THE COURT: -- at the table --

2 MR. FLAXER: Right.

3 THE COURT: -- at that point and then you'll need to
4 seek further relief from the stay.

5 MR. FLAXER: My concern is the opposite which is that
6 the debtors -- I just don't want the debtors to argue that
7 assuming we prevail on the appeal which is, again, only on the
8 motion to dismiss issues, when we then revert to the trial
9 court, I don't want the debtors to say oh, no, no, you've let
10 us out of this case, we're now out forever but I think, I don't
11 hear them saying that.

12 THE COURT: I don't think they're saying that.

13 MR. FLAXER: But maybe that could be put in some kind
14 of order.

15 THE COURT: I mean this is -- I'm trying to draw a
16 parallel between this and the other stay relief case, and I
17 don't think that under Sonnax you get there, okay. And I can
18 go through all the factors. I don't think you get there.

19 So therefore, what I'm saying to you is that if you
20 take the debtors up on what they suggested, let them out as
21 parties for the purposes of the current appeal and the current
22 appeal only, you're done.

23 I mean if you had elected to not include them as
24 parties, you wouldn't be here at all because there would be an
25 appeal that was out there that the debtors aren't in, so

1 there's no motion for relief from stay because they're not in
2 it to begin with.

3 MR. FLAXER: For better or worse, there's a Missouri
4 statute that pretty clearly required us to join them, but we're
5 happy to find a way forward that doesn't -- that doesn't hurt
6 anybody. And it seems to me that the way forward which we're
7 evolving, is that as long as it's okay with the -- as long as
8 we can work it out in the next step of briefing in the Missouri
9 court that the other defendants aren't going to try to utilize
10 this in a way that hurts us, we're fine with letting the
11 debtors out for this stage as long as when we get to the next
12 stage the debtors won't argue that they've now been let out for
13 good, which I don't hear them saying.

14 THE COURT: Let me --

15 MR. MARTIN: I don't know how that works, Your Honor.

16 MR. FLAXER: Well, that makes three of us.

17 MR. MARTIN: If they -- as we've said, this litigation
18 could take any number of directions. They're going to file
19 motions to recuse the current appeals court. They're going to
20 then move -- seek appeals in the Missouri Supreme Court. This
21 case is going who knows where. Right? And in who knows what
22 legal directions. And what we're saying is, if we have to
23 participate in order to protect our rights as the case goes
24 crazy, then it should be stayed as to us, because we don't have
25 money to burn in this litigation. We just don't.

1 But if they want to drop us altogether, that's one way
2 to proceed. They can then proceed against the other
3 defendants, however they wish. But --

4 THE COURT: So we're not -- we're now departed from
5 the notion of just dropping you from the current appeal and
6 then revisiting it at any subsequent juncture.

7 MR. MARTIN: Well, we could do that, Your Honor. I
8 think there is a way to do it, but it has to be very carefully
9 crafted, and we can't -- none of us can control what the courts
10 in Missouri will do, or what issues they will address while
11 we're on the sidelines. And that's the concern that I have is
12 that we would somehow be prejudiced by agreeing to this interim
13 solution. And I just want to make sure that there is an
14 interim solution that doesn't prejudice the debtors before we
15 agree to it.

16 MR. FLAXER: I mean, I think the discussion about how
17 this could go in lots of different ways and there's lots of
18 uncertainty I don't think is correct. We asked for very narrow
19 relief. We're talking about the pending appeal and a possible
20 further appeal to the Missouri Supreme Court, which is limited
21 to our attempt to reverse the dismissal of our case in the
22 trial court. That's it. So, if we prevail, but if we let the
23 debtors out, so I mean, we --

24 THE COURT: Look -- this is already costing the estate
25 too much money. I would suggest to you that you need to think

1 about whether or not you let the debtors out, period, full
2 stop, and pursue your claims against your other defendants.
3 And if that's -- if you make a determination that you don't
4 want to do that, then the stay is going to remain in place.

5 MR. FLAXER: I mean --

6 THE COURT: We are -- this case has been just filed in
7 July. There's a lot going on. Given the specter of multiple,
8 multiple litigations, this is not the typical we're going to go
9 liquidate a claim in a state court, which has to be liquidated
10 anyway, in order to assert it in this case. That's not what
11 this is. This is a complicated, lengthy, quirky -- I think was
12 the word that someone used -- litigation in Missouri, which I
13 don't have the ability to control, and the law of unintended
14 consequences applies everywhere. And I cannot permit a
15 litigation to go forward, where the debtor is the victim of
16 unintended consequences.

17 And I'm not ascribing any bad intent by any of you
18 folks, but you have a litigation decision to make, because for
19 right now, the stay's going to stay in place --

20 MR. FLAXER: I mean --

21 THE COURT: -- without prejudice. You can come back
22 again at a later point, but it's just not going to work.

23 MR. FLAXER: I mean --

24 THE COURT: It doesn't come close to complying with
25 the Sonnax factors.

1 MR. FLAXER: I mean, I would ask Your Honor to
2 consider at least the fact that I think we've made a pretty
3 good record that were the stay to be lifted, the debtors'
4 involvement in this appeal would be zero or minimal, because
5 there's already another law firm that's representing the other
6 defendants and the debtor that's doing all the work. The
7 debtor doesn't have to do anything on this appeal, and we
8 limited the request we seek to the appeal. We can go through
9 the other applicable factors. We think we have a very strong
10 motion to lift the stay. My preference is always to try to
11 resolve things on a practical level. I thought we were moving
12 towards what made a lot of sense. I --

13 THE COURT: If you can satisfy -- the fact that
14 there's another law firm doesn't help. The fact that in your
15 view the defendants' interests are aligned doesn't help.
16 Unless you can satisfy the debtors that there's zero prejudice
17 to them, or the possibility of prejudice to them, they're not
18 required to jump through these hoops, because you've elected to
19 name them as a party in a litigation, which they don't need to
20 participate in right now.

21 That's why -- one of the reasons they're in Chapter
22 11. And you can make a decision to do without them. But for
23 now the stay is going to remain in place. And I'm denying the
24 motion without prejudice.

25 MR. FLAXER: Understood, Your Honor.

1 THE COURT: If you want to -- if you need me to write
2 an opinion, I'll write an opinion.

3 MR. FLAXER: I don't need you to write an opinion. I
4 don't think so. The only thought, I mean -- just so
5 everybody's aware, it seems to me that our next step is to have
6 this next round of briefing in the Missouri court, and just so
7 it doesn't come as a surprise to anybody, should -- if we're
8 able to work it out in the Missouri court --

9 THE COURT: But the appeal is stayed as to the debtor
10 defendants.

11 MR. FLAXER: I understand; I understand. Well, let's
12 think about that for a minute. We need to submit briefs to the
13 Missouri court on what the way forward is, in light of
14 automatic stay. We will brief those issues in our -- what
15 we're going to ask the court to do is to permit the appeal to
16 proceed without the debtors. That's going to be what we're
17 going to ask the court to do --

18 THE COURT: But now what you're saying is that
19 notwithstanding the fact that I've just told you that the
20 automatic stay is staying in place. You're going to go tell
21 the Missouri court something that's going to require the
22 debtors to respond.

23 MR. FLAXER: Well, that's why I'm sort of thinking
24 this through with everybody, because I don't want to do
25 anything -- I want everybody to be clear about what we intend

1 to do, and if it's a problem, I want to make sure I don't
2 contravene anything. If we can't -- if in the, I think,
3 unlikely event that the Missouri court rules that it will
4 release or -- we can't grant any relief even with respect to
5 the other defendants, if the debtors are not in the case, which
6 I think is unlikely, but if that happens, then I would like --
7 then I will take you up on the "without prejudice" and I'll
8 come back here.

9 THE COURT: Mr. Flaxer, we're not having a
10 negotiation. And what you've just outlined requires the
11 debtors to continue to do exactly what they're not supposed to
12 have to do, because of the existence of the automatic stay.
13 So, I in no way want to preclude you from pursuing your rights
14 against the other defendants, but you cannot do it in a way
15 that requires the debtors to participate or that in any way
16 prejudices their rights.

17 MR. FLAXER: Okay, I understand. So, the motion will
18 be denied without prejudice.

19 THE COURT: Without prejudice.

20 MR. FLAXER: And I'll be happy if -- I'll be thrilled
21 if I never have to come back.

22 MR. HUEBNER: Your Honor, just to be clear, because
23 the last few minutes made me a little bit nervous that Mr.
24 Flaxer was at a different hearing than I was. Right now we are
25 parties to an appeal named by them. That is now stayed,

1 because we are in Chapter 11 --

2 THE COURT: Correct.

3 MR. HUEBNER: -- and they need stay relief which they
4 did not get. I don't want his things "here's what we're going
5 to go do" as being seen as some sort of like, "but I told the
6 Court I was doing this". They made a motion. It was denied.
7 Federal law stays all proceedings to which we are a party. As
8 Mr. Martin told the Court, we think that while this appeal, if
9 successful, does not automatically create a claim, it removes a
10 real barrier against a certain claim, and therefore could be
11 very prejudicial to us. Unless I'm missing something, the
12 Court agreed with us in the end, and that's where we are.
13 We're done.

14 THE COURT: That --

15 MR. HUEBNER: They should -- this happens in the
16 insurance context all the time, and the parties make the
17 decision, we'll either do the insurance stip that says you're
18 done forever, it's only nominally for insurance --

19 THE COURT: Right.

20 MR. HUEBNER: -- or we're just going to dismiss you,
21 because now that you're in bankruptcy, we really want to go
22 after everybody else who still is creditworthy --

23 THE COURT: Well, that's what I was trying to say in a
24 less --

25 MR. HUEBNER: -- and we look forward to accepting such

1 a deal from them if they want to propose it.

2 THE COURT: I think in the shorthand that I was using,
3 I think Mr. Flaxer understood that I was referring to that type
4 of analysis, so --

5 MR. FLAXER: We are at the same hearing.

6 THE COURT: Okay. Very good. Then someone send me an
7 order. All right?

8 MR. FLAXER: Yeah, I would only ask that we get a
9 chance to see the order --

10 MR. HUEBNER: Of course, you will.

11 MR. FLAXER: -- or if you want me to do it. We will
12 work that out.

13 THE COURT: Okay, all right.

14 MR. HUEBNER: We will of course work it out. We don't
15 submit orders ex parte.

16 THE COURT: Thank you very much. All right --

17 MR. FLAXER: Thank you, Your Honor.

18 MR. HUEBNER: Your Honor, unless I am yet again in
19 error about the order of the agenda letter, I believe that that
20 is all the matters that were on the agenda, both B1 and 2, and
21 the A, I think, 1 through 4, and I think that the public
22 portion of this hearing --

23 THE COURT: All right. All right.

24 MR. HUEBNER: -- is now behind us.

25 THE COURT: The hearing's concluded, so we'll close

1 the record now.

2 MR. MARTIN: Thank you very much, Your Honor.

3 (Whereupon these proceedings were concluded at 11:51 AM)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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