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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI

Case No. 12-51502

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In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
111 South 10th Street  
4th Floor  
St. Louis, Missouri

March 18, 2013  
1:13 PM

B E F O R E:  
HON. KATHY A. SURRETT-STATES  
U.S. BANKRUPTCY JUDGE

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Motion for Authority to Implement Compensation Plans by Debtor  
(2819)

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P R O C E E D I N G S

THE CLERK: Your Honor, we are back on the record.

THE COURT: All right, thank you. Be seated, please.

All right, this is in the matter of the Patriot Coal Corporation. It's the motion for authority to implement compensation plans by the debtor. Let me start first with appearances on the record in the courtroom, please.

MR. WALSH: Good afternoon, Your Honor. Brian Walsh and Laura Hughes from Bryan Cave, on behalf of the debtors.

THE COURT: Good afternoon.

MR. WALSH: Also here today from the Davis Polk firm, we have Benjamin Kaminetzky, Michael Russano, Elliot Moskowitz, Daniel Voss (ph.), Angela Libby.

THE COURT: Good afternoon.

MR. WILLARD: Good afternoon, Your Honor. May it please the Court, Greg Willard and Angie Schisler on behalf of the official committee of unsecured creditors, the members of whom are American Electric Power, Gulf Coast Capital Partners, U.S. Bank as indenture trustee for the convertible notes, the United Mine Workers of America, the United Mine Workers of America 1974 Pension Plan and Trust, and Wilmington Trust Company as indenture trustee for the senior unsecured notes.

I'd also, at this time, Your Honor, like to introduce to the Court, my co-counsel, Mr. Tom Mayer, from the Kramer Levin firm.

1 THE COURT: Good afternoon.

2 MR. WILLARD: And Mr. Mayer obviously is in the  
3 courtroom. Therefore, Mr. Rogoff will not be appearing by  
4 telephone.

5 THE COURT: All right.

6 MR. WILLARD: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. RANDOLPH: Good afternoon. Paul Randolph for the  
9 U.S. Trustee.

10 THE COURT: Good afternoon.

11 MR. CROWE: Good afternoon, Your Honor. Jim Crowe  
12 from Dowd Bennett, local counsel for the United Mine Workers of  
13 America 1974 Pension Trust and the United Mine Workers of  
14 America 1993 Benefit Plan. With me in court this afternoon are  
15 Ms. Rebecca Hillyer --

16 MS. HILLYER: Good afternoon.

17 THE COURT: Good afternoon.

18 MR. CROWE: -- from Morgan Lewis and her colleagues  
19 Rachel Mauceri and Melina Forte, sitting in the gallery We're  
20 also joined this afternoon, Your Honor, by Richard Welch from  
21 Mooney Green in Washington, D.C.

22 THE COURT: All right. Good afternoon.

23 MR. CROWE: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MS. TOLEDO: Good afternoon, Your Honor. Laura Toledo

1 on behalf of Bank of America as agent for the pre-petition  
2 secured lending group and the second out DIP lender. In the  
3 court with me today is Ana Alfonso from Willkie Farr. And also  
4 joining by phone is Margot Schonholtz --

5 THE COURT: All right.

6 MS. TOLEDO: -- of the Willkie firm. Thank you.

7 THE COURT: Good afternoon.

8 MR. PERILLO: Good afternoon, Your Honor. My name is  
9 Fred Perillo. I represent the United Mine Workers of America.  
10 My client is the union which represents approximately 1,800 of  
11 the debtors' mining employees. Thank you.

12 THE COURT: Thank you and good afternoon.

13 MR. CRANDALL: And Grant Crandall with the United Mine  
14 Workers.

15 THE COURT: Good afternoon.

16 MR. TURNER: Good afternoon, Your Honor. Marshall  
17 Turner on behalf of Citibank, N.A. as first out -- as agent for  
18 the first out DIP lenders. And in the courtroom is Ana --  
19 sorry --

20 MS. SAAVERDRA: Andrea Saavedra of Weil Gotshal &  
21 Manges.

22 THE COURT: Good afternoon.

23 MR. TURNER: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. DOYLE: Good afternoon, Your Honor. Dan Doyle on

1 behalf of Caterpillar Financial Services Corporation and the  
2 Caterpillar Global Mining entities.

3 THE COURT: Good afternoon.

4 MS. CASE: Good afternoon, Your Honor. Rebecca Case,  
5 local counsel Payne-Gallatin Company and Shonk Land Company.  
6 Thank you, Your Honor.

7 THE COURT: Good afternoon.

8 MR. COUSINS: Good afternoon, Your Honor. Steven  
9 Cousins of Armstrong Teasdale, co-counsel with Peabody Energy  
10 Corporation, together with Jones Day. Thank you.

11 THE COURT: Good afternoon. All right, then. And  
12 then on the telephone, I believe we have Ms. Schonholtz on  
13 behalf of Bank of America.

14 MS. SCHONHOLTZ: I'm here. Good afternoon, Your  
15 Honor.

16 THE COURT: Good afternoon. Blaine Early on behalf of  
17 Argonaut Insurance?

18 MR. EARLY: This is Blaine Early. And on behalf of  
19 four other sureties as well, Your Honor. But I'm here.

20 THE COURT: All right. Thank you and good afternoon.  
21 And then Mr. Huebner, you're on the line with us on behalf of  
22 the debtors?

23 MR. HUEBNER: I am, Your Honor. Good afternoon.

24 THE COURT: Good afternoon. And David Barney on  
25 behalf of Alexis Cook, et al.

1 MR. BARNEY: Present, Your Honor.

2 THE COURT: Good afternoon. And Tom Persinger on  
3 behalf of Southern Land Company.

4 MR. PERSINGER: Thank you, Your Honor. Good  
5 afternoon. Today it's here on behalf of Payne-Gallatin  
6 Company.

7 THE COURT: All right. All right, thank you.  
8 All right, then, Mr. Walsh or Mr. Kampinsky (sic),  
9 this is the debtors' motion.

10 MR. WALSH: Good afternoon, again, Your Honor. For  
11 the record, Brian Walsh of Bryan Cave on behalf of the debtors.  
12 Your Honor, we received a note from Mr. Huebner saying he's  
13 having trouble hearing, there's a lot of static on the line.  
14 I'm not hearing it the courtroom, but there may be something  
15 going on. If we might re-emphasize the importance of keeping  
16 phones on mute, I'm hopeful that might help the situation.

17 THE COURT: All right. Then let me remind everybody  
18 who is appearing by telephone, if you would please place your  
19 phone on mute other than when you are speaking, and hopefully  
20 that will address the issue.

21 MR. WALSH: Thank you very much, Your Honor.

22 THE COURT: Thank you.

23 MR. WALSH: Your Honor, I will have some concluding  
24 remarks on the motion, but Mr. Kaminetzky is going to take the  
25 lead on this motion today. I'd like to give him a brief

1 introduction to the Court, as I've done with other counsel from  
2 Davis Polk.

3 Mr. Kaminetzky is a litigation partner in the  
4 litigation group at Davis Polk. He's a former law clerk for a  
5 judge on the Sixth Circuit. He's been involved in a number of  
6 billion-dollar disputes arising from leveraged buy-outs, which  
7 as the Court is aware, give rise to interesting issues in  
8 bankruptcy cases and outside of bankruptcy.

9 He's also handled a number of incentive programs in  
10 Chapter 11, similar to the one that we're bringing to the Court  
11 for consideration today. And finally, as a bit of local color,  
12 Mr. Kaminetzky has spent time in our courthouse here. He  
13 represented the equity group in the Bridge Information Systems  
14 case that was pending before Judge McDonald a few years ago.

15 So, Your Honor, with that, I'll yield the podium to  
16 Mr. Kaminetzky.

17 THE COURT: All right.

18 MR. KAMINETZKY: Good afternoon, Your Honor. Benjamin  
19 Kaminetzky of Davis Polk for the debtors. It's a pleasure  
20 being here in front of Your Honor this afternoon. And thank  
21 you for agreeing to hear the motion this afternoon.

22 Your Honor, they say a picture is worth a thousand  
23 words. In a slight variation to that theme, a CEO's word is  
24 worth a lot more than a thousand words of a litigator. And  
25 it's for that reason, Your Honor, and because the issue today

1 is the debtors' business judgment, that my remarks will be very  
2 brief, just a few bullet points, and we will quickly, then,  
3 turn to the testimony of Patriot's CEO and president, Mr.  
4 Bennett Hatfield, who is with us in court today.

5           So just again, briefly, a few bullet points. Why are  
6 we here today? Quite simply, Your Honor, much work remains in  
7 these cases and it will demand extraordinary amounts of time,  
8 dedication, patience, and sacrifice from the debtors'  
9 employees. However, the debtors are currently losing their  
10 most critical employees at historically unprecedented and  
11 alarming rates. Each departure forces the debtors to expend  
12 precious dollars and time on locating, recruiting, and training  
13 new employees. But perhaps, far more important, with each  
14 critical employee who resigns from the companies, the debtors  
15 face the loss of well-respected employees, mentors,  
16 supervisors, managers, with years of experience at Patriot.

17           And as you'll hear, Your Honor, the debtors are all  
18 too often unable to attract full replacements for those who  
19 leave, and are forced to demand more from personnel across all  
20 areas of their business, often forcing one person to do many  
21 people's jobs or forced to hire high-cost outside consultants  
22 to fill the gaps.

23           In short, the debtors' remaining work force has been  
24 stretched to the maximum capacity, all during the most critical  
25 period in the debtors' history. Now, the loss of any more



1 critical employees or the failure to quickly implement a plan  
2 to adequately incentivize key employees, will threaten the  
3 entire restructuring effort.

4           So, Your Honor, the debtors are here today to ask the  
5 Court's approval for a very modest, yet critically important,  
6 incentive and retention plan. As you will see this afternoon,  
7 these plans are a prudent and necessary exercise of the  
8 debtors' sound business judgment. They are cheap. They are  
9 broad-based. The incentive performance metrics are aggressive.  
10 The retention program payments are timed so as to retain  
11 employees throughout the course of these cases.

12           They still -- that means even if every dollar is paid,  
13 they still leave employees well below market and pre-petition  
14 levels of compensation. They do not include insiders. They  
15 were developed over an eight-month period and are the product  
16 of extensive collaboration with various constituencies in this  
17 bankruptcy. Indeed, it would be a gross breach of fiduciary  
18 duties if these debtors did nothing to hold the company  
19 together and allow the reorganization to unravel from the  
20 inside due to the continuing exodus of critical employees.

21           And let me pause here to note that in an act of  
22 leadership, Mr. Hatfield and his executive management team,  
23 completely excluded themselves, not only from the retention  
24 plan, but from the incentive plan as well.

25           Just two more brief points, Your Honor: one about the

1 law and one about who has voiced objections to these plans, and  
2 perhaps more importantly, who has not. First the law. The  
3 union and the funds, the only objectors, pretend -- they  
4 literally pretend that the applicable law here is complicated  
5 or not well-settled. Nothing can be further from the truth.  
6 All incentive plans, what we call AIPs or [apes] are accorded  
7 business judgment deference under Section 503(c)(3) of the  
8 Code. Similarly, any retention plan, what we call CERP or  
9 [kirp], that does not include insiders, is similarly accorded  
10 business judgment deference under 503(c)(3) of the Code.

11           The heightened showing contained in 503(c)(1) only  
12 applies -- again, only applies, if you are giving a retention  
13 plan to insiders. This is black-letter law. Here it is  
14 debtors' position that no insider is in either plan. And as I  
15 noted before, the entire executive management team is excluded  
16 from both plans.

17           But let me be fair and pause here. The U.S. Trustee's  
18 Office, Ms. Long, expressed that -- we believe erroneously, but  
19 she expressed the view that seven employees that were in the  
20 CERP, in the retention plan, are insiders, because they were  
21 technically elected by the board of directors. Again, we don't  
22 think the case law supports this position, but because we love  
23 Leo and Paul and have the utmost respect for the U.S. Trustee's  
24 Office, we settled with the U.S. Trustee, and removed these  
25 seven people from the retention plan and moved all those

1 dollars to one hundred percent incentive. And as I just  
2 stated, all incentive plans, even to insiders, are accorded  
3 business judgment deference.

4 So with this change, Your Honor, the U.S. Trustee now  
5 concedes the 503(c)(3), business judgment, is the only thing at  
6 issue in today with respect to both the AIP and the CERP, both  
7 the retention plan and the incentive plan. And under the  
8 applicable and familiar business-judgment standard as stated in  
9 the Eighth Circuit and many cases, for example, In re Food Barn  
10 Stores, the Court should approve the motion if it is "not  
11 manifestly unreasonable or made in bad faith and appears to  
12 enhance the debtors' estate."

13 And it is also worth mentioning what I hope is obvious  
14 to all. Today is not the day -- today is not the place or the  
15 time to litigate 1113 and 1114 issues. As I just noted, our  
16 settlement with the U.S. Trustee removed any lingering insider  
17 concerns. The objectors, however, ask this Court to ignore,  
18 literally ignore, the reams of cases that we cite in our papers  
19 and find mid-level employees to be insiders, based solely on  
20 their titles. Again, the case law says absolutely not.

21 Courts all around the country hold that just like you  
22 can't judge a book by its cover, you can't -- you cannot  
23 determine an employee's insider status from his or her title.  
24 Instead, courts are instructed to employ a functional test and  
25 look at things such as whether plan participants are members of

1 the debtors' inner circle; are they responsible for making the  
2 debtors' critical financial and operational decisions; do they  
3 exercise sufficient authority over the debtors to dictate  
4 corporate policy and the disposition of corporate assets; do  
5 they report to the board of directors or CEO in the ordinary  
6 course? These are the questions you ask when deciding if  
7 someone is an insider under the Bankruptcy Code. And as you  
8 will hear in a few minutes from Mr. Hatfield, none of the  
9 employees in the CERP, in the retention plan, come close.

10 Finally, Your Honor, I ask that you look around the  
11 room and take note who is sitting where. And I mean this more  
12 spiritually than physically because of the limitations of the  
13 courtroom. If there was anything truly unlawful, remiss,  
14 inequitable, too generous, discriminatory about the plans, if  
15 there was not a serious retention issue, if the relatively few  
16 dollars allocated to these plans could have been saved without  
17 risking substantial damage to the estates and to the  
18 reorganization, if the metrics in the incentive plans were so-  
19 called layups instead of robust hurdles, quite frankly, many of  
20 which we're currently falling short; if the retention plans  
21 included insiders, where would the creditors' committee be  
22 today?

23 Would they be supporting the plans like they are here,  
24 or would they be arm-in-arm with the objectors? To be sure,  
25 getting the committee's support was not easy. Believe me, it

1 wasn't easy at all. We literally worked with the committee for  
2 months to get the proposed plans into a state where they would  
3 receive committee support.

4           Where would the DIP lenders be? Again, if these plans  
5 were not absolutely necessary to the reorganization, would the  
6 DIP lenders be supporting a motion where limited and precious  
7 cash was being spent? And as noted earlier, if there was any  
8 lingering post-settlement doubt that these plans did not one  
9 hundred percent comport to the Bankruptcy Code, wouldn't you  
10 see Ms. Long and Mr. Randolph raising the U.S. Trustee's hand  
11 in fierce opposition?

12           I submit, Your Honor, that the silence of these  
13 parties, and in the case of the unsecured creditors' committee  
14 and the Bank of America DIP agent, the affirmative support of  
15 these constituencies speak volumes.

16           And with that, Your Honor, unless you have any  
17 questions, I'd like to call Mr. Bennett Hatfield to the stand.

18           THE COURT: No, I don't have any questions. And let  
19 me ask the fund who has the objections, United Mine Workers'  
20 Association, are you all fine with waiving your opening  
21 argument until after Mr. Hatfield would have had his testimony,  
22 or do you want to do your opening argument now?

23           MR. PERILLO: If it would please the Court, I would  
24 like to --

25           THE COURT: We need you at the podium, I'm sorry, so

1 we can get the recording accurate.

2 MR. PERILLO: With the indulgence of the Court, I  
3 would give a brief opening.

4 THE COURT: All right. All right, then, Mr.  
5 Kaminetzky, let me have -- let him give his brief opening  
6 argument and then we'll proceed with the testimony.

7 MR. KAMINETZKY: Okay.

8 THE COURT: All right.

9 MR. PERILLO: Your Honor, Fred Perillo on behalf of  
10 the United Mine Workers and its 1,800 members and tens of  
11 thousands of retirees who are involved in this case.

12 Your Honor, there is something inherently unseemly in  
13 the effort to insulate the executives from the financial risks  
14 all other stakeholders face in the bankruptcy process. Those  
15 are not the words of an overheated union lawyer; that is what  
16 the Court said in U.S. Airways. We now know, because of the  
17 recent filing of the 1113 and 1114 petitions in this case, that  
18 the debtor seeks something in the order of 150 million dollars  
19 per year in concessions from the union and the retirees. No  
20 stakeholder is being asked to make that sacrifice except for  
21 us. That is the reason why the other voices are silent. It is  
22 the reason why only the union and the funds are protesting.

23 It tells us something, Your Honor, about these  
24 debtors, that they believe that highly compensated officials,  
25 people making 300,000 dollars a year or a quarter of a million

1 dollars a year, and who now demand bonuses of hundreds  
2 thousands more, view this 6 or 7 million dollar program as a  
3 small matter and view the 150 million dollars of concessions  
4 they seek from low compensated, frankly, in the United States  
5 today, poor people, that they view those as necessary and  
6 equitable.

7           If we go down this road, Your Honor, we know where  
8 this story ends. When bankruptcy managers ask to enrich  
9 themselves, they balance the budget on the backs of the  
10 workers. And when that path is followed to its logical  
11 conclusion, the workers resist, most often resulting in the  
12 liquidation of the debtor. This is where we are headed if we  
13 do not stop this process today.

14           These bonuses are, in fact, huge and hugely  
15 inequitable. This type of confrontation will lead to the  
16 liquidation of this debtor. The United Mine Workers has  
17 already told the debtor at the bargaining table, there will be  
18 no consensual concessions if managers are paid these enormous  
19 bonuses.

20           We disagree with Mr. Kaminetzky on the law and on what  
21 the evidence will show in almost every respect. With respect  
22 to the question of insiders, Your Honor, we find it impossible  
23 to believe that the debtors' eleven mining complexes and  
24 nineteen mines, are run by just six people -- just six people  
25 who would qualify as insiders. That of the 900 salaried people

1 of whom 225 are in the program, none -- none count as having  
2 control over this debtor. That is a staggering and  
3 unbelievable statement and one we think will be belied by the  
4 evidence.

5 For example, there are dozens of senior vice  
6 presidents and vice presidents, general managers and operation  
7 managers in this program. One of the board of directors of a  
8 subsidiary debtor is in the program, a member of the board.  
9 Corporate officers are in the programs, named in the bylaws.  
10 These people are clearly insiders, and the program is heavily  
11 weighted toward them.

12 We believe, Your Honor, in addition, you will find  
13 that diligence was lacking in the creation of this program;  
14 that there was no effort to determine whether employees had job  
15 opportunities elsewhere, let alone actual job offers; that  
16 there was no study done of attrition or even to determine that  
17 there was a CERP in a comparable mining enterprise. There was  
18 no diligence done with respect to setting the thresholds or  
19 comparing the eleven percent to forty-five percent bonuses to  
20 other mining concerns. You will be surprised, I think, at the  
21 evidence of how little diligence was actually done.

22 I wish to say, Your Honor, in addition, that the  
23 incentive -- so-called incentive program here, will be shown to  
24 be, in reality, a retention program. These are all bonuses  
25 that are designed to compensate people, in effect, to give them



1 the maximum bonus they would have earned if the company were  
2 not in bankruptcy.

3 I'll conclude, Your Honor, by asking you to take a  
4 step back and looking at this case from a longer perspective.  
5 If it indeed is true that Patriot is in such difficult shape  
6 that its rank and file workers must make these major  
7 sacrifices, sacrifices that will put some of them into poverty,  
8 how can it be that we are the only ones willing to bend our  
9 backs in this way and that managers will sit on their hands and  
10 say without more money, without money that is double the  
11 compensation of a miner, we will not strive to make this  
12 enterprise succeed?

13 And how is it possible that for the five years prior  
14 to bankruptcy -- Patriot was created in 2007 to 2012 -- they  
15 labored under that compensation when there was literally  
16 nothing stopping Patriot from having a corporate-wide program?

17 I would ask Your Honor that when you view the  
18 evidence, that you determine that this bonus program is an  
19 enormity, is unnecessary, is unfair, and should be denied.  
20 Thank you.

21 THE COURT: Thank you. And then also, do the pension  
22 trusts, do they want to make an opening statement as well?

23 MS. HILLYER: Good afternoon, Your Honor. Rebecca  
24 Hillyer on behalf of the funds. I have nothing to add to Mr.  
25 Perillo's opening statement. Thank you.

1 THE COURT: All right. Thank you. All right, then  
2 Mr. -- oh, Mr. Randolph?

3 MR. RANDOLPH: Yes, Your Honor. I'd like to clarify  
4 something for the record. The U.S. Trustee is not here  
5 supporting the debtors' motion. We were able to resolve one of  
6 our sure objections which would have been officially filed with  
7 the Court regarding seven individuals that we thought, because  
8 they were appointed by the board of directors, were certainly  
9 insiders. We defer to the Court after hearing all the  
10 evidence, whether or not the compensation plans should be  
11 approved. Thank you.

12 THE COURT: All right. Thank you.

13 All right, Mr. Kaminetzky, you may call your witness.

14 MR. KAMINETZKY: With your permission, Your Honor, I'd  
15 like to call president and CEO of Patriot, Mr. Bennett  
16 Hatfield.

17 THE COURT: All right, Mr. Hatfield, would you step up  
18 to the podium first, please, to be sworn.

19 (Witness sworn)

20 THE CLERK: Please have a seat in the witness box sir.  
21 There's a step up.

22 MR. KAMINETZKY: May I proceed, Your Honor?

23 THE COURT: You may.

24 MR. KAMINETZKY: Thank you.

25 DIRECT EXAMINATION

1 BY MR. KAMINETZKY:

2 Q. Could you please state your name for the record?

3 A. Bennett K. Hatfield.

4 Q. If you could keep your voice up for the folks on the  
5 phone.

6 And where are you currently employed?

7 A. I'm employed by Patriot Coal Corporation.

8 Q. And could you briefly tell us your educational background?

9 A. Yes. I'm a -- I have a bachelors in science degree from  
10 Virginia Tech in mining engineering. And I'm a licensed  
11 professional engineer.

12 Q. Prior to joining Patriot, where were you employed?

13 A. Prior to joining Patriot, I was employed by International  
14 Coal Group, where I was president and CEO for approximately six  
15 years.

16 Q. Before that?

17 A. Before that I was employed by Arch Coal as president of  
18 their eastern operations for approximately two years.

19 Q. And prior to that?

20 A. Prior to that, I was employed by El Paso Corporation for  
21 fourteen months, as their executive vice president and chief  
22 administrative officer for their Coastal Coal Company  
23 operations, that later became part of Alpha Natural Resources.

24 Q. And before that?

25 A. Before that, I had a plus-twenty year career with Massey

1 Energy Company. I was, in my final position there, executive  
2 vice president and chief operating officer.

3 Q. So how many years have you worked in the coal industry?

4 A. Over thirty years.

5 Q. And how long have you been employed by Patriot?

6 A. I joined the company about nine months before the filing,  
7 so I guess I've been here since September of 2011.

8 Q. And what is your current position at Patriot?

9 A. I'm president and chief executive officer.

10 Q. And how long have you held that position?

11 A. Since -- I've held that position since October of 2012.

12 Q. And what position did you hold at Patriot before October  
13 of 2012?

14 A. Prior to October 2012 I was president and chief operating  
15 officer.

16 Q. And could you briefly describe your role as Patriot's  
17 chief executive officer?

18 A. Yes. I'm responsible for overall management of the  
19 company. I report to the board of directors. I'm responsible  
20 for all aspects of operations, management, marketing, financial  
21 reporting, essentially all aspects of the company and all its  
22 business units.

23 Q. Now, as you know, Mr. Hatfield, today we're in court to  
24 gain approval or to seek approval of the retention and the  
25 incentive plan for your company. What role did you have in

1 development of the debtors' proposed compensation programs?

2 A. Those programs were developed at my initiative. I was the  
3 primary director, if you will, the primary person that helped  
4 formulate the plans and determine the final constituency of  
5 both programs.

6 Q. And from whom did you seek advice with respect to both the  
7 retention and the incentive plans?

8 A. I relied heavily on the executive team, the five people  
9 that report directly to me, including general counsel, senior  
10 vice president corporate development, the chief marketing  
11 officer, the executive vice president of mining operations and  
12 chief financial officer.

13 Q. Did you also work with any outside advisors, with respect  
14 to the development of these -- this retention and incentive  
15 program?

16 A. Yes, we relied on several parties. We certainly relied on  
17 Davis Polk, our legal counsel, to guide us with respect to the  
18 legal requirements and limitations of such programs. We relied  
19 on Towers Watson, compensation consultant, to help us with the  
20 market benchmark for comparable positions with respect to  
21 compensation standards. And also Towers Watson advised us with  
22 respect to what other companies that are undergoing a Chapter  
23 11 reorganization had done, by way of providing comparables.

24 Q. Okay. Do you have a compensation committee at Patriot?

25 A. Yes, we do. A small -- it's a segment of the board of

1 directors that's called the compensation committee.

2 Q. And what role, if any, did they have in connection with  
3 the incentive and retention program at issue today?

4 A. They provided guidance on the program. And they obviously  
5 had to approve the program before we were even able to take it  
6 to other parties to seek their approval. So we presented  
7 several variations of the program to the compensation committee  
8 as it evolved over the course of several months.

9 Q. And did the creditors' committee and/or its advisors have  
10 a role with respect to the retention and incentive plans at  
11 issue today?

12 A. Yes, they certainly did. We presented the program in  
13 earlier drafts to the -- both the advisors for the creditors'  
14 committee, their counsel, Kramer Levin, and their financial  
15 advisors, Mesirov and Houlihan; and we presented it directly to  
16 the committee as well, and received feedback and suggested  
17 changes and reacted in response to that direction.

18 Q. Now, I want to just get a clear idea of the division of  
19 responsibility between the executive management team that you  
20 described and Patriot's advisors with respect to the  
21 development of these programs. Who established the total cost  
22 of the program?

23 A. That would be the executive team.

24 Q. And who selected which participants or who from the  
25 company would participate in the two programs?

1 A. I and the executive team.

2 Q. Who determined the compensation opportunities for  
3 participants?

4 A. That was myself and the executive team.

5 Q. Who set the performance metrics for the incentive plan?

6 A. Myself and the executive team.

7 Q. Who set the targets for payout of the incentive plan?

8 A. That would be me and the executive team.

9 Q. And who determined the timing of the payouts?

10 A. The same; me and the executive team.

11 Q. Okay. And if you could then describe, so what did Towers  
12 Perrin, again, do in connection with the incentive and  
13 retention plans?

14 A. Towers provided the comparables, if you will, for  
15 positions, to tell us essentially where the market is for  
16 certain categories of salary positions. And they also provided  
17 comparables with respect to other companies that were going  
18 through the reorganization that had established incentive  
19 plans, to give us some guidance as to what was in past cases  
20 deemed to be reasonable, permissible.

21 Q. And did Blackstone have a role in connection with these  
22 plans?

23 A. Blackstone certainly was of benefit through the process.  
24 They primarily helped us crunch the numbers and also helped us  
25 prepare presentations to explain the program to the creditors'

1 committee and to our DIP lenders.

2 Q. Okay. You've described the role of the executive  
3 management team and of your outside advisors. Did other  
4 company employees have a role in developing the proposed plans?

5 A. There were others that we had to rely on for information,  
6 certainly. Certain people in the human resources group,  
7 obviously, had to provide payroll data, salary data, historic  
8 compensation levels. They were in the category generally of  
9 providing data. Similarly in the safety department and the  
10 environmental engineering area, we needed to get data with  
11 respect to past safety and environmental performance and what  
12 reasonable target might be. So we received data from several  
13 segments of other areas of the company, but those people  
14 weren't involved in actually framing the policy or making  
15 decisions on it.

16 Q. Now, who made the decision that there should be two  
17 programs, both a retention plan and an incentive plan?

18 A. That was me.

19 Q. And why did you decide that there should be two different  
20 programs rather than just one?

21 A. Well, the programs serve two very different purposes. The  
22 retention program is designed to do exactly what it describes.  
23 So we have identified approximately 110 employees that we think  
24 are -- we're at very high risk of losing. They provide  
25 critical skills, critical experience to the company. We think



1 it's essential to retain those people for us to reorganize this  
2 company successfully. And we wanted to put in place a clear  
3 award program that would help motivate their remaining with the  
4 company, because they certainly have other job opportunities.  
5 So that one's aimed specifically at retaining those employees  
6 and gaining their commitment, if you will, to stay with the  
7 company through what's clearly going to be a challenging  
8 reorganization.

9 Q. And the incentive program, what's that's purpose?

10 A. The incentive program is aimed at a larger group,  
11 generally the corporate office and the regional offices, both  
12 in Henderson, Kentucky and in Charleston, West Virginia, where  
13 we have a large group of our 1,100 salaried employees that  
14 don't participate in any mine-level incentive program. The  
15 mines have their individual safety and production and  
16 environmental bonus programs.

17 But there's a core group of corporate and regional office  
18 employees that don't participate in any incentive program. So  
19 we wanted something that is in line with our standard practice  
20 of incentivizing their support of helping us achieve these key  
21 targets with respect to financial performance, safety  
22 performance, and environmental performance.

23 This is also consistent with frankly what's been  
24 historically the case. This group of employees has, since  
25 Patriot was created, participated in an incentive program of

1 this sort that awards the employees based on financial  
2 performance, safety performance, and environmental performance.  
3 It's also consistent with what's in the competitive  
4 marketplace. Each of our competitors, among the publicly  
5 traded companies, have similar programs.

6 Q. Similar incentive programs?

7 A. Yes.

8 Q. Now, how are payments under the two programs structured?

9 You could start with the incentive payments.

10 A. The incentive payments are made on the basis of  
11 performance in well-defined areas. Financial performance  
12 represents about sixty percent of the determination. Safety  
13 represents five percent, environmental five percent, compliance  
14 five percent; and then there's a twenty-five percent that's  
15 driven specifically by individual goals that are set for that  
16 particular individual.

17 So those components comprise one hundred percent of the  
18 test, if you will that must be met. And --

19 Q. And what's the measuring period in terms of when the  
20 participants would see payments using those metrics?

21 A. There are two major periods: January through June; the  
22 first six months of 2013. There'll be a measurement for those  
23 target metrics, those target performance metrics. And then  
24 there's a second payout period, a second measurement period,  
25 from July through December. The respective awards will

1 actually be made within thirty to sixty days after the period  
2 has been completed and measurements made as to what has been  
3 earned.

4 Q. And what is the timing of the proposed retention payments?

5 A. Retention payments would pay out twenty-five percent at  
6 the end of the first quarter of 2013, another twenty-five  
7 percent at the end of the third quarter of 2013, and the final  
8 fifty percent -- it's obviously backloaded by design -- would  
9 pay out the later of March 31, 2014 or ninety days after we  
10 have had a successful emergence from the Chapter 11  
11 reorganization. It'll be the later of those two tests.

12 Q. Now, why did you decide to pay some of the retention  
13 payment this year rather than making a hundred percent of it  
14 contingent on the employee remaining with the company until  
15 emergence from bankruptcy?

16 A. Quite frankly, many of our key employees are becoming  
17 skeptical as to whether any program's going to be approved.  
18 They have had this retention program described to them since  
19 the middle of 2012 and many were anticipating payments as early  
20 as August, September, October of 2012. And obviously we have  
21 not been able to make any of those payments because of the  
22 reorganization and the need to get a program approved.

23 So there's some skepticism among the covered group as to  
24 whether the payments will be made. And we felt that it's  
25 important to show some progress payments, some demonstration

1 that there's actually going to be a payment. Otherwise we have  
2 the challenge of ongoing skepticism. That's demonstrated  
3 vividly by the fact that several people that are covered by the  
4 retention program are already choosing to leave the company.  
5 They've resigned and gone to other companies just because they  
6 don't believe there's going to be a delivery of that award.

7 Q. Now, what criteria did you use to determine participation  
8 in the two proposed programs?

9 A. I relied heavily on input from the executive team and  
10 their -- and they also relied on direct input from their  
11 reports. That helped us essentially review the workforce of  
12 1,100 salaried employees and determine who were the 110 people  
13 that were of most critical experience and skills and need to  
14 retain those folks. And they went into the retention program.

15 And the incentive program is essentially defined by  
16 positions with respect to their working on those offices and  
17 not being covered by a mine-level program.

18 Q. Now, without revealing the substance of any privileged  
19 conversations with lawyers, do you understand that with respect  
20 to retention plans, the Bankruptcy Code treats insiders  
21 differently?

22 A. Yes, I do.

23 Q. Okay. And are there insiders, in your opinion, in either  
24 one of the plans?

25 A. Absolutely not.

1 Q. Now, did the company eliminate everyone with an officer or  
2 manager title from the proposed plans?

3 A. No. It would be -- frankly, it made no sense to do so.  
4 There were a number --

5 Q. Why not, if insiders should be excluded from retention  
6 plans, why didn't you eliminate everyone with an officer or  
7 manager title?

8 A. Because lots of people have the title of vice president or  
9 director or operations manager, and have absolutely no control  
10 of corporate policy or strategy forming or key decisions on  
11 divestures or acquisitions. They don't interact with the board  
12 of directors. They -- many people have that title, frankly, as  
13 a morale booster of sorts, to show that they are important in  
14 the organization and they sometimes represent the organization  
15 or a subsidiary of the organization in some particular area,  
16 but by no means are they an insider and certainly not an  
17 officer that frames policy and decision making for Patriot Coal  
18 Corp.

19 Q. Did you prepare a few demonstrative exhibits in connection  
20 with your testimony today, in order to assist you in your  
21 testimony?

22 A. Yes, I did.

23 MR. KAMINETZKY: Your Honor, may I approach the  
24 witness?

25 THE COURT: You may.

1 Q. Now, do you recognize page 1 of the slides that I just  
2 handed you?

3 A. Yes, I do.

4 Q. Okay. And could you describe what it is -- what page 1  
5 indicates?

6 A. Yeah. Page 1 is a table that captures the information  
7 that I asked our attorneys and advisors to gather for me. It  
8 lists the characteristics of an insider as we understand it,  
9 down the left side of the page, and demonstrates, as indicated  
10 by the red x's, that we've scrutinized this list and concluded  
11 that in this case, none of the plan participants truly is an  
12 insider.

13 Q. And could you just run down the list real quickly and  
14 explain why that's the case?

15 A. Certainly. With respect to the first characteristic,  
16 resides within the inner circle, making the company's critical  
17 financial decisions, certainly does not apply to anyone in the  
18 incentive program.

19 Q. In either of the programs, so the record's clear. Is that  
20 correct?

21 A. That's correct; either of the programs. Has the authority  
22 to make company-wide or strategic decisions. That's certainly  
23 not the case for anyone below the level of the executive team.  
24 And we think that's abundantly clear.

25 Q. Exercises sufficient authority over the debtor so as to

1 unqualifiedly dictate corporate policy and the disposition of  
2 corporate assets. Certainly none of these people have the  
3 authority or capabilities of doing that. And that's  
4 demonstrated.

5 None of them report to the board in the ordinary course.  
6 There are some individuals in the plan that are invited to  
7 board meetings for a specific purpose, perhaps to make a  
8 presentation. And in the incentive plan, there's a person who  
9 is the corporate secretary and attends the board meetings to  
10 take minutes and solely for the purpose of taking minutes, but  
11 otherwise has no reporting relationship to the board with  
12 respect to framing decisions or managing the business.

13 The other characteristic referenced there is, is not  
14 subordinate to or required to report to an officer. Attends  
15 board meetings, I've already spoken to in part. But clearly in  
16 this case, none of these people are attending board meetings on  
17 a regular basis and only a few of them have ever attended a  
18 board meeting.

19 Is elected or appointed by the board of directors to  
20 manage the daily operations of the corporation. And that's  
21 certainly not the case for the plan participants that we have  
22 identified.

23 Q. Now, notwithstanding what's shown on page 1, did the  
24 company recently make changes to the proposed plans in response  
25 to issues the U.S. Trustee raised regarding insiders?

1 A. Yes, we did.

2 Q. And could you describe those changes and why they were  
3 made?

4 A. The U.S. Trustee had concerns about a group of seven  
5 individuals because of what I view to be a technicality, and we  
6 thought was clearly a technicality, that the board of  
7 directors, in a technical context, approves those positions or  
8 elects those positions on an annual basis. This group was the  
9 primary focus and concern of the U.S. Trustee. And in  
10 discussions with the U.S. Trustee, we made the determination to  
11 resolve that issue, that we would remove those people, all  
12 seven, from the retention program, and put their entire  
13 compensation at risk in the incentive program, which assures,  
14 certainly, that they're going to get a somewhat reduced award,  
15 because the entire amount then becomes at risk and deliverable  
16 only upon satisfaction of each and every performance target.

17 Q. And was that an easy decision to make with respect to  
18 these seven employees?

19 A. No, it was --

20 Q. To take them out of the retention program?

21 A. -- it absolutely was not?

22 Q. And why not?

23 A. Because I don't believe it was the right answer. These  
24 people are not insiders. These people are at great risk of  
25 loss. In fact, as you may know from the news report we got



1 earlier this morning, one of these seven has since resigned  
2 from the company, and delivered a notice of resignation this  
3 morning to go to work for another company.

4 Q. So one of the seven resigned this morning?

5 A. Yes.

6 Q. Now, just so the record's clear, are there any  
7 participants left in the retention program who were elected by  
8 the board of directors?

9 A. No.

10 Q. Now, how did you select the various performance metrics  
11 for the incentive program?

12 A. The performance metrics were guided primarily by the  
13 historic program compensation. We've had an incentive program  
14 of this type for as long as Patriot has existed. And indeed,  
15 as I noted earlier, most of the companies we compete with have  
16 similar incentive programs for their corporate office and  
17 regional office personnel. So we started with a general  
18 framework of the incentive program that's historically been in  
19 place. And then we made revisions to certain of the metrics in  
20 light of our situation with the Chapter 11 reorganization.

21 Q. Okay. And what adjustments did you make specifically to  
22 the metrics from pre-petition to what you're trying to get  
23 approved here in terms of the adjustments of the various  
24 percentages for each metric?

25 A. On financial performance, for example, normally that would

1 be fifty percent of the award, and it would be gauged entirely  
2 on the basis of EBITDA, operating profit in general terms. And  
3 we changed the fifty percent to sixty percent to put greater  
4 weight on financial performance, which we think would certainly  
5 be expected and assuredly so by both the creditors' committee  
6 and the DIP lenders. So we put further weight than normal on  
7 financial performance and divided it into two categories.

8       Instead of just all EBITDA, we put half of that weight,  
9 thirty percent of the sixty percent, on liquidity; liquidity  
10 being a critical covenant and compliance requirement in our DIP  
11 agreements. Additionally, on EBITDA, we made a slight revision  
12 to call -- to base that portion of the financial performance  
13 measurement on EBITDAP, EBITDAP being a slight variation that  
14 excludes any savings that may be achieved through the 1114  
15 process through reduction or elimination of retiree medical  
16 obligations.

17 Q. How does the aggressiveness of the metrics in the proposed  
18 incentive plan compare to the aggressiveness in the pre-  
19 petition program?

20 A. The current program, the post-petition program, is  
21 substantially more aggressive in terms of difficulty in meeting  
22 those targets. Financial is certainly going to be a challenge,  
23 in large part because coal prices have continued to drop since  
24 the forecast was completed. The coal market continues to be  
25 very weak. We've indeed have to idle mines and complexes for

1 weeks since the forecast was completed, just because we can't  
2 sell the coal. So we're very much price-challenged, revenue-  
3 challenged on the forecast. And that's going to make the  
4 financial performance of it particularly difficult to meet.

5 Q. Now, you were here for the opening statements. Weren't  
6 you here -- by the lawyers? You were in court?

7 A. Yes.

8 Q. And you heard Mr. Perillo say that the incentives in  
9 the -- the metrics in the incentive programs are "give-mes".  
10 Did you hear him say that?

11 A. With all due respect, that's nuts. The issue with respect  
12 to the financial is, for two months of the year, we're already  
13 way behind, just because of the pricing disadvantage. And so  
14 we're going to have a huge challenge with respect to overcoming  
15 the drag that we're already going to have to deal with in the  
16 first half of the year from the low pricing.

17 Q. So just so that we're clear, I just want to make sure the  
18 record's clear. So you're saying for the EBITDA metric, you're  
19 already missing it?

20 A. Yes.

21 Q. Okay. And that's thirty percent of the program?

22 A. Yes.

23 Q. Okay. So explain to me what happens if you miss EBITDA  
24 even just by a little bit. Does anyone -- does any of the  
25 participants get any of that thirty percent?

1 A. A miss goes to zero. There's no pro-ration. It's not ten  
2 percent low you get ninety percent of your bonus. You miss it.  
3 You go to zero.

4 Q. So explain to me how that EBITDA metric is a give-me if  
5 you're not hitting it today?

6 A. It's absolutely not a give-me. It's a stretch target.  
7 And it's going to be very difficult to achieve it. And for  
8 that matter, liquidity, even though we're meeting liquidity  
9 through two months, if the rate of liquidity decline is the  
10 same for the balance of this year as it was in the month of  
11 February, we will not make the liquidity test either. So --

12 Q. So you --

13 A. -- both are at significant peril, frankly, of satisfying  
14 the targets.

15 Q. You're already missing EBITDA, and if things continue the  
16 way you are now, you're saying you're going to miss liquidity?  
17 Is that your testimony?

18 A. Yes.

19 Q. And that's sixty percent of the potential dollars to be  
20 earned under the entire incentive program. Is that right?

21 A. Yes.

22 Q. And how are you doing on the other metrics?

23 A. Well, on safety we're performing miserably, to this point.  
24 We had a record good safety year in 2012, the best we've had in  
25 the history of Patriot. But the first two months have been

1 very painful with respect to accident performance. And we're  
2 not performing well at all, and far off target on safety.

3 Q. So you're not hitting that metric as well. Is that what  
4 your testimony is?

5 A. We're not even close at this point.

6 Q. Not even close. So how is that a give-me?

7 A. That isn't a give-me. It'll be difficult to get any  
8 credit at all on safety unless we have just a spectacular ten  
9 months over the balance of the year.

10 Q. Now, you mentioned -- you testified earlier that twenty-  
11 five percent of the incentive award is based on individual  
12 metrics. Do you recall that?

13 A. Yes.

14 Q. Could you explain to the Court what that means? What's an  
15 individual metric and how those are determined or created or  
16 set up?

17 A. Yes. First I should clarify that historically that  
18 number's been closer to thirty-five percent, so when we put  
19 additional ten percent weight on financial performance, we  
20 essentially took that away from the individual performance. So  
21 the individual performance component of the new program is  
22 lower than historic.

23 But essentially in -- for each of these participants in  
24 the plan, when their annual performance review is completed,  
25 targets are set for the coming year. And there are three to

1 five targets per individual. And to the extent that we can, we  
2 try to make those objective targets with a number. Some of the  
3 targets are necessarily subjective, qualitative, if you will.  
4 And that's unavoidably the case. But as to the extent we can,  
5 we try to make it a point of measurement so you can hear -- see  
6 a clear demonstration of achievement.

7 A good example, for instance, would be a vice president of  
8 purchasing, if his job is negotiating roof bolts and other  
9 commodities, one of his targets might be to reduce our roof  
10 bolt cost by ten percent over the coming year. If he's a  
11 manager of contract services, he might be asked to reevaluate  
12 our trucking costs and see if there isn't a way to improve  
13 costs by five percent for a particular truck haul, say from  
14 Kanawha Eagle to the river dock; or he might look for  
15 compliance on insurance certification. It's critically  
16 important that all our truckers be insured and so that the  
17 general public is protected. So he may have a test requiring  
18 one hundred percent pass on all spot inspections on insurance  
19 certification.

20 So the goals are generally set to the individuals and the  
21 job that they're being asked to do for the coming year. And  
22 that would represent when that's scrutinized, about twenty-five  
23 percent.

24 Q. You testified earlier that the creditors' committee played  
25 a role in connection with the retention and incentive plan at

1 issue today. Could you just describe for the Court again, what  
2 exactly their role was, when did you engage them, and the  
3 number of conversations, the best you recall, that you had with  
4 the creditors' committee and its advisors?

5 A. Yes. I can't remember the exact date we met with them,  
6 but we met with them -- with the creditors' committee  
7 specifically, in the fourth quarter, in November or December.  
8 And we presented to them the plan that we thought met all the  
9 standards and the required targets at that time. We then had a  
10 couple of conversations, our advisors speaking with both the  
11 legal advisors for the committee, Kramer Levin, and Houlihan  
12 and Mesirov, discussing it with Blackstone.

13 And the cumulative feedback we got from the committee and  
14 its advisors was that they wanted some substantial changes in  
15 the program before they would support it.

16 Q. And could you describe in general what changes the  
17 committee wanted in the program after you presented it to them  
18 in the fourth quarter of last year?

19 A. They were most vocal with respect to the total cost,  
20 because the designed program, at that point, was significantly  
21 greater expense than the one that we've proposed and is  
22 presented for court approval today. So they asked us to scale  
23 down the size -- the cost of the program dramatically. And  
24 they also asked us to reevaluate the timing of payouts, because  
25 there was an earlier payout sequence that was proposed in the

1 earlier drafts of the plan.

2 Q. Now, did you agree with the comments that the committee or  
3 its advisors gave with respect to the proposed program?

4 A. No, I did not. At that time, frankly, we had already put  
5 in front of the committee what I thought was a credible plan  
6 that was required to keep the key people that we need to keep  
7 to make this reorganization successful. I did not agree with  
8 it. But at the same time, we recognized that we have to have a  
9 consensus here, that these -- this -- their cooperation and  
10 frankly the cooperation of our DIP lenders, was essential to  
11 moving this effort forward. So we took their advice as  
12 guidance that we needed to meet and revised the program  
13 accordingly.

14 Q. So you took the changes that they requested?

15 A. Yes, we did.

16 Q. So you took the changes that the UCC requested, the  
17 unsecured creditors' committee, and the U.S. Trustee. Is that  
18 right?

19 A. Yes.

20 Q. And you also met with the DIP lenders. Is that correct?

21 A. Yes.

22 Q. Okay. And did the DIP lenders object to the plan that you  
23 proposed.

24 A. I don't recall them asking for specific changes other than  
25 generally concurring with the feedback from the creditors'



1 committee. As we addressed the creditors' committee, that  
2 seemed to also satisfy the DIP lenders, as I recall.

3 Q. And what's the final cost of the version of the plans that  
4 we presented to the Court today, if you know?

5 A. The maximum cost would be 6.9 million dollars, if we  
6 achieve every target on the list: safety, environmental,  
7 regulatory compliance, and EBITDAP and liquidity. If we hit a  
8 hundred percent on all cylinders, the maximum cost would be 6.9  
9 million dollars.

10 Q. Now, how does the cost of the proposed compensation plans  
11 compare to the cost of Patriot's pre-petition incentive and  
12 retention plan?

13 A. It's substantially lower.

14 Q. And have you prepared a slide to illustrate that?

15 A. Yes, I have.

16 Q. And is that page 2?

17 A. Yes.

18 Q. And if you could please explain to the Court what's  
19 depicted on page 2?

20 A. Page 2 illustrates the cost of the incentive program and  
21 the retention program in 2013 at maximum payout with the red  
22 bar. That's the 6.9 million dollars number that I referenced  
23 earlier; the red bar on the right on the slide. That is shown  
24 in contrast to the actual cost of the 2011 incentive program  
25 and the 2010 incentive program. 2011 the incentive program

1 alone paid out 7.9 million dollars to this group of  
2 participants, and in 2010, the payout to this same group of  
3 participants was 9.4 million dollars.

4 So in short, both programs in total, at maximum payout, in  
5 2013, are significantly lower than what's been paid out  
6 historically for the incentive program alone.

7 Q. Now, your company is in bankruptcy, correct?

8 A. That's correct.

9 Q. And your company is facing a severe liquidity problem. Is  
10 that correct?

11 A. That's correct.

12 Q. So why would you spend up to 6.9 million dollars on these  
13 plans if you need to save every possible dollar?

14 A. This reorganization is just as much at risk of failure  
15 from loss of key management talent as it is of running out of  
16 cash. Because if we lose key managers that are contributing to  
17 improving our performance and turning this company around,  
18 operating performance will deteriorate; we'll be running with  
19 fewer people, trying to do more jobs, running in less than  
20 adequate fashion. And that will increase the cash drain. And  
21 that will push us further toward chaos.

22 So in short, I think keeping this critical group of  
23 employees is just as important as avoiding running out of cash,  
24 and an essential component of reorganizing this company.

25 Q. Now, how are the compensation opportunities allocated

1 among the plan participants both for the AIP and the CERP?

2 A. With respect to -- I'm not sure I understand your  
3 question. Could you repeat it?

4 Q. I guess, how was it decided how many dollars to allocate  
5 to which person and to which group of people, with respect to  
6 the retention plan and the incentive plan?

7 A. Well, the determination on how the dollars would be  
8 awarded or distributed was frankly made by me, working with the  
9 executive team. But it's -- the allocation is generally to the  
10 more senior people in the organization, the people that are  
11 delivering the most critical skills getting a larger share of  
12 the award. But if you start from the top down, frankly, the  
13 first six people in the organization get zero. So the  
14 executive team is getting no portion of the benefit here.

15 Their direct reports are the regional vice presidents, the  
16 department heads, the critical staff members, long haul  
17 coordinators, mine superintendents, general managers, that  
18 really drive the bus and make us successful or do not. So  
19 that's where you generally see the higher portion of the payout  
20 being on the more senior group of the participant list, with  
21 smaller percentages toward the bottom rank, if you will.

22 Generally, the metric that's used is percent of salary.  
23 So on the low end of the payout, for instance, with an  
24 incentive program, the payout, if they hit all targets, might  
25 be only five percent of salary. On the upper end of the

1 incentive program, the payout might be as much as forty percent  
2 of salary, again, recognizing the critical need to keep a  
3 certain group of people.

4 Q. We talked earlier about the various targets or the various  
5 metrics in the incentive program. How can a lower level  
6 employee influence or help the company achieve financial  
7 metrics?

8 A. Well, I think the -- every member on the team can make a  
9 difference. I mean, granted that a mine superintendent can  
10 make a greater difference than a person directing -- an  
11 accounting clerk or something of that sort. But if they're  
12 all -- if they're an administrative assistant and they're  
13 ordering office supplies, they can help us control costs. If  
14 they're directing janitorial services, they can help us control  
15 costs and reduce the cash outlay. So I believe every member of  
16 the team can make a contribution. And that's why the incentive  
17 plan is designed as such. It takes in a much wider group of  
18 our work force that has no involvement in the mine plans, they  
19 get no benefit from the bonuses that are paid out on the basis  
20 of mine production or mine safety. But they're captured by  
21 this corporate incentive program that recognizes they can  
22 contribute to the success of the effort.

23 A good example, for instance, is even on safety. Some  
24 might ask the question, why do -- why is there a safety  
25 component for someone who's only an accounting clerk or

1 administrative assistant in the Charleston office. And the  
2 answer is they're part of the team. So even if we have a  
3 safety meeting and do safety presentations, the administrative  
4 assistant is helping us make the safety presentations and  
5 helping set up the room, and try to do so at the lowest cost.  
6 So everybody's contributing to an effort that we think should  
7 ultimately be successful.

8 Q. I'd like to switch focus now to attrition over the last  
9 several months. Did you prepare a slide, slide 3, to assist in  
10 your testimony in that regard?

11 A. Yes.

12 Q. Okay. And could you tell the Court or explain to the  
13 Court what's depicted in slide 3?

14 A. Yes. Slide 3 lists the critical employee voluntary  
15 departures since June of 2012. This approximates the period in  
16 which we have been in this reorganization process, having filed  
17 the petition on July 9th of 2012, but we began to use people in  
18 a marked fashion -- accelerated fashion in June of 2012. And  
19 this slide lists approximately between thirty and thirty-five  
20 people who have left the company since -- since that time.

21 Q. And this slide, sorry, doesn't include the gentleman that  
22 announced this morning that he's leaving, is that correct?

23 A. No, it does not. We only learned that a few -- a couple  
24 of hours ago, actually.

25 Q. And --

1 A. Of greater concern, if I could clarify, is that the rate  
2 didn't slow down at the end of December. Quite frankly, it  
3 seems to have accelerated thus far, in 2013, an alarming loss  
4 of talent since the beginning of the year.

5 Q. And why did you choose to put a column on this slide that  
6 says "location"?

7 A. I wanted to be able to illustrate that this isn't just a  
8 corporate office problem. Granted that we're concerned about  
9 the losses in the corporate office in St. Louis, and we're  
10 concerned about the losses in Charleston, but we're also losing  
11 key management talent at the mine level, at locations like the  
12 Guyan mine in Logan County, West Virginia, the Dodge Hill  
13 complex in West Kentucky, the federal mine in Northern West  
14 Virginia. We're losing talent across the company, at the  
15 operating level and the corporate level.

16 Q. Now, have any of the departing employees told the company  
17 why they were leaving?

18 A. Yes.

19 Q. And what were some of the things that they said?

20 A. The typical response, frankly, is --

21 MR. PERILLO: Objection, Your Honor. This elicits  
22 hearsay.

23 MR. KAMINETZKY: Your Honor, it's not for the truth of  
24 the matter asserted. We don't really care why they leave.  
25 It's important -- again, what we're measuring here is the

1 debtors' business judgment. So what the debtor heard or what  
2 Mr. Hatfield heard is extremely important. And the statement  
3 that he's going to testify to is not for the truth, but rather  
4 for the fact that it was said and what was said, and that's  
5 clearly a hearsay exception.

6 THE COURT: All right. I'll overrule the objection.  
7 You can answer the question.

8 A. The typical response is uncertainty about the future.  
9 These people are taking jobs with other companies that are not  
10 in bankruptcy. They have great concern about whether the  
11 Patriot's going to emerge successfully and whether there will  
12 be any sort of incentive program that helps offset their risk.  
13 So they're leaving us because of uncertainty about the future,  
14 uncertainty about the success of our reorganization effort, and  
15 going to work for competitors in the coal business that are  
16 more financially stable, and even companies outside the coal  
17 industry.

18 Q. How has Patriot managed to cope with the loss of these  
19 critical employees listed on page 3 of your testimony?

20 A. It's been extremely difficult to replace people at this  
21 talent level when you're in bankruptcy; no one wants to come to  
22 work for a bankrupt company. So the only -- the only people  
23 we're sometimes able to attract, frankly, are those that may be  
24 between jobs. Otherwise they're going to stay with -- with the  
25 company that's giving them a check, that is not in bankruptcy.

1 So we've had great difficulty filling these positions. In some  
2 cases, quite honestly, we determined that we were not able to  
3 fill them, and we've reorganized internally to try to do  
4 without that position.

5 A good example would be our vice president of operations  
6 for West Kentucky. We lost him to a competitor, and we,  
7 frankly, couldn't find an opportunity to replace that talent.  
8 So we rearranged the operating reporting to put two wide  
9 regions under one senior vice president; didn't have a choice.  
10 So we now have more people covering broader areas than they  
11 were asked to do when they were hired on initially.

12 We've also done a lot of internal promoting. When we  
13 can't find someone to join the company to fill a critical  
14 position, we've often had to promote internally from a  
15 subordinate level. And generally, the cost to the company, the  
16 sacrifice, quite frankly, is that we have a less capable, a  
17 less-experienced person running the department or running the  
18 mine, and doing our best to try to fill a lower slot below  
19 them. So it's all been a continuing diminution, frankly, of  
20 effectiveness for the business.

21 Q. And have you ever had to hire outside consultants, and  
22 what's the effect on the company of using outside consultants?

23 A. In several high-level cases, particularly the high-level  
24 financial positions in St. Louis, we have had to bridge the  
25 talent gap with hired consultants. A good example would be the



1 chief accounting officer position that was vacated in June of  
2 2012. We had to hire a consultant to come in and work. This  
3 is a job that would normally pay maybe 200 or 220,000 dollars a  
4 year. We had to hire a consultant at an annualized base of  
5 about 450,000 dollars a year until we could come up with a  
6 replacement. After about eight months we found an individual  
7 who was between jobs who agreed to step in and take the  
8 position. He's able to do about two-thirds of what the former  
9 position filled. So that's not the only case. Other financial  
10 reporting positions in St. Louis, we've also had to bridge with  
11 consulting help.

12 Q. And the consulting help costs more than the people that  
13 they're replacing?

14 A. Yes, typically.

15 Q. Now, how does the rate of attrition Patriot is currently  
16 experiencing compare to historical levels?

17 A. It's increased dramatically.

18 Q. Have you prepared a slide that reflects that information?

19 A. Yes.

20 Q. Is that slide 4?

21 A. Yes, slide 4.

22 Q. And if you could please tell the Court what's depicted on  
23 slide 4.

24 A. Slide 4 illustrates the attrition that we're seeing in  
25 June to December of 2012 on the far right -- the far right red

1 bar. And next to that, January to May of 2012, in the smaller  
2 red bar, and compares that to 2011 attrition and 2010. And you  
3 can see 2010 and '11, we were looking at seven to eleven  
4 percent attrition level for corporate employees. That  
5 increased to thirteen percent in the first half of 2012. And  
6 in the second half of 2012, it's at twenty percent.

7 Q. And just to finish the picture, how are you doing in the  
8 first few months of 2013?

9 A. I would say it's worse. I don't have a statistic readily  
10 available, but based on my -- the number of personnel  
11 resignations I have seen and learned of, it's higher.

12 Q. Now, what do you think the impact on the debtors would be  
13 if the Court does not approve the proposed compensation plan?

14 A. Quite frankly, I think we have chaos. I think it  
15 threatens the successful reorganization of this business.  
16 We -- if you just look at the corporate office as a snapshot  
17 and ignore the damage at the mine level, we depend on the  
18 corporate office to get our taxes paid, to have our benefit  
19 plans administered, to get our payroll service, to keep our  
20 information technology system up and working, to do all those  
21 functions. And that's the area where we're having the most  
22 dramatic attrition. So that's our SEC reporting, that's our  
23 litigation service, that's everything that we need to maintain  
24 our corporate functions.

25 At the mine level, every time we lose a person, we have to

1 replace them with a more junior person, a person that's less  
2 experienced, generally less capable. So if we continue on that  
3 path, and frankly, if we don't come out of this hearing with an  
4 answer very promptly, I think we see chaos, I think we see more  
5 resignations, more people going to work for competitors, for  
6 certainty of a future job, and I think a very troubling outlook  
7 for this company.

8 Q. Okay. You heard Mr. Perillo, a little while ago, talk a  
9 lot about sacrifice and equity and how dare they, in light of  
10 what's happening with the unions. Did you hear Mr. Perillo's  
11 opening remarks about that?

12 A. Yes, I did.

13 Q. And is it a fair characterization to say that why should  
14 we be giving bonuses to these people when -- and only seek  
15 sacrifice from the union employees?

16 A. The statement reflects a serious misunderstanding of the  
17 facts or a misrepresentation of the facts. We have already  
18 gone to every segment of our work force, frankly, before we  
19 went to the union, and asked for substantial cuts. We have --  
20 our salaried employees have received salary cuts. Our nonunion  
21 and our salaried employees have seen substantial changes in  
22 their benefits. They're all paying ten percent of the cost of  
23 their health care now. Before filing they didn't pay any of  
24 that. And they don't even have as rich a program as the UMWA  
25 has. Their program was much more economical than the union

1 workers, but now they're even paying ten percent of that cost.  
2 They've lost -- they've had reduced vacation time. They've had  
3 elimination of retiree benefits. There are retiree medical  
4 that's been promised to the non -- to the salaried work force  
5 for years and years, but they've been put on notice that we  
6 plan to terminate it. So there's been sacrifice called for  
7 from every segment of this company, and I don't think it's fair  
8 at all to say that the UMWA is the only place where we've gone  
9 to ask for relief or to demand an accommodation to help this  
10 company emerge.

11 Q. Well, let's unpack that a little bit. Let's go slow,  
12 because I think this is an important point, since Mr. Perillo  
13 began and ended his opening with it. Let's talk -- well, could  
14 you turn to page 5? Is this a slide that you prepared in  
15 connection with your testimony?

16 A. Yes.

17 Q. Okay. Could you explain to the Court-- you know, kind of  
18 unpack this slide for the Court and show -- and explain to the  
19 Court what it depicts?

20 A. Slide 5 illustrates the dramatic reduction in compensation  
21 for the proposed plan participants. It makes the point, if you  
22 look at the 2010 and '11 two-year average, that this group of  
23 employees would have been paid a total of 29.2 million dollars;  
24 that's the blue bar on the left. That compares to if we don't  
25 approve these programs, this same group of -- that same group

1 of individuals, for the 2012 and '13 period, would receive  
2 twenty percent less, 23.5 million dollars, on the far right of  
3 the graph.

4 Q. So that's a twenty percent pay cut if these proposed plans  
5 aren't approved --

6 A. Yes.

7 Q. -- is that what you're saying? Okay. Could you explain,  
8 then, what the middle graph shows?

9 A. The middle bar illustrates that if these plans are  
10 approved, there's still an eleven percent reduction in the two-  
11 year average for 2012 and '13 compared to 2010 and '11.

12 Q. Okay. So just so it's clear, so if the plans aren't  
13 approved, it's a twenty percent pay cut, and even if they are  
14 approved, it's an eleven percent pay cut?

15 A. That's correct.

16 Q. Okay. And is that -- do you consider that sacrifice?

17 A. Yes, it is.

18 Q. And does slide 5 depict all the sacrifice that you've  
19 asked for and implemented with respect to your nonunion work  
20 force?

21 A. No. This simply captures the payroll impact and the cost  
22 of the health care benefits. It doesn't capture a host of  
23 other programs, changes that have been made.

24 Q. And have you prepared a slide that depicts those  
25 additional -- that additional sacrifice?

1 A. Yeah, slide 6.

2 Q. And could you please explain to the Court what's shown on  
3 slide 6?

4 A. Slide 6 highlights the point that the plan participants  
5 have suffered significant additional reductions in compensation  
6 and benefits since the Chapter 11 filing. And it -- the  
7 bullet -- bullets there outline various program cancellations  
8 or eliminations.

9 The first bullet describes the -- our discontinuing the  
10 long-term equity incentive program, which paid out  
11 approximately three million dollars to the plan participants in  
12 2011 alone.

13 The second bullet references the termination of the  
14 supplemental 401(k) plan; that was worth approximately 350,000  
15 dollars to proposed plan participants, substantially more to  
16 the executive team, obviously, but they're not among the  
17 proposed plan participants.

18 The third bullet, no payment of approximately three  
19 million of earned amounts under the 2012 incentive program.  
20 This is money that had been earned, that these people, for the  
21 second half of 2012, thought they were going to get. And then  
22 we had to tell them at, you know, the end of 2012, that because  
23 of the cash needs of this company we simply can't pay it, and  
24 we terminated the program without any payment; three million  
25 dollars of 2012 incentive not paid.

1           The fourth bullet, elimination of eight traditional  
2 retiree health care plans and the medical payment reimbursement  
3 program, often referred to as our MPR program. That has an  
4 impact of at least nine million dollars. All of our salaried  
5 retirees and planned future retirees are being told that their  
6 programs are -- are plans to be terminated.

7           The next bullet references elimination of life insurance  
8 benefits upon retirement for active salaried and nonunion  
9 employees, reduced holiday, personal leave and vacation time,  
10 adjustments made in each of those categories through the course  
11 of this reorganization.

12           The next bullet eliminated deferred vacation balances from  
13 Peabody and Magnum employees worth approximately one million  
14 dollars. That's often referred to as bank vacation time that  
15 these people had been anticipating a payout for, for years,  
16 going back to the days of the Peabody spinoff, and they've now  
17 been told it's not going to be paid.

18           And the last one is termination of the Peabody pension  
19 shortfall and Magnum-defined contribution retirement plan  
20 payments that are longstanding programs that have been  
21 terminated.

22 Q.   And just so the record's clear, and the items, the cuts,  
23 the sacrifice depicted on page 6, are in addition to the pay  
24 cuts we talked about on page 7, is that correct?

25 A.   Yes.

1 Q. Now, has Patriot's union employees made similar sacrifices  
2 to those depicted on pages 5 and 6 of the slides that you just  
3 talked about?

4 A. No. To this point, they've had no sacrifice at all.  
5 Indeed, the union employees got a dollar-an-hour raise January  
6 1, 2013, because that's in the contract. Now, as you know, and  
7 I'm sure other attorneys in this building know, we can't make  
8 any alteration of the contract until we've completed the  
9 negotiating process as defined in 1113, and for retiree  
10 medical, 1114, and so no alteration or compromise of their  
11 compensation benefit programs has occurred at all to this  
12 point.

13 Q. And my final question, Mr. Hatfield -- and thank you for  
14 your time -- what would be the effect, in your judgment, of  
15 delaying approval of the proposed program?

16 A. I think delaying approval of the programs runs the  
17 substantial risk that the reorganization will fail from a loss  
18 of key talent that is critical to this business emerging as a  
19 viable reorganized business. I think loss of key talent poses  
20 just as much threat to us as loss of cash, because this company  
21 can only emerge if we can hold a management team together that  
22 directs the mines, that keeps the equipment running, that  
23 manages our business, takes care of our employee human  
24 resources programs, and keeps this business viable throughout  
25 the process. I think we have chaos, we have substantial



1 increase in attrition and resignations if we don't -- if we  
2 aren't able to provide prompt communication that these programs  
3 are going to get approved.

4 Q. Thank you, Mr. Hatfield.

5 MR. KAMINETZKY: That's all I have.

6 THE COURT: All right. Mr. Perillo, did you have some  
7 cross-examination for this witness?

8 MR. PERILLO: I do, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. PERILLO:

11 Q. Good afternoon, Mr. Hatfield.

12 A. Good afternoon.

13 Q. It's a pleasure to see you again. Mr. Hatfield, would it  
14 be fair to say that Patriot has about 4,000 active employees  
15 currently?

16 A. Yes.

17 Q. And of those, 1,800 are represented by the United Mine  
18 Workers?

19 A. I believe the numbers are about 1,615; it's close to that.

20 Q. We represent roughly sixty percent of your hourly work  
21 force?

22 A. That's close.

23 Q. And about 1,300 or so are your nonunion miners?

24 A. Yes.

25 Q. And then the balance of 900, or so, are salaried workers?

1 A. I believe it's about 1,100 balance.

2 Q. 1,100?

3 A. Yeah.

4 Q. And 225 of those are in these programs we're discussing  
5 today?

6 A. 225 are in the incentive program; only 110, I believe, are  
7 in the retention program.

8 Q. And combined, that is what, approximately 274 unique  
9 individuals?

10 A. No, I believe it's 225 or less, because some people are in  
11 both programs. So --

12 Q. And now, everyone who is in the incentive program is also  
13 in the retention program?

14 A. I'm not sure that's accurate, but I think it's accurate  
15 that there's approximately 225 or 250 individuals.

16 Q. Patriot is the sixth largest coal company in the  
17 Appalachian basin, is that true?

18 A. Ranked on revenues, I believe -- yes, I believe that's  
19 true --

20 Q. And you have --

21 A. -- we're about the sixth largest.

22 Q. Excuse me, I'm sorry. I thought you were finished with  
23 your answer. Go ahead.

24 A. I believe you're approximately correct.

25 Q. And you have about fourteen competitors?

1 A. We probably have more than that. Are you referring to the  
2 Appalachian region only?

3 Q. Well, in the Appalachian basin you have approximately  
4 fourteen competitors?

5 A. That's probably reasonable.

6 Q. And those are all coal companies or energy companies?

7 A. Generally speaking, yes.

8 Q. You think you have more competitors than the people in the  
9 Appalachian basin?

10 A. I think there's more numbers than that, because a lot of  
11 independents are out there that aren't necessarily represented  
12 as a publicly traded coal company, so the number is probably  
13 larger. But if you look at publicly traded coal companies,  
14 there's probably eight or so, but your number, in terms of  
15 substantial competitors, is probably a reasonable number.

16 Q. All of your competitors are feeling the same market forces  
17 from the recession that Patriot is feeling, is that correct?

18 A. I think that's generally the case. Some companies are  
19 obviously more capable of withstanding the downturn than  
20 others.

21 Q. You indicated --

22 MR. PERILLO: Excuse me. Strike that.

23 Q. The biggest reason that Patriot filed for bankruptcy was  
24 its so-called legacy costs, its retiree costs; is that not  
25 correct?

1 A. I believe that was cited as one of the largest reasons.  
2 There are other factors, obviously. We had some underwater  
3 contracts that were problematic that were a drain on the  
4 business, and -- but the single biggest issue was the retiree  
5 medical obligation that's very substantial.

6 Q. And Patriot, for the first time, had a corporate-level  
7 retention plan in June of 2012, is that correct?

8 A. I'm sorry; could you repeat your question?

9 Q. The first time Patriot attempted to implement a corporate  
10 level retention plan was in June of 2012, is that not correct?

11 A. That is correct.

12 Q. You had told participants in that plan that court approval  
13 is necessary, correct?

14 A. Yes, we told them upon filing that it was our  
15 understanding that the court would have to approve the  
16 retention program and any future incentive program for that  
17 group.

18 Q. There was nothing stopping you from having a  
19 corporate-wide retention plan in 2009 or 2010 or 2011, correct?

20 A. I don't think there was any prohibition. If you'll  
21 recall, the motivation for what happened with the corporate  
22 retention program in second quarter of 2012 was we were getting  
23 to see dramatic attrition and concern because of the financing  
24 crisis. It became common knowledge to the news media that  
25 Patriot was at risk of not having its needed financing

1 approved, and that once that became a point of media  
2 speculation, we began to have some -- some serious concerns  
3 about keeping the work force, particularly the corporate work  
4 force together, because of fear that we would be filing for  
5 bankruptcy. So that's the first time we launched the  
6 initiative of considering a corporate retention program.

7 Q. That's very interesting. The answer to my question,  
8 however, is you could have such a plan in 2009, 2010, 2011, had  
9 you so chosen?

10 A. Yes, we actually had programs, but they weren't  
11 corporate-wide. They were generally focused on specific  
12 operating personnel. But, yes --

13 Q. And you did not have the corporate-wide program that  
14 you've attempted to implement now?

15 A. Correct.

16 Q. I want to talk to you about some of the individuals who  
17 are in the program. Let's first talk about the retention plan.  
18 The CERP is, admittedly, a retention plan, correct?

19 A. That's correct.

20 Q. And the purpose of that plan is to encourage people to  
21 stay employed at the debtor?

22 A. That's correct.

23 Q. By paying them more money.

24 A. By giving them more than just their base salary.

25 Otherwise, all they are assured of receiving is a base salary.

1 Q. And as you sit here today, none of the participants --  
2 proposed participants have an actual current job offer in hand  
3 of which you are aware?

4 A. Well, presumably, some of them that are no longer with us  
5 received those job offers and left, but I'm not aware of anyone  
6 that's on the list today that has a job offer that hasn't acted  
7 on it, except the one that resigned this morning.

8 Q. Well, you're not proposing to pay anything to people who  
9 have already left --

10 A. No --

11 Q. -- so we understand?

12 A. -- I'm not.

13 Q. So of the people who remain at Patriot, to your knowledge,  
14 none has a job offer.

15 A. To my knowledge, I'm not aware of any.

16 Q. The practice in the coal industry of recruitment has been,  
17 for a long time, that competitors try to attract away a leader,  
18 somebody who is a title officer, and then when they get that  
19 person away, to have him go and try to recruit his former  
20 subordinates to come over to the other company. Is that a fair  
21 statement?

22 A. That does happen sometimes, yes.

23 Q. And Patriot uses that practice too, does it not?

24 A. I don't know if I would call it a practice, as such, but  
25 it is common, when you hire a senior manager, that if he likes

1 the job, he can sometimes to talk to people where he used to  
2 work and encourage others to join the company. So I wouldn't  
3 call it a focused practice as much as just something that's  
4 just a normal chain of human events.

5 Q. And your competitors are doing it, too?

6 A. They're --

7 Q. Correct?

8 A. They're hiring good talent when they see the opportunity;  
9 I believe that's true.

10 Q. That's not something that happened just since July 9 of  
11 2012, is it? That's been going on for a long time.

12 A. The rate of deterioration that we've seen since July of  
13 2012 is dramatic compared to what we have seen historically.

14 Q. I understand that that's your position, but I would like  
15 you to answer my question. My question was that the practice  
16 of recruiting people away from competitors has gone on for a  
17 very long time, is that not true?

18 A. I think that's true.

19 Q. And in fact, when we previously spoke about this subject,  
20 you told me it was eons old; wasn't that your phrase?

21 A. The practice of hiring people when you have the chance,  
22 and building on a hire by recruiting folks that they used to  
23 work with, that is a fairly well-established practice, yes.

24 Q. Now, the retention program includes, even after the change  
25 that was made on -- what was it, the 6th of March, when you

1 made the change where you moved seven people out of the CERP?

2 A. Yes, at the urging of the U.S. Trustee, we did make that  
3 change, to move seven people out of the retention program into  
4 the incentive program.

5 Q. Even after that change, there are still nine vice  
6 presidents, people with the title of vice president in the  
7 program?

8 A. That may be correct; I'm not sure. There are certainly  
9 some vice presidents in the program.

10 Q. Eleven general managers?

11 A. That may be correct; I don't have a list in front of me,  
12 but without question, we have eleven mining complexes, and I  
13 believe all of the general managers are in the program.

14 Q. You testified previously, on direct examination, that you  
15 were the one who made the decision who to include in the  
16 program, did I not understand that?

17 A. No, that is correct, but I don't know all 4,000 employees  
18 personally. I do rely on others who work for me, and those who  
19 work for them, to help me frame the list. But I am, without  
20 question, the one who approved the constituents on the list.

21 Q. I can understand you wouldn't know all 4,000 employees  
22 personally. How about the nine highly compensated vice  
23 presidents who run your mining operations; you honestly don't  
24 know who they are?

25 A. I believe I know everyone that runs mining operations for



1 me. Is there a question about an individual?

2 Q. Well, we'll get there in just a moment. Doesn't the group  
3 in the CERP include the vice presidents who run your mining  
4 complexes?

5 A. The regional vice presidents -- and that would be the  
6 people responsible for the West Virginia North region, the West  
7 Virginia Central region, and Kentucky, and West Virginia South,  
8 yes, those -- those regional operating vice presidents are in  
9 the program.

10 Q. And if I understand it, the way Patriot is organized,  
11 there are eleven mining complexes?

12 A. That's correct.

13 Q. And nineteen mines?

14 A. That's probably correct.

15 Q. Okay. And over each one of those complexes and mines  
16 there's a general manager or a vice president or both, is that  
17 not correct?

18 A. For each mining complex there's a general manager who is  
19 responsible, yes.

20 Q. And they are all in this program?

21 A. Yes. The general managers generally report to a regional  
22 operating vice president.

23 Q. And if I remember correctly, you used the colloquial  
24 phrase, in your direct testimony, these are the people driving  
25 the bus. That's what you said?

1 A. Yes, managing the operations, making a difference.

2 Q. In addition to those people that we've just discussed,  
3 there was a vice president of human resources who worked with  
4 the compensation committee on the development of the program.  
5 That individual is also in the program, is he not?

6 A. I disagree with your characterization of the individual --  
7 individual's responsibilities, but the vice president of human  
8 resources, who provided data to us with respect to payroll and  
9 historic compensation, he provided data to the executive team,  
10 he is a participant in the program.

11 Q. And he attended meetings of the compensation committee?

12 A. He may have attended one or more meetings where he was  
13 called to be available with respect to data on historic  
14 compensation.

15 Q. And he also worked with your consultant, who was employed  
16 by Towers Watson?

17 A. Yes, he worked with Towers Watson, again, with respect to  
18 providing them with data for their analysis.

19 Q. The senior manager of employment relations, she also  
20 attended at least one of those meetings of the compensation  
21 meeting, did she not?

22 A. I'm not certain about the title. You said senior manager  
23 employee relations?

24 Q. Isn't that her title?

25 A. I don't recognize the title, to be honest.

1 Q. Okay. There was a female employee who was a senior  
2 manager of compensation and employer relations. Do you recall  
3 that person?

4 A. You may be correct; I believe I know the individual you're  
5 talking about. I'm not certain about the title, but she would  
6 have been there, again, with the payroll data, looking at  
7 historic compensation and answering compensation committee  
8 questions on current salaries and job position.

9 Q. And she also worked with the Towers Watson consultant,  
10 correct?

11 A. She would have been part of the team providing data to  
12 Towers Watson.

13 Q. And you're also aware that one of the subsidiary debtors  
14 has a member of its board of directors who is included in the  
15 compensation program, is that not correct?

16 A. I'm not certain who you're talking about.

17 MR. PERILLO: May we go off the record for a moment,  
18 Your Honor?

19 THE COURT: You may.

20 (Recess from 2:42 p.m. until 2:44 p.m.)

21 MR. PERILLO: Will my voice carry?

22 THE COURT: Well, we need you at -- will it pick up;  
23 we probably prefer that you be at the podium and then you can  
24 approach the witness.

25 MR. PERILLO: I'll handle it this way.

1 RESUMED CROSS-EXAMINATION

2 BY MR. PERILLO:

3 Q. Mr. Hatfield, in an off-the-record discussion, we agreed  
4 that in order not to use this individual's name, I'd write it  
5 down on a piece of paper and then I'd walk across the room and  
6 give it to you to try to refresh your memory as to who this  
7 person is. I'm about to do that.

8 A. That's fine. Okay, thank you. Yes, I'm familiar with the  
9 individual.

10 Q. You were able to read the name that I just showed you?

11 A. Yes, I was.

12 Q. That person is, in fact, a member of the board of  
13 directors of that company that I wrote on the piece of paper?

14 A. I believe that's an accurate statement, but that would be  
15 one of the subsidiary companies, by no means a member of the  
16 board of directors of Patriot Coal Corporation.

17 Q. He's a member of one of the ninety-nine debtors,  
18 however -- a board of directors member of one of the  
19 ninety-nine debtors --

20 A. Yeah --

21 Q. -- correct?

22 A. -- specifically, if you look at your list of employees,  
23 he's a general manager at one of the mining complexes that  
24 includes that subsidiary. That's why he's on the board of  
25 directors.

1 Q. In fact, he has the title president of that subsidiary, a  
2 member of the board of directors of that subsidiary, and also a  
3 general manager --

4 A. That --

5 Q. -- isn't that all correct?

6 A. That would be correct, I believe.

7 Q. There are no foremen in the CERP, is that true?

8 A. No.

9 Q. It's not true, or there are no foremen in the --

10 A. It's not true.

11 Q. Why don't we see the job title "foreman" on any of the  
12 exhibits listing the participants in the program?

13 A. It -- again, foreman is kind of a generic term in the  
14 industry, and it's used to cover a variety of jobs. There's a  
15 section foreman who's responsible for ten -- ten to twelve  
16 people at the working phase, and then there's sometimes a shift  
17 foreman and a mine foreman, and there's also sometimes, in  
18 large mines, a transportation foreman or a belt conveyer  
19 foreman. And I know from memory there are at least two people  
20 in a position of either a longwall foreman or a belt conveyer  
21 foreman that are in the CERP. So it would be correct to say  
22 that all foreman are not in the CERP, but there are some  
23 foremen that are in the CERP.

24 Q. And what job titles do those people have?

25 A. I believe something like -- one of them is director of

1 underground belts; do you see that on your list? That's  
2 essentially a belt foreman at a large mine. And the other one  
3 may have some sort of a director of mine operations or some  
4 title of that nature. I didn't create all of these titles, but  
5 some of them can get a little bit confusing because they vary  
6 across the industry.

7 Q. All of the people who have the job title of "General  
8 manager 1", with a suffix "UG", those are actually all people  
9 who are indeed the general managers of underground mines or  
10 mining complexes, is that not true?

11 A. That's correct. And that would include the individual  
12 who's on the piece of paper you just showed me, general  
13 manager.

14 Q. And then all of the people with the title "General manager  
15 1 SF", those are all people who are actually general managers  
16 of surface mines, correct?

17 A. Yes, generally -- generally that would be a mining complex  
18 that's primarily surface mines. Sometimes there's a mixture.

19 Q. So none of those people have morale booster titles that  
20 say they're the general manager of a mine when they're really  
21 not?

22 A. That's correct. If they have the title "General manager",  
23 that means they're responsible for a mining complex.

24 Q. And the regional VPs, they actually are all VPs that have  
25 jurisdiction over an entire region of Patriot, correct?

1 A. A regional VP would be responsible for something between  
2 two and four mining complexes, depending on the respective  
3 regions.

4 Q. And those people don't have a morale or booster title that  
5 just suggests they control a mining complex when they really  
6 don't?

7 A. No, I think the title is descriptive of the job they do.

8 Q. And they are in the CERP?

9 A. Yes.

10 Q. You testified that the incentive plan -- I'm moving to the  
11 other plan for a moment -- applies to most people in the  
12 corporate office and many people in regional offices, is that  
13 accurate?

14 A. Yes, I believe that's accurate. It's --

15 Q. And --

16 A. More generally, it's people that are not covered by any of  
17 the mine-level bonus programs.

18 Q. And that now includes the seven individuals that were  
19 removed from the CERP and then moved over to the AIP as a  
20 result of the U.S. Trustee's colloquy with you?

21 A. Yes, I believe those individuals would have already been  
22 in the AIP, but their award level was increased because of  
23 their removal from the retention program.

24 Q. And so what was done is all the money that they were going  
25 to make under the CERP was just added to their AIP bonus.

1 A. Yeah, I would say their maximum eligible bonus was  
2 essentially the retention amount padded onto their incentive  
3 program, so a hundred percent of their award is at risk and  
4 requires that we meet all of the targets that I described on  
5 finance -- financial and safety and so forth.

6 Q. Now, these people include the corporate secretary, the  
7 seven people that we're talking about?

8 A. Yes.

9 Q. That's a named officer in the bylaws?

10 A. Yes. As I explained in our dep -- in the deposition,  
11 eighty percent of her job is managing litigation, as the second  
12 ranking attorney in our corporation. The corporate secretary  
13 job is less than twenty percent of her role. She just takes  
14 minutes there.

15 Q. I realize you and I may know this, but not everyone  
16 present has read the deposition; that's why this may seem a  
17 little repetitive to you, but I hope you'll indulge me. It  
18 also includes the senior VP of operations north?

19 A. That's correct.

20 Q. The senior VP of operations south.

21 A. Yeah. I would say West Virginia north, senior VP of  
22 operations, West Virginia operations south.

23 Q. And the corporate treasurer?

24 A. That's correct.

25 Q. The vice president of safety?



1 A. Correct.

2 Q. The vice president of investor relations?

3 A. Correct.

4 Q. And senior counsel?

5 A. Correct.

6 Q. Now, I think you testified that you made the determination  
7 of what amount was necessary to -- you'll pardon me using the  
8 word -- incentivize people in the AIP, is that true?

9 A. Yes, it was my determination as to what the final award  
10 level or maximum eligibility would be.

11 Q. And these seven people that we just discussed, they  
12 originally had bonuses, AIP bonuses, that range from five  
13 percent to fifteen percent, correct?

14 A. I believe that's correct.

15 Q. And you determined that five to fifteen percent was an  
16 adequate amount to give them incentive to perform to achieve  
17 the targets that you hoped they would achieve?

18 A. Yes, we believed that was the case when they were also  
19 participants in retention as well.

20 Q. And now you are telling the Court, I believe, that those  
21 amounts need to be increased to forty to sixty percent of  
22 salary?

23 A. Yes, we put the entire amount at risk in the incentive  
24 program, obviously unsuccessfully, since one of the seven  
25 resigned this morning.

1 Q. Which one of the people was that?

2 A. That would be the -- the last general -- the assistant  
3 general counsel position that you referenced.

4 Q. The person who's a senior counsel?

5 A. I believe senior general counsel was how he appeared on  
6 your list, if I understood you correctly. Or maybe it was  
7 assistant general counsel. I think that's correct.

8 Q. Now, the -- I believe in your testimony you recounted a  
9 number of people who you believe had left because of concerns  
10 over security; they feel insecure at Patriot because it is a  
11 bankrupt corporation.

12 A. Yes.

13 Q. And you were proposing that giving them money as of  
14 specific dates -- and you testified as to what the dates are in  
15 your direct testimony -- will give them that additional  
16 security?

17 A. Correct.

18 Q. And on the day after they receive that money, they could  
19 leave and just take that money with them?

20 A. That's generally true; the day after they get the check,  
21 if they get the twenty-five percent check, they could leave,  
22 having stayed only that long and not stayed through the end of  
23 the award period. That's obviously why we backloaded most of  
24 the award.

25 Q. Do you know --

1 MR. PERILLO: Strike that. Permit me for a moment.

2 Q. The incentive plan we are talking about, apart from the  
3 individuals that we've been discussing, the seven individuals,  
4 there are also fifteen other vice presidents that make 160,000  
5 dollars or more per year in that program, is that correct?

6 A. I'm not certain if that's true or not. There are -- I  
7 would agree that there are several other people with a title  
8 vice president. Some may be vice president of purchasing and  
9 some may be vice president of middle or large coal sales, some  
10 may be vice president of former coal sales. So some have vice  
11 president in their title. I -- I don't know if your number's  
12 correct --

13 Q. Those --

14 A. -- or not.

15 Q. Those people who are, let's say, for example, vice  
16 president of sales, coal sales, are they important people to  
17 Patriot's operation?

18 A. Yes.

19 Q. They actually have authority over coal sales?

20 A. They have limited authority with respect to a particular  
21 segment of coal sales. They generally meet with customers and  
22 try to structure transactions to market our coal.

23 Q. Coal is a major asset of the Patriot corporation, isn't  
24 it?

25 A. Yes, it is.

1 Q. There are also eleven general managers in the program that  
2 are making 146,000 dollars or more?

3 A. That's probably the right area. That's generally the  
4 salary range for a general manager in the Appalachian region,  
5 whether it's Patriot or one of our competitors.

6 Q. The chief information officer is in the program?

7 A. Yes.

8 Q. The two senior VPs who are in the program make between 230  
9 and 350,000 dollars, roughly?

10 A. That sounds correct.

11 Q. And that's the base salary that they're guaranteed to  
12 receive regardless of these programs, correct?

13 A. Yes, which as noted earlier, is still substantially less  
14 than what they've made historically or would be paid by a  
15 competitor.

16 Q. But that's their base salary. That doesn't include the  
17 bonus?

18 A. That is their current base salary, yes.

19 Q. With the bonuses -- for example, the fellow making 340-  
20 some thousand dollars would go up to something in the  
21 neighborhood of 550,000?

22 A. I can't do my math -- the math in my head, but the  
23 incentive payments, if they get the maximum award, would be  
24 additional to base salary.

25 Q. The VP and controller is also eligible for the AIP

1 program, is that correct?

2 A. I believe that's correct.

3 Q. And that person is also appointed by the board of

4 directors, is he not?

5 A. I believe that's correct, technically appointed, but he's

6 in the same category, I think, as the other seven, but

7 nonetheless, I don't disagree with your technical point.

8 Q. Okay. And even though he was in the same category with

9 the others appointed by the board, he -- was he originally in

10 the CERP?

11 A. No, he was not.

12 Q. Okay. So he stays in the AIP?

13 A. Correct.

14 Q. I understand, Mr. Hatfield, that the way reporting works

15 at Patriot, there are a number of people who report directly to

16 the board of directors. Can you categorize those people for

17 me?

18 A. The only person that reports directly to the board of

19 directors is me; that's my boss, essentially. And the other

20 members of the executive team, as I call it, which, with me,

21 total six people that remove themselves from either of the

22 programs, those are my direct reports. And that would

23 include -- I could name them, if you wish.

24 Q. No, that's quite all right. You are the only person,

25 though, who directly reports to the board of directors, and

1 then the other people, who have removed themselves from the  
2 program, report to you?

3 A. They do.

4 Q. And then the next level of people down from them, they  
5 report to one of those six people?

6 A. Yes --

7 Q. And --

8 A. -- generally speaking.

9 Q. In general, those would include your senior VPs?

10 A. It would include senior VPs, some department heads, some  
11 lead attorneys, a wide variety of talents.

12 Q. A wide variety of, sir?

13 A. Of talents, of positions.

14 Q. The senior VPs who report to -- would they report to you  
15 or the chief operating officer?

16 A. They would currently report to the executive VP of mining  
17 operations. We've essentially changed that position and did  
18 not hire a chief operating officer.

19 Q. And how many people are in that tier?

20 A. In the tier of people reporting to --

21 Q. Well, there's --

22 A. -- who?

23 Q. -- you, who report to the board, and then there's the  
24 other five people who are your reports. And now we're talking  
25 about the next tier down; these are the people who report to

1 those five. How many people are in that tier?

2 A. I can't recall the number from -- from memory, but in some  
3 cases there are as many as five to seven direct reports for  
4 each of the five people that report to me.

5 Q. So that's roughly thirty -- thirty to forty people?

6 A. Probably.

7 Q. Okay. And those are -- every one of them is either in the  
8 CERP, the AIP or both?

9 A. I think, generally speaking, that would be accurate.

10 Q. And does that include the CIO as well?

11 A. Yes, he would report to the CFO who reports to me.

12 Q. Now, the general managers, are they in the next level  
13 down?

14 A. Yes, the general managers report to the regional operating  
15 vice presidents. So they would be one level below the level we  
16 just described.

17 Q. And those general managers, what numbers do they comprise  
18 roughly another --

19 A. There're approximately eleven of those.

20 Q. All together?

21 A. Yes.

22 Q. I think you told us previously that everybody in Patriot's  
23 salaried workforce has some level of spending authority,  
24 correct?

25 A. Yes, I think that's accurate. In some cases, it may be a

1 very modest level of spending authority but I think that's  
2 generally accurate.

3 Q. I can appreciate that. Of the tiers that we're talking  
4 about, however, the regional VP tier that has roughly thirty-  
5 some-odd people in it who report to your reports and the  
6 general managers who are below them, that eleven or so people,  
7 what level of spending authority do they have?

8 A. As I sit here, I really don't know. There is a defined  
9 level per corporate policy but I just don't remember the  
10 number. I think I characterized it for you earlier as  
11 certainly being less than a million dollars but I don't  
12 remember the number.

13 Q. And so they have spending authority of up to one million  
14 dollars?

15 A. I believe I said less than. I'm not sure what it is.

16 Q. Is that consistent across the group or does it vary person  
17 by person?

18 A. I think it varies by position in the company.

19 Q. That's according to title then, from your job title?

20 A. Well, position in the company would be more representative  
21 because sometimes a job title it's more focused on experience  
22 in a job. For instance, two people that are regional operating  
23 vice presidents, one may be called senior, one may just be a  
24 regional operating vice president, and they do the same job but  
25 one has been in the business for thirty years and the other one



1 maybe only five or ten.

2 Q. And so let's take, for example, a regional vice president  
3 who is long experienced and long tenure with Patriot. What's  
4 his level of spending authority?

5 A. Again, I do not recall.

6 Q. You don't know?

7 A. But it's defined. I just don't recall.

8 Q. How can you state with confidence that he's not an insider  
9 if you don't know how much money he can spend?

10 A. Because I know he has no ability to -- to shape the policy  
11 and direction of the company. That's done by the executive  
12 team that works with me. I know that he doesn't attend board  
13 meetings -- board of directors meetings with -- with input on  
14 the policy and direction of the company. So I know what his  
15 job is. That's why I can respond.

16 Q. And yet he still runs an entire -- or several entire  
17 mining complexes of Patriot?

18 A. Yes, he does. And I would say he's very good at it.

19 Q. Do you still have your exhibit in front of you?

20 A. Yes, I do.

21 Q. If we turn to page 3 of that exhibit. In July of 2012,  
22 the VP of Kentucky operations left the company. Do you see  
23 where that's reflected?

24 A. Yes.

25 Q. That's the individual you told us previously was not

1 replaced and his position was accommodated by internal  
2 restructuring?

3 A. That's correct.

4 Q. With the exception of the person that is two down from  
5 that person, general manager one of surface mine, do you see  
6 that?

7 A. Yes.

8 Q. There are none of the other general managers of mining  
9 operations who have departed. Is that correct?

10 A. I believe that's correct. I believe the one you  
11 referenced is the only general manager that has resigned.

12 Q. I'd also like you to flip to page 5 while you have that  
13 document in your hand. I notice that the -- on the far right  
14 of the graph, the red bar that represents eighty percent of the  
15 person's compensation is actually shown smaller than the twenty  
16 percent that's in the gap above it. If we actually adjusted  
17 these bars to reflect their true height relative to a hundred  
18 percent, that line would go up to maybe a quarter of an inch or  
19 so below the dotted line. Is that true?

20 A. Yeah, I'm not sure what point you're making. The numbers  
21 are labeled quite clearly on the tops of the bars. It's  
22 twenty-three --

23 Q. Sure, but --

24 A. -- and a half million is essentially six-and-half million  
25 less than what those people would've made in 2010, 2011.

1 Q. But if we glance at the chart, though, it actually shows  
2 that the twenty percent that's missing on top is greater than  
3 the eighty percent that's shown which is impossible, correct?

4 A. Well, the --

5 Q. Eighty percent is bigger than twenty percent, isn't it Mr.  
6 Hatfield?

7 A. I'll agree with your mathematical conclusion. I think the  
8 point of the illustration is that the base isn't zero. It's  
9 just easier to illustrate the difference when you don't start  
10 at zero because it's a tall bar.

11 Q. Now, this represents a twenty percent loss in  
12 compensation?

13 A. I believe that's correct.

14 Q. Okay. If we talk for a moment about what you're asking  
15 rank-and-file employees to accept, your typical rank-and-file  
16 unionized miner makes twenty to twenty-six dollars, something  
17 in that neighborhood?

18 A. Yeah. There's a wider range but for illustrative purposes  
19 that's fine.

20 Q. And that the concessions you're seeking from them just in  
21 their regular compensation, amount to six or seven dollars an  
22 hour, more than twenty-five percent, don't they?

23 A. Actually it varies by position. With respect to wages  
24 we're not proposing to change underground miners much at all  
25 but there are more substantial changes with surface miners and

1 preparation plan employees because we believe they're more  
2 significantly out of line with market, market being the point  
3 of reference that's relevant here, I think.

4 Q. The value of the retire -- excuse me, of the pension  
5 contribution, you're taking -- you're proposing to take away  
6 from those people -- it's about eight dollars an hour, is it  
7 not?

8 A. Yeah, I'm not certain what math you're referencing there.  
9 Could you --

10 Q. Isn't that --

11 A. -- enlighten me?

12 Q. -- the hourly value of the pension contribution?

13 A. I don't know.

14 Q. You do not know?

15 A. Well, I know what we spend annually on pensions for --  
16 let's go to a point of clarification here. The -- under the  
17 contract, I believe, the payment into the pension plan is about  
18 \$5.50 per hour. That's for each active worker going into a  
19 fund that then pays the pension. So yes, we are proposing that  
20 that -- that that payment be terminated but that's not eight  
21 dollars. There are other per hour payments for different  
22 purposes that we are proposing to change.

23 Q. When you add to that the change to health insurance,  
24 doesn't that amount to roughly another three dollars an hour?

25 A. The health insurance would be an additional cost,

1 certainly. It would be generally in line with the adjustment  
2 that we have asked our nonunion miners to make on health care.

3 Q. So that the pay cuts that rank-and-file employees will  
4 take amount to something in the neighborhood of fifteen dollars  
5 per hour --

6 A. Yeah, I --

7 Q. -- if you add all those things together?

8 A. Yeah. I'm not certain of the math. I think the key point  
9 is in each case everyone is taking a cut versus their historic  
10 compensation. I think that's demonstrated across the board.  
11 But also in each case, we don't believe anyone has asked -- is  
12 being asked to work appreciably below market. And in every  
13 offer that we have advanced to the UMWA, I don't believe we  
14 have ever suggested a payment that is out of line with regional  
15 market as we measure it.

16 Q. So it's your position that for the five years prior to the  
17 bankruptcy, you simply paid the union miners more than the  
18 market would've demanded?

19 A. Under contract we had no choice, actually.

20 Q. But you negotiated those contracts, did you not?

21 A. I didn't at all. I got here nine months before we went  
22 into bankruptcy. But my predecessors negotiated contracts.

23 Q. Yes. Real officials of Patriot with the power to  
24 negotiate negotiated that, correct?

25 A. They did agree to -- they came to agreement on a contract.

1 I will acknowledge that point.

2 Q. Was I wrong in my opening statement to say that you have  
3 asked for about 150 million dollars of annual concessions from  
4 unionized miners and retirees?

5 A. I believe that's an accurate description of the total  
6 savings that we're asking for under 1113 and 1114.

7 Q. And the total concession from retirees when you go into  
8 the outer years, would number well over a billion dollars,  
9 almost two billion?

10 A. It's a large number. It's also the largest reason that  
11 we're in bankruptcy.

12 Q. Let me ask you, what other constituency besides the  
13 retirees is taking a 1.6 billion dollar cut for Patriot?

14 A. I don't think there is another constituency that is  
15 receiving that much that can give it up. Again, what we're  
16 trying to do with Patriot is emerge and avoid liquidation  
17 because in liquidation everyone loses. And I think there's a  
18 consensus generally on both sides of the table in that regard.  
19 Union losses job rights. Retirees lose value in the company  
20 because they are going to be the largest portion of ownership  
21 in this reorganized company. And the stronger we make this  
22 company, the better off the retirees are. So it is my goal to  
23 make this company as strong as we can and make it viable.

24 So I believe that is the path that has the greatest  
25 reward. We can't measure from where we are cutting because

1 where we are today is simply not viable and has nothing but a  
2 path to liquidation.

3 Q. I can understand why you didn't want to answer my  
4 question, so I'll remind you of what it is. I asked who else  
5 besides the retirees is giving you a concession of that  
6 magnitude. The answer is there is no one.

7 A. Well --

8 Q. Isn't that correct?

9 A. -- I believe the answer was no one because no one else is  
10 receiving that level of benefit.

11 Q. And besides the active unionized employees, who else is  
12 giving you annual concessions in the seventy-five million  
13 dollar range?

14 A. No other group is being asked to give that level because  
15 no other group has that level of pay above market.

16 Q. And together those make up the 150 million plus, correct?

17 A. The total 150 includes both what we're proposing for  
18 retiree medical changes and for the 1113 co-bargaining  
19 agreement changes.

20 Q. Now Mr. Hatfield, you've been at the bargaining table with  
21 the UMWA for a couple of months -- longer than a couple of  
22 months?

23 A. Since November 15th, yes.

24 Q. And you've been consistently told by the UMWA that there  
25 won't be a consensual resolution to this case if bonuses are

1 paid to managers as you've proposed. That's been told to you,  
2 has it not?

3 A. Actually in those terms, no, I haven't heard it. I -- the  
4 UMWA has been very clear that they oppose the bonus program  
5 that we have outlined. That's -- I don't dispute that point at  
6 all. But as you just characterized it, I don't believe I've  
7 heard in that context, no, sir.

8 Q. Hasn't every single proposal made to you by the UMWA  
9 included a proviso in it that while UMWA members are paid below  
10 their contract, no bonuses would be paid to managers?

11 A. Yes. Each of their proposals has essentially mandated  
12 that there would be a salary freeze, no bonuses, until the  
13 union is restored full pre-filing benefits and compensation.  
14 That's been a key requirement of each of the proposals they've  
15 given us which is a good reason we felt like it wouldn't work.

16 Q. I want to turn to -- oh, before we leave that subject, if  
17 the inability to reach agreement -- and I will just pause to  
18 say we are all hopeful that we will, but if the inability to  
19 reach an agreement continues, and causes labor unrest, how will  
20 that effect your ability to achieve the metrics in this  
21 program?

22 A. A labor unrest would be the equivalent of jumping up and  
23 down on broken ice and we all know what that outcome is.

24 Everybody falls into the pond and it's a really bad outcome.

25 So labor unrest is -- could indeed be the ultimate path



1 that could force this company into liquidation.

2 Q. And that would cause there to be no bonuses?

3 A. It could cause everyone to lose bonuses and all.

4 Q. Are your managerial employees aware of this?

5 A. I believe the management employees are painfully aware of  
6 the challenges this company faces going forward and the high  
7 risk that we may not emerge successfully. I think that's why  
8 we're losing as many as we are losing.

9 Q. And specifically, they're aware of what I just mentioned?

10 A. They are aware of the risk of labor unrest. I think  
11 that's again, a key feature of -- of the pattern in recent  
12 departures and resignations.

13 Q. I want to turn now to a slightly different subject. You  
14 talked in your direct testimony about selecting individuals for  
15 the program. You didn't make an individual assessment of each  
16 employee in the program, is that correct?

17 A. I relied heavily on input from the executive team and  
18 they, I'm sure, relied on input from people that report to them  
19 as we framed the final list. But in the end, I scrutinized the  
20 list. I changed some levels; changed some individuals and made  
21 the final approval.

22 Q. I think you would agree with me that you did not actually  
23 conduct an attrition analysis of Patriot prior to your creation  
24 of the original corporate CERP, is that correct?

25 A. I'm not sure as to the effectiveness of an attrition

1 analysis. The attrition analysis is easily measured at the  
2 front door with people leaving.

3 Q. Well, that may be so but my question was did you or did  
4 you not make the analysis? And I think you probably answer  
5 that either you did or you didn't.

6 A. Yeah. We did not make a --

7 Q. Okay.

8 A. -- ask for an attrition analysis study, as such.

9 Q. Thank you very much. Nor did you compare your program to  
10 retention programs in the coal industry generally?

11 A. We called on our advisors to gather information on  
12 comparables, particularly with respect to companies that were  
13 in reorganization -- Chapter 11 reorganization. And that's  
14 what we felt like was the relevant metric.

15 Q. Okay. But again, going back to my question, do you even  
16 know if there are retention programs in the coal industry?

17 A. I'm not certain. I suspect that they are -- they are  
18 there in some component, but more typically the industry relies  
19 on the incentive program framework much as Patriot relied on  
20 theirs prior to the filing.

21 Q. And so the answer to my question is you're not even aware  
22 if there is a coal company that has a retention program?

23 A. Yeah. I'm not certain whether there is or is not.

24 Q. Okay. And the list of names of individuals that were put  
25 into the program -- both programs, essentially was carried over

1 from prior incentive programs at the mine level?

2 A. No. With respect to the incentive program, you're  
3 statement is correct. The incentive program was essentially  
4 framed up as a participant list that would normally be eligible  
5 for incentive consideration. The retention program was built  
6 up more or less from -- from a blank sheet of paper on who are  
7 the critical employees, who do we have the greatest risk of  
8 losing.

9 Q. So for the larger of the two programs, the incentive  
10 program, you simply carried the names over from existing  
11 programs pre-bankruptcy?

12 A. It's a matter of position eligibility. As I described,  
13 that program covers people that aren't covered by mine-level  
14 incentive programs so it captures corporate office, regional  
15 offices, both in Kentucky and West Virginia, and those  
16 positions define who is a participant.

17 Q. I want to go over some things in your testimony which  
18 caught my ear. In describing personal goals, you told us that  
19 there were some lower-level employees, for example, who would  
20 check to make sure that no uninsured drivers carried loads for  
21 Patriots. Do you recall that testimony?

22 A. Yeah. I was giving an example of what might -- what  
23 individual goals may look like for, for instance, a vice  
24 president of purchasing or a manager of contract services. And  
25 the example you're describing in a manager of contract

1 services.

2 Q. And that's just one example, granted, but was it the  
3 practice of Patriot, prior to being in bankruptcy, to allow  
4 uninsured drivers to haul its loads?

5 A. No, it's always been our practice to try require that they  
6 have insurance coverage and we have procedures in place. But  
7 sometimes an audit may determine an area of particular  
8 weakness. If there's a high turnover of truckers or change in  
9 ownership of the trucking company, sometimes the insurance  
10 certificates are no longer valid.

11 So when we do an audit, we see a weakness, we try to  
12 respond to that by stepping up the standard.

13 Q. So isn't that individual that you mentioned, this safety  
14 compliance fellow, he's doing exactly what he did in 2010,  
15 2011. I mean that's just his job, isn't it?

16 A. Well, the purpose of the performance review is to try to  
17 do your job better each and every year. So in each performance  
18 appraisal we try to describe where they fell short in the prior  
19 year where things could've been done better. And we set goals  
20 for making that improvement in the coming year. I think that's  
21 not only typical for the coal industry; it's fairly common in  
22 the broader U.S. industry.

23 Q. But if I'm correct, though, and I think I am, wasn't it  
24 always Patriot's goal, irrespective of bankruptcy, to achieve  
25 certain minimal levels of performance like let's not use

1 uninsured drivers? That's not a new goal, is it?

2 A. No. It's always a goal to the best job one can. I may be  
3 missing your question here but do you think it's unreasonable  
4 to set standards for improvement each and every year? Is that  
5 a point I should respond to?

6 Q. No. No one suggests that.

7 A. Okay.

8 Q. But that was true in 2007, 2008, 2009, 2010, 2011. Always  
9 true, correct?

10 A. It's -- and it's our determination to try to continue to  
11 improve. That's why the safety target gets -- gets more rigid  
12 each and every year. Every year the target safety performance  
13 is stronger. We drop the accident rate. Same way with  
14 compliance; the target gets lower every year. We don't ever  
15 stop at one year and say that's as good as we're ever gonna  
16 get, let's stop now.

17 Q. Another example you gave was an administrative assistant  
18 who might be able to control costs by frugally purchasing  
19 office supplies. Do you recall that example?

20 A. Yes.

21 Q. But again, wasn't that always the pre-bankruptcy practice  
22 of Patriot as well?

23 A. It is their job, but I believe incentive programs can  
24 sometimes motivate more -- more aggressive pursuit of  
25 excellence. I think it can motivate a stronger performance.

1 Extra time and initiative invested in a better outcome.

2 Q. When we spoke about this issue in the discovery phase of  
3 this litigation, one of the things you told me is the extra  
4 work that such administrative assistants were doing were things  
5 like setting up dinners with your bankers, is that true?

6 A. I believe your question was how can someone like an  
7 administrative assistant contribute to financial performance or  
8 liquidity or safety? And I used the example that even on  
9 liquidity, an administrative assistant may be setting up  
10 dinners for the bankers but there's some cost involved which  
11 contributes to the EBITDAP component. And on safety meetings,  
12 it wouldn't be uncommon for the administrative assistant to  
13 prepare the presentations that'll go to the mines that -- that  
14 help encourage them to improve safety.

15 So I believe every member of the team can make a  
16 contribution. It's simply a lower contribution in some levels  
17 than others.

18 Q. One more question along this line. In the course of your  
19 testimony, I think you also mentioned that one of the things  
20 you were doing -- you, Patriot, was doing, in order to get past  
21 the difficulties created by people leaving your organization  
22 was to promote from within. Do you remember that?

23 A. Yes. I described that as how we're filling some of these  
24 openings.

25 Q. Yeah. And isn't promotion of talent from within something

1 that typically happened at Patriot throughout its existence?

2 A. To the extent we can. It's always a good thing when you  
3 have the talent on the bench to fill position with a junior  
4 person. But that doesn't mean that you're stronger because a  
5 twenty year old experienced superintendent left and you would  
6 up with someone who's only been in the mines for five years. I  
7 don't think that necessarily makes us stronger. Indeed quite  
8 to the contrary.

9 Q. In your direct testimony, I think you testified that some  
10 of the people who are leaving Patriot are leaving because they  
11 want a certainty of a future job. Do you recall the --

12 A. Yes.

13 Q. -- I wrote down the phrase because it was so fetching:  
14 "Certainty of a certain job."

15 A. Yes.

16 Q. Does this program give people certainty that they will  
17 have a job in the future?

18 A. No, it does not. But it does give them the incentive to  
19 take some risk that the job may disappear.

20 Q. Thank you. And there's actually not been any particular  
21 person who's told you -- told you personally, I would've stayed  
22 if only you'd given me a sixty percent bonus. There is no such  
23 person who's told you that. Isn't that correct?

24 A. Actually there are people that have told me that they are  
25 leaving despite the retention bonus because they don't believe

1 it'll get approved.

2 Q. And there are people who are leaving even though you  
3 offered them money to stay?

4 A. Yes. We have offered promotions in some cases, to one  
5 young mining engineer in Kentucky and he left because he didn't  
6 believe the company was going to be secure.

7 MR. PERILLO: Permit me a moment to confer, Your  
8 Honor.

9 THE COURT: Yes.

10 MR. PERILLO: Thank you.

11 Your Honor, in order not to belabor the Court with  
12 repetitive questioning, I've divided up the topics with the  
13 other objecting counsel. And so I'm going to turn over the  
14 witness at this point and I simply would say that the UMWA  
15 would adopt the examination that Ms. Hillyer is about to make.  
16 Thank you.

17 THE COURT: All right.

18 MS. HILLYER: If I may, Your Honor, have one moment?

19 (Pause)

20 MS. HILLYER: Thank you, Your Honor.

21 THE COURT: Uh-huh.

22 CROSS-EXAMINATION

23 BY MS. HILLYER:

24 Q. Good afternoon, Mr. Hatfield.

25 A. Good afternoon.



1 Q. You mentioned --

2 MS. HILLYER: Sorry, yeah, go ahead.

3 We have some documents that we've prepared that we may  
4 use during cross-examination. We put them into binders --

5 THE COURT: All right.

6 MS. HILLYER: -- to make that easier. We may not use  
7 them all but -- you want to give one to the witness?

8 May I approach the witness?

9 THE COURT: I assume Mr. Kaminetzky has seen these?

10 MS. HILLYER: Yes. They're mostly from Mr.

11 Kaminetzky.

12 THE COURT: Oh. All right. Yes --

13 MS. HILLYER: May we approach the witness?

14 THE COURT: -- you may approach the witness.

15 THE WITNESS: Thank you.

16 MR. KAMINETZKY: I received them eight -- Your Honor,

17 I received them eight seconds ago, so I reserve the right to  
18 object as they come up.

19 THE COURT: Absolutely.

20 MR. PERILLO: Yep.

21 BY MS. HILLYER:

22 Q. Mr. Hatfield, on cross-examination you testified that the  
23 targets related to safety and the safety compliance, your  
24 targets get lower every year, is that correct?

25 A. Generally speaking that's been the case. I can speak with

1 certainty on that for the last three years where I've -- I've  
2 had some immediate recollection. I believe that's also the  
3 case historically.

4 Q. And when you say lower, given the nature of these targets,  
5 that means better, right?

6 A. Lower accident performance means better safety, yes.

7 Q. And you testified that you're working to improve on those  
8 targets and get better every year, isn't that right?

9 A. Yes, we try to lower the accident rate -- that's probably  
10 the easiest way to frame it -- each and every year so the  
11 target of accident frequency generally gets lower each year.

12 Q. The MSHA compliance rate, the environmental incident rate,  
13 and the safety incident rate in the proposed AIP, those target  
14 numbers are actually worse than Patriot's actual numbers in  
15 prior years, isn't that right?

16 A. They're actually lower than the target for the prior year.  
17 They are less favorable than our actual accomplishment in 2012  
18 primarily because we had the best safety performance on record  
19 and the best compliance performance on record.

20 Q. And you're not striving to get better than that?

21 A. We are, but we don't penalize people if they don't hit a  
22 home run every time they're at bat. In the case of 2012, we  
23 probably had ten mines that had zero accidents which is a  
24 remarkable accomplishment in our business. And so we try not  
25 to put people in a position where if they don't hit a home run

1 each and every time they are at bat, they are going to lose  
2 out. So we try to lower the target each year. That doesn't  
3 necessarily mean that the target each year will be better than  
4 the home run accomplishment of the prior year.

5 Q. I'm going to ask you to turn to tab 11 in your binder,  
6 just for a reference point. We don't need to put this up. Do  
7 you recognize this document, sir?

8 A. Yes, this appears to be Patriot's presentation to the  
9 unsecured creditors' committee on December 5, 2012.

10 Q. You attended that meeting?

11 A. Yes, I did.

12 Q. And you presented part of the slide deck; isn't that  
13 right?

14 A. Yes, I did present part of the slide deck.

15 Q. You turn to page 48, please -- titled Covenant Analysis,  
16 2013; do you see that?

17 A. Yes, I do.

18 Q. That's Patriot's most recent forecast for projected 2013  
19 performance, correct?

20 A. No. This would be the October bank plan numbers, which  
21 were prepared in October. The most recent would be the January  
22 forecast for 2013.

23 Q. The January -- that was -- there is a January 2013  
24 forecast?

25 A. Yes.

1 Q. And your counsel, Davis Polk, had that information?

2 A. I'm not certain what my counsel has, but there's a January  
3 2013 forecast. There's an update to this, if you will, but  
4 this is the last presentation that I believe was formally  
5 presented to our lenders and to the creditors' committee.

6 Q. Well, I can represent to you that in the context of this  
7 motion, we were told that these were the most recent numbers of  
8 the forecast. But be that as it may, the financial targets in  
9 the AIP, as proposed, for EBITDAP and liquidity -- those were  
10 based on these numbers on page 48; isn't that correct?

11 A. At this time, that would have been the case, yes. What  
12 would have been presented to the creditors' committee at this  
13 time -- that would have been the case, yes.

14 Q. Patriot's forecast of liquidity for June of 2013 -- that's  
15 the same liquidity target it must hit for payments to issue  
16 under the 2013 AIP; isn't that right?

17 A. I'm sorry, I'm not understanding your point. What was  
18 your question?

19 Q. The forecast of liquidity for June of 2013, that's the  
20 same liquidity target for the January to June AIP target; isn't  
21 that right?

22 A. Yeah, as I sit here, I'm not certain what the AIP target  
23 is. I don't know if it was updated for the January forecast or  
24 not.

25 Q. But they're the same as the number on 48, correct? As of

1 this forecast that was presented to the UCC?

2 A. Yeah, again, that was the case on December 5; I'm not  
3 certain if that's the case today or not.

4 Q. Take a look at tab 9, sir. This was a document that was  
5 provided to us in the context of this motion, as well. Looking  
6 at the number, as of February 14th, for liquidity -- February  
7 14th, 2013 -- Patriot is already exceeding its liquidity target  
8 for the AIP; isn't that right -- as of the date of this  
9 document?

10 A. Yeah, I believe, as I've noted earlier, that we are  
11 currently in compliance on liquidity. We are missing on  
12 EBITDAP; we are missing on safety. But if the rate of  
13 deterioration of the liquidity from -- through the course of  
14 February continues, we would fail the liquidity test as well.

15 Q. The individual qualitative goals, under the 2013 AIP,  
16 those are established during an employee's annual performance  
17 review with his or her supervisor, correct?

18 A. That's correct.

19 Q. And those goals are set in the immediate supervisor's  
20 discretion, correct?

21 A. Correct. I believe there is a review by the next level of  
22 supervision. I think they technically have to be approved by  
23 the next supervisor up, but I think that's generally just a  
24 review for appropriateness.

25 Q. And these goals are set every year as part of employee

1 performance reviews, correct?

2 A. Yes.

3 Q. It's what the employees are expected to do, correct?

4 A. That's generally the plan.

5 Q. And these goals are set every year, regardless of whether  
6 the company's in bankruptcy, correct?

7 A. Yeah, again, it's the normal plan. Whether it's on time  
8 or not this year because of the bankruptcy, I couldn't -- I  
9 couldn't say. But generally speaking, it is the annual  
10 performance review, and it's -- you both review the last year's  
11 performance and the projection goals for the coming year.

12 Q. You were not involved in setting any of those goals,  
13 correct?

14 A. For the individuals, I -- no, except for the people that  
15 report to me.

16 Q. And you did not review or evaluate each of the  
17 individual's goals when preparing and finalizing the 2013 AIP,  
18 correct?

19 A. I did not.

20 Q. So you're not able to testify about the details of those  
21 individual goals, correct?

22 A. No, I am not able to provide details on this.

23 Q. And you're not able to testify about whether they're  
24 aggressive or not, correct?

25 A. No, I can only share the illustrations for those that I am

1 familiar with from past reviews.

2 Q. The 2013 AIP participants, those are chosen employees by  
3 title, not by individual, correct?

4 A. Yeah, it's essentially the positions in the corporate and  
5 regional offices, as -- as described. It's the group that is  
6 not eligible for any participation in the mine-level bonuses.

7 Q. And if an employee in the AIP left the company and was  
8 replaced, that replacement employee is automatically eligible  
9 for payment under the AIP; isn't that right?

10 A. That would generally be the case. That would be part of  
11 the compensation. It would be described to them at the point  
12 of hiring.

13 Q. Even if that replacement started with the company a few  
14 weeks ago?

15 A. That would generally be the case. That would also be  
16 consistent with what our competitors do.

17 Q. Regarding the participants in the CERP, as proposed,  
18 Patriot has already found replacements for some of those  
19 individuals who have left the company; isn't that right?

20 A. We found some replacements and promoted others internally.

21 Q. And some of those replacements' base salaries are lower  
22 than the employee who left, correct?

23 A. I wouldn't say that's representative at all. I can only  
24 think of one example where that was the case. It was somewhat  
25 less-experienced person.

1 Q. And the replacement hire, in certain instances, is  
2 eligible for payment under the CERP as well, correct?

3 A. Under the CERP, no. CERP is a specific list of  
4 individuals. It's not a pot of money.

5 Q. If that person had been in the CERP before?

6 A. No, if someone's in the CERP, and they leave, that doesn't  
7 mean that the person that gets hired in their position goes  
8 into the CERP. That would not be the case.

9 Q. If that person was a replacement from within the company  
10 who had already been in the CERP?

11 A. Only if they were already in the CERP would they remain in  
12 the CERP.

13 Q. Only half of the CERP payments are tied to emergence from  
14 reorganization, correct? Fifty percent?

15 A. That's correct.

16 Q. And if a person is employed -- an employee's employed on  
17 the trigger date for payment under the CERP but left before the  
18 payment issue date, they still get a payment, correct?

19 A. It's my recollection, as the program is drafted, that they  
20 are -- the award is granted if they remain with us through the  
21 defined period. I don't believe there is a requirement that  
22 they remain through the date of getting the check. So I think  
23 your statement is correct.

24 Q. And they wouldn't have to give back any amount of that  
25 money just because they've since left the company, correct?



1 A. That would be correct because they would have satisfied  
2 the test that, essentially, triggered the award.

3 MS. HILLYER: I have no further questions at this  
4 time, Your Honor. Thank you.

5 THE COURT: All right, thank you.

6 Mr. Kaminetzky, if you have some brief --

7 MR. KAMINETZKY: Very brief.

8 THE COURT: -- redirect.

9 MR. KAMINETZKY: I think under ten questions for both.  
10 And, Your Honor, I apologize in advance. I'm going to be  
11 jumping around because this is redirect, so --

12 THE COURT: Not a problem.

13 MR. KAMINETZKY: -- although I try to weave a  
14 beautiful garment, this is going to be kind of random.

15 REDIRECT EXAMINATION

16 BY MR. KAMINETZKY:

17 Q. Which company will be paying incentive or retention plans,  
18 the parent company or a subsidiary company?

19 A. The parent company, Patriot Coal Corporation.

20 Q. Now, Mr. Perillo spent a long time with you, talking about  
21 general managers, vice presidents, senior vice presidents.  
22 Talked about this seven -- now six people that were moved  
23 from -- were moved from the CERP and shifted to the AIP. Does  
24 any of that colloquy change your testimony with respect to  
25 slide number 1 of your testimony? Based on anything you've

1 heard, or any of the positions that Mr. Perillo went through  
2 with you, would you change any of these Xs to checks?

3 A. Absolutely not.

4 Q. Is the goal of 1113 to take anyone to pay below what you  
5 believe to be market-level compensation?

6 A. No. It would be foolish if we did; we wouldn't be able to  
7 keep good people. The goal is to -- is to match the regional  
8 market and be able to compete with others that are paying at  
9 that level.

10 Q. And is it your belief that if the proposed participants in  
11 the AIP and the CERP make every dollar under these plans, as  
12 likely or unlikely that that is, that then they'll be at market  
13 level?

14 A. Yes. I'm not sure I understood that question correctly.  
15 Could --

16 Q. In other words --

17 A. -- you reframe it?

18 Q. -- would implementation -- is implementation of the AIP  
19 and the CERP, if all that money is earned under those plans,  
20 will the participants then be at market level or still be below  
21 market level?

22 A. I think we can retain them, but they will still be  
23 somewhat below market by our measure -- with few exceptions.  
24 There are a few individuals that were promoted during the  
25 interim that, on a Towers Watson analysis, they said were

1 slightly above market, but if you look at the overall group, in  
2 my assessment, they're below market. That's why we started out  
3 with a stronger incentive program and a stronger retention  
4 program, to try to meet market.

5 Q. Again, just so it's clear, and I'm sorry for the inartful  
6 question -- so even if every dollar's earned, you still think  
7 they'll be below market -- the participants in the plan?

8 A. Yes.

9 Q. Okay. Now turning to Ms. Hillyer's questioning, Ms.  
10 Hillyer pointed out that the financial incentives, or the --  
11 sorry -- the financial metrics, that's the EBITDA, or now  
12 EBITDAP and liquidity are consistent with the forecast. Do you  
13 recall that exhibit?

14 A. Yes.

15 Q. Okay, now could you explain to me, if all you're asking  
16 these people to do, or the company to do, is to hit forecast,  
17 how is that not a "give me" or a "layup" -- in Mr. Perillo's  
18 parlance?

19 A. It's not a layup because the forecast is -- is already a  
20 stretch forecast because we've saw so much weakening on coal  
21 prices. We've lost on the revenue side, and we've had two  
22 months in a row with significant problems at our longwalls that  
23 have driven us well below year-to-date pace for EBITDA already,  
24 on top of marketing actually forcing us to close one of our  
25 major mine complexes at Rocklick for -- for a couple of months.

1 So we've had a huge number of disadvantages, and that on  
2 top of the market weakness makes this a stretch forecast, at  
3 best, from the financial perspective. And as I spoke to safety  
4 earlier, we've had a terrible year -- terrible year thus far on  
5 safety performance. And so we're -- we're -- we will be doing  
6 a remarkable job if we can come close to those targets.

7 Q. And just my final question, and this is based on the  
8 questioning of Ms. Hillyer, I guess what Ms. Hillyer was asking  
9 is a pretty good question. Why isn't it a good thing if you're  
10 able to replace someone at a higher salary with someone at a  
11 lower salary? You've just saved money for the company; sounds  
12 great.

13 A. It's not great because you don't have the equivalent  
14 experience; you don't have the equivalent skill set. There  
15 were things that that twenty-year superintendent knew how to do  
16 that the five-year superintendent may not, or may not do as  
17 well. That's not to sound age discriminate, but certainly  
18 there's some value with their experience, and losing the people  
19 at that level to our competitors is damaging to the business.

20 MR. KAMINETZKY: Thank you, that's all I have, Your  
21 Honor.

22 MR. PERILLO: May I?

23 THE COURT: All right. Mr. Perillo, briefly?

24 RE-CROSS-EXAMINATION

25 BY MR. PERILLO:

1 Q. Mr. Hatfield, you testified that you believe your  
2 managerial employees are below market. In 2007, 2008, 2009,  
3 2010, 2011, when you didn't need bankruptcy court approval for  
4 anything, were these employees paid below market?

5 A. No, I believe with the incentive programs they were  
6 receiving in that time frame, they were generally at market.

7 Q. So their basic salary, then, you believe was satisfactory  
8 to hold them, with the other programs you had in place?

9 A. Only with the other programs because our competitors pay  
10 incentive programs just like we've described here. So you have  
11 to capture the incentive program benefit, along with the base  
12 salary to say it's at market. I think that was the case  
13 historically.

14 Q. And you testified for me before that until June of 2012,  
15 the company never had a corporate-wide retention program?

16 A. That's true, a retention program was specific to mine  
17 locations and specific skill sets during that period.

18 Q. Now, your counsel just asked you about these forecasts,  
19 and I want to ask you something that I neglected to, but I'll  
20 take the opportunity now. Can you meet those forecasts, in  
21 particular for EBITDA and liquidity, without the 1113 or the  
22 1114 relief?

23 A. No.

24 Q. So you could reduce the relief you were requesting from us  
25 by six or seven million dollars, change the forecast, and meet

1 those forecasts. Is that not true?

2 MR. KAMINETZKY: Your Honor, I'm going to object.  
3 This is well beyond the scope of my redirect.

4 MR. PERILLO: I'll withdraw the question.

5 THE COURT: All right. Thank you.

6 MS. HILLYER: I have nothing further, Your Honor.

7 THE COURT: All right, thank you.

8 Thank you, Mr. Hatfield, you may step down.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Mr. Kaminetzky, do we have any other  
11 witnesses this afternoon?

12 MR. KAMINETZKY: Yes, Your Honor, we have one more  
13 witness who should be substantially shorter than Mr. Hatfield,  
14 the CEO.

15 THE COURT: All right, you may call your next witness.

16 MR. KAMINETZKY: Okay, Your Honor, with your  
17 permission, I'm going to turn the podium over to my colleague,  
18 Michael Russano.

19 THE COURT: All right.

20 MR. RUSSANO: Good afternoon, Your Honor.

21 THE COURT: Good afternoon. You may call your next  
22 witness.

23 MR. RUSSANO: Thank you. I'd like to call Nick  
24 Bubnovich to the stand.

25 THE COURT: Mr. Bubnovich, if you'd step up to the

1 podium first, to be sworn.

2 MR. BUBNOVICH: Yes, Your Honor.

3 (Witness sworn)

4 THE CLERK: Please have a seat in the witness box,  
5 sir. There's a step up.

6 VOIR DIRE EXAMINATION

7 BY MR. RUSSANO:

8 Q. Good afternoon, Mr. Bubnovich.

9 A. Good afternoon.

10 Q. Could you please state and spell your name for the record?

11 A. Yes. My name is Nick Bubnovich, B-U-B-N-O-V-I-C-H.

12 THE WITNESS: Michael, before we go any farther, could  
13 I get some water? I'm going to --

14 MR. RUSSANO: Oh, sure.

15 THE WITNESS: -- need it to get through this.

16 MR. RUSSANO: Sure. I think we're actually out of  
17 water over here. If I can indulge my worthy adversaries for  
18 some water?

19 MR. WILLARD: Your Honor, may I approach?

20 THE COURT: You may. Thank you, Mr. Willard.

21 MR. RUSSANO: Thank you very much.

22 THE WITNESS: Thank you.

23 BY MR. RUSSANO:

24 Q. Could you please describe your current employment status?

25 A. Yes, I retired from Towers Watson in July 2012, but at the

1 same time I entered into a consulting agreement with Towers to  
2 provide consulting services to certain of the firm's clients,  
3 including Patriot.

4 Q. And before your retirement, where did you work?

5 A. From January 2005 until the date of my retirement, I was a  
6 director at Towers Watson in the Chicago office. Before that,  
7 from May 2002 until December 2004, I was a partner at Deloitte  
8 & Touche in its Human Capital consulting group. And before I  
9 joined Deloitte & Touche, I was a partner in Arthur Andersen's  
10 Human Capital consulting group.

11 Q. Could you please briefly describe for the Court the  
12 subject matter of your specialty?

13 A. Yes, I provide a wide variety of compensation consulting  
14 services and benefit services to compensation committees,  
15 boards of directors, and management.

16 Q. And how long have you been practicing in this field?

17 A. Over twenty-five years.

18 Q. Have you ever provided compensation consulting services  
19 for companies in bankruptcy?

20 A. Yes, I have. I've been the compensation advisor on a  
21 number of large and complex bankruptcy restructurings,  
22 including, for example, Delphi Automotive, Delta Airlines,  
23 Winn-Dixie, TWA, and most recently, Hawker Beechcraft, which  
24 recently exited from Chapter 11.

25 Q. Have you ever provided consulting services with respect to



1 annual incentive programs?

2 A. Yes, I have. I've provided consulting services to  
3 hundreds of incentive programs.

4 Q. Have you ever provided consulting services with respect to  
5 retention programs?

6 A. Yes. I've worked on a number of retention programs --  
7 forty, fifty, possibly more.

8 Q. What academic degrees do you hold, and from where?

9 A. I have a bachelors from Hanover College in Hanover,  
10 Indiana and a JD from the University of Georgia School of Law.

11 Q. Have you ever written and published articles on  
12 compensation issues?

13 A. Yes, I've published a number of articles on compensation  
14 issues. I wrote three of the chapters in the National Center  
15 for Employee Ownership's book, "Beyond Stock Options".

16 Q. Have you ever served on any boards or participated in any  
17 professional organizations with respect to compensation issues?

18 A. Yes, again -- a number of different situations. The most  
19 relevant would be, I was a member of the Executive Compensation  
20 Committee of the American College of Bankruptcy, and in 2006,  
21 we published an article on the compensation provisions in  
22 BAPCPA.

23 Q. Have you ever taught or lectured in the field of corporate  
24 compensation?

25 A. Yes, I participated in many seminars and presentations

1 given by the American Bar Association, ALI-ABA, and any number  
2 of other professional groups.

3 Q. Have you ever testified as an expert witness in corporate  
4 compensation issues in bankruptcy?

5 A. Yes, I have, approximately fifteen to twenty times.

6 Q. Have you ever submitted any expert declarations, where you  
7 didn't testify as an expert?

8 A. Yes, I have. Probably another fifteen to twenty times.

9 Q. And of all those times, has a court ever rejected your  
10 expert analysis regarding a corporate compensation issue?

11 A. Yes, once. In Delphi Automotive, the court rejected my  
12 analysis concerning the emergence bonus program.

13 Q. In that case, did you offer any other expert opinions?

14 A. Yes, I testified three or four other times concerning the  
15 six-month annual incentive program as well as the severance  
16 program.

17 Q. And did the court accept that expert testimony?

18 A. Yes, it did, on each occasion.

19 MR. RUSSANO: Your Honor, at this point, I'd like to  
20 tender Mr. Bubnovich as a qualified expert witness in the field  
21 of corporate compensation, including the design of incentive  
22 and retention programs for companies in and out of Chapter 11.

23 THE COURT: Mr. Perillo or Ms. Hillyer, any objection?

24 MR. PERILLO: No.

25 MS. HILLYER: No, Your Honor.

1 THE COURT: Thank you.

2 All right, so the witness will be qualified as an  
3 expert.

4 DIRECT EXAMINATION

5 BY MR. RUSSANO:

6 Q. Mr. Bubnovich, when were you retained by Patriot and for  
7 what purpose?

8 A. Patriot's compensation committee retained Towers Watson,  
9 in January 2008, to provide compensation consulting services to  
10 the board compensation committee and, with the committee's  
11 approval, to management.

12 Q. And since the point of that retention, what has been your  
13 personal role?

14 A. Well, since the beginning of the engagement, I've been the  
15 lead consultant.

16 Q. Has that role changed at all since your formal retirement?

17 A. No, I continue to be the lead consultant.

18 Q. Did you have any role with respect to the design of the  
19 critical employee retention plan, which I'll call the CERP,  
20 that is the subject of this hearing?

21 A. Yes, I did.

22 Q. And could you please describe to the Court what that role  
23 was?

24 A. Well, my role was somewhat narrow and specific. I  
25 provided advice to the compensation committee and management in

1 four general areas. I recommended competitive compensation  
2 levels for participants in the plan. I made some  
3 recommendations concerning the timing of payments under the  
4 plan. I also suggested some criteria for selection of  
5 participants, and, finally, I provided information with respect  
6 to other companies' CERPs.

7 Q. When you mention compensation levels in the CERP, what do  
8 you mean by that?

9 A. Well, in these sorts of situations, I generally recommend  
10 amounts that, based on my experience, have worked in the past.  
11 Accordingly, I generally recommend a range of retention  
12 payments that correspond to competitive annual incentive  
13 opportunities. But you have to remember that in each case,  
14 that is, each employee, you would expect that adjustments would  
15 be made, based on each employee's potential contribution,  
16 experience, and performance.

17 Q. And whose job is it to make the final determination as to  
18 what those compensation levels should be?

19 A. That's management's.

20 Q. Do you have an understanding what management ultimately  
21 decided to do in this matter?

22 A. Yes, I do. The ultimate decision reached, after  
23 discussions with the UCC, were to provide levels under the plan  
24 equal to eleven to forty-five percent of salary, depending on  
25 the individual participant.

1 Q. And was that decision consistent with your general advice?

2 A. Well, yes. I would say, yes.

3 Q. Moving now to the timing of payments. What  
4 recommendations did you make to management regarding that  
5 issue?

6 A. In these sorts of situations, my recommendation is always  
7 that a substantial portion of the payment be held back and not  
8 paid until emergence. Additionally, I also believe that it's  
9 important that interim payments be made along the way. And so  
10 in this case, I advised the committee and management that there  
11 should be a substantial payment at the back end, along with  
12 interim payments.

13 Q. When you say substantial payment at the back end, why  
14 didn't you recommend that all the payment be at emergence?

15 A. In these sorts of circumstances, where there's not a lot  
16 of certainty about the duration of the program, and where it's  
17 not expected to be modest -- and by modest I mean, you know,  
18 less than six months -- most employees, you know, don't want to  
19 wait that long. Also, I think that most employers, or most  
20 companies that have adopted CERPs find it promotes retention if  
21 you make a payment along the way for employees, you know, who  
22 have made substantial contributions along the way.

23 Q. Turning now to selection criteria for the CERP, what  
24 recommendations did you make to management on that issue?

25 A. Well, in general, I recommended to management that the

1 participants should include those critical employees who can  
2 affect the company's business operations and are also critical  
3 to the restructuring effort.

4 Q. And whose job was it to make the ultimate decision about  
5 which employees should participate in the CERP?

6 A. That's the province of management.

7 Q. Why is that?

8 A. Well, management is best positioned to know who's a  
9 critical employee and, for that matter, who might not be  
10 meeting expectations. Someone like me does not have any access  
11 to confidential data about performance reviews. And again,  
12 management best knows its workforce, and thus it's management's  
13 job to make that determination.

14 Q. Was your role on this assignment, with respect to the  
15 CERP, consistent with your role in other assignments where you  
16 consulted on the design of a CERP?

17 A. Yes. Now again, I provide information about competitive  
18 practices, information about design features under the program,  
19 you know, but ultimately, it's up to management to take that  
20 advice and tailor it to the particular circumstances of the  
21 company.

22 Q. In your opinion, is the design and structure of the CERP  
23 consistent with market practice?

24 A. Yes, it is.

25 Q. Turning to the annual incentive plan, which I'll refer to

1 as the AIP, did you have any role with respect to the design of  
2 the AIP that is the subject of this hearing?

3 A. Yes, I did.

4 Q. And can you describe to the Court what that role was?

5 A. Again, my role was somewhat limited and similar to the  
6 case of the CERP. Initially, my recommendation to the company  
7 was that we pretty much stay the course and continue the plan  
8 substantially along pre-petition lines. So I recommended to  
9 the company that the metrics that it ought to consider would be  
10 EBITDA; cash flow; continued use of the operational metrics  
11 that have been discussed, safety, MHSA and environmental. And  
12 additionally -- no; stop; end of sentence.

13 Q. Okay, and whose job was it, ultimately, to decide which  
14 metrics would be used in the AIP?

15 A. Well, again, that's management's province.

16 Q. Do you have an understanding of which metrics management  
17 ultimately decided to use?

18 A. Yes. Management eventually decided on six metrics --  
19 again, rather similar to what existed in the pre-petition plan.  
20 As has already been discussed, the metrics are: EBITDAP,  
21 liquidity, mine safety, safety, environmental incidence, and  
22 the sixth, if you will, is individual performance objectives.

23 Q. In your opinion, is it common for incentive programs to  
24 include a metric for individual performance?

25 A. Yes, it is. Companies across the country, you know, want

1 supervisors and managers to have some influence over the  
2 performance of their subordinates and thus an annual incentive  
3 plan is an ideal mechanism in which to drive the appropriate  
4 behavior.

5 Q. In your opinion, is it common for the actual incentive  
6 plan to describe each and every individual performance goal for  
7 each and every plan participant?

8 A. No, that's absolutely unworkable, given the number of  
9 participants we're talking about here, as well as in other  
10 plans. That kind of detail doesn't belong in the plan itself.

11 Q. Did you have any role in deciding what the actual targets  
12 would be for the particular metrics?

13 A. No, I did not.

14 Q. Who did?

15 A. That's management's province.

16 Q. And did you have any role in deciding who would actually  
17 participate in the AIP?

18 A. No; again, that's management's province.

19 Q. Was your role in this assignment consistent with your role  
20 on other assignments where you consulted on the design of an  
21 AIP?

22 A. Yes, I provide advice and data to compensation committees  
23 or management, but again, in the end, it's up to either the  
24 committee, the board, or management to make the decision  
25 concerning the incentive program.



1 Q. Does the design of the AIP here differ in any way from the  
2 design of AIPs in other Chapter 11 cases that you have  
3 consulted in and that you have studied?

4 A. Yes, I would say that, in general, the design here is more  
5 conservative than you would see in other Chapter 11 incentive  
6 programs.

7 Q. Have you prepared an exhibit to illustrate this point?

8 A. Yes, I have.

9 MR. RUSSANO: Your Honor, if I could approach?

10 THE COURT: You may. I assume the other side has seen  
11 this as well?

12 UNIDENTIFIED SPEAKER: Excuse me, could copies be  
13 provided to counsel? Thank you.

14 Q. Do you have the exhibit now in front of you, Mr.  
15 Bubnovich?

16 A. Yes, I do.

17 Q. And is the point on page one of the exhibit?

18 A. Yes it is. There are --

19 Q. Could you walk us through this?

20 A. Yes. There are four bullet points on this first page,  
21 which illustrate how the proposed Patriot AIP differs from  
22 other Chapter 11 AIPs.

23 First, as has been previously discussed, all six members  
24 of the executive management team have voluntarily removed  
25 themselves from consideration in not only this plan, but also

1 the CERP.

2 Second, this program is more egalitarian than a lot of  
3 other incentive programs. It includes a substantial number of  
4 corporate employees, you know, not just a privileged few.

5 Third, the incentive compensation opportunities under the  
6 program are capped at threshold levels. Stated another way,  
7 you know, there's no upside or additional payments that would  
8 be made to any of the participants if the debtors exceed its  
9 business plan.

10 And then finally, there's no opportunity for a partial  
11 payment if a metric is not hit. So for example, if a metric  
12 is -- financial metric -- is not met by ten dollars -- if it  
13 falls ten dollars short -- then there would be no payment made  
14 whatsoever and certainly no partial payment.

15 Q. Thank you. You could put that aside for the moment. Mr.  
16 Bubnovich, in your opinion, is the overall design and structure  
17 of the AIP consistent with market practice?

18 A. Yes, it is.

19 Q. After management decided upon which metrics and targets  
20 and participants to use in the actual plans, did your role end  
21 there?

22 A. No, it did not. I was asked to undertake a benchmarking  
23 project to determine the cost of the plans relative to the  
24 marketplace.

25 Q. Could you briefly describe to the Court what the term

1 "benchmarking" means in this context?

2 A. Yes. Benchmarking simply refers to the process where we  
3 compare the total compensation for the participants in the AIP  
4 to the market. And in this particular case, the market would  
5 be the data that we gathered from the different surveys that we  
6 used.

7 Q. I see. So you benchmark the pay of all employees that are  
8 participating in the plans; is that right?

9 A. Not quite. When you're trying to benchmark over 200 jobs,  
10 it never shakes out that you're able to benchmark all the  
11 positions, for a number of reasons. But as it turned out, we  
12 were able to benchmark, with our initial pass at the survey  
13 data, 109 positions out of 225.

14 Q. And are those positions -- are you referring to the AIP?

15 A. Yes, I am.

16 Q. What about the CERP?

17 A. Well, keep in mind that there's a number of people who  
18 participate in both plans and we were able, as part of the  
19 process, to benchmark a significant number of the CERP  
20 participants, as well. We ended up benchmarking 56 of the 110  
21 or so CERP participants.

22 Q. Okay. But by my rough math, that equates to approximately  
23 half the participants in both plans. Does it concern you at  
24 all that you were only able to benchmark half and not more?

25 A. Not in this case, at all. The reason for that is we were

1 able to benchmark a real solid cross-section of participants in  
2 the AIP. We benchmarked a number of high paid participants, a  
3 number of the middle managers or middle paid participants, and  
4 also a significant number of the lower participants.

5 Now, those that we weren't able to benchmark, are not  
6 situated very differently than those we were able to benchmark.  
7 You know, it's not as if their salaries are significantly  
8 different or they had substantially different opportunities  
9 under the AIP or the CERP. So the fact that we're able to do  
10 half is appropriate under the circumstance.

11 Q. Turning now to the actual data that you used to conduct  
12 your analysis, could you describe to the Court what those data  
13 sources were?

14 A. Yes. We initially used two data sources. The first one  
15 was the Towers Watson compensation database, which is a survey  
16 that covers -- covers companies with revenues from one to three  
17 billion dollars. And then we also used a Mercer executive  
18 compensation survey and the Mercer cut we used was for  
19 employees with revenues from 1 to 2.5 billion dollars.

20 Q. Could you tell us a little bit more about the surveys  
21 themselves?

22 A. Yeah. These are both what I would call nationwide, robust  
23 surveys which cover hundreds of companies and obviously, you  
24 know, hundreds of positions.

25 Q. When you say "nationwide survey", did that also include

1 various industries across the nation?

2 A. Yes. The surveys were not limited to one particular  
3 industry, as you just suggested; instead, it was what we call  
4 "all industries", although "all industries" as defined as not  
5 including finance, health care, and not-for-profit, because  
6 those three industries tend to have different pay models than  
7 others.

8 Q. Wouldn't it have been better to just use the coal  
9 industry?

10 A. No. I don't believe so; let me give you a couple reasons  
11 why.

12 The first reason is I don't believe employees at Patriot  
13 are restricted to finding jobs solely in the coal industry. I  
14 mean, if you work in human resources, legal, finance,  
15 information services, technology, or accounting, or any one of  
16 a number of other functions, you have skills that are  
17 transferable; you can find jobs in other industries. And as  
18 far as I'm concerned, you know, even if you look at some of the  
19 mine-level jobs, I'm not even sure that those jobs or those  
20 people holding those positions would be restricted to finding  
21 jobs in the coal industry. I mean, take a mine superintendent,  
22 for example. Here's a person whose skill set is manages a lot  
23 of people, knows how to supervise the handling of dangerous  
24 equipment under -- or large equipment under dangerous  
25 conditions, and knows how to move a lot of material from one

1 place to another. Now, to me, that's a skill set that a lot of  
2 employers would covet and it might easily lead to positions in  
3 other industries.

4 Secondly -- and somewhat oddly enough, perhaps -- the  
5 national pay average in St. Louis is slightly higher than the  
6 national average. So certainly, the use of national data in  
7 the case of the St. Louis-based employees is fine.

8 And then the third reason is that I know -- I believe that  
9 if I added the coal, the special -- the coal industry-only  
10 survey data, it would not affect the data significantly.

11 Q. Did there come a time where, in spite of everything you  
12 just testified to, you actually looked at coal industry-  
13 specific data?

14 A. Yes, I did. The UCC asked that the benchmarking analysis  
15 include data from coal survey. And as it turned out, Patriot  
16 participated in an industry survey so it had the data.

17 Q. And what impact, if any, did that have on your overall  
18 conclusions?

19 A. Well, there were a couple of modest changes, if you will.  
20 The first, because the coal survey -- as you might imagine --  
21 covered a lot of coal-specific jobs that weren't covered by the  
22 Towers or the Mercer data, we were able to increase the number  
23 of positions that we benchmarked to 151.

24 And then secondly, the numbers moved down a little bit  
25 when we added the coal survey in, but again, not in a way that

1 would significantly change my conclusions regarding the data.

2 Q. Just so the record's clear, when you say "the numbers  
3 moved down a little bit", does that mean it showed that the  
4 plan participants were slightly more undercompensated or less  
5 undercompensated?

6 A. More undercompensated.

7 Q. I do want to get to the specifics of your conclusions in  
8 just a moment, but first let me ask you about another thing  
9 that you mentioned regarding the Mercer and Tower surveys being  
10 nationwide. Does that mean that it would include data for  
11 places like, let's say, Southern California, where obviously  
12 the cost of living is higher than it is here in St. Louis, and  
13 in West Virginia?

14 A. Sure, that's quite likely.

15 Q. And doesn't that trouble you in terms of the reliability  
16 of your analysis?

17 A. No, not at all. If you're going to call out Southern  
18 California because it's part of a nationwide survey, well, then  
19 you have to realize that there's data that's being collected  
20 from companies in a lot of other areas where the pay might be a  
21 lot lower than the national average; it would offset any  
22 increase there might be because of companies from Southern  
23 California. Now, there are places in the south, the mid-west,  
24 and even parts of the west where the cost of living is a lot  
25 lower than the national average, and certainly lower than

1 Southern California.

2 Q. Moving into the actual results of your benchmarking  
3 analysis, could you describe for the Court what the results  
4 were of your initial analysis, using just the Mercer and Tower  
5 survey data?

6 A. Yeah. Well, the initial analysis was that the  
7 participants in the AIP were substantially undercompensated  
8 versus the market.

9 Q. Have you prepared an exhibit to illustrate those results?

10 A. Yes, I have.

11 Q. And is that on page 2 of the packet you have?

12 A. Yes, it is.

13 Q. Could you just walk us through those results?

14 A. Sure. Looking first only at the Towers and the Mercer  
15 data -- and assuming that there is no adoption or  
16 implementation of the proposed plans -- the AIP participants  
17 are underpaid by twenty-seven percent, versus the market  
18 median. Now, that translates to about the fifteenth  
19 percentile.

20 Q. What do you mean by -- when you say "fifteenth  
21 percentile", what does that actually mean?

22 A. Well, in this case what it means is that eighty-five  
23 percent of the survey peers are more highly compensated than  
24 the AIP participants.

25 Q. And what are results look like if we assume that the plans



1 are approved and that there's maximum payouts under the plans?

2 A. Well, if you add in approval of the plans and assume that  
3 all payments are made under the CERP and that all dollars are  
4 earned under the AIP, the participants would be thirteen  
5 percent below the market median, which in this case translates  
6 to about the twenty-fifth percentile.

7 Q. And what do those results look like when you add in the  
8 coal industry survey data?

9 A. Well, when I added in the coal survey, as I already  
10 mentioned, the numbers moved down a little bit. It was from  
11 minus thirteen to minus seventeen percent.

12 Q. You can put that aside, thank you. Mr. Bubnovich, based  
13 on your benchmarking analysis, what conclusions did you draw?

14 A. No matter how you slice and dice the data, the AIP and  
15 CERP participants are paid at levels substantially below the  
16 market. Now, this is true no matter how you analyze it or what  
17 data you use to determine the market. Whether you use just the  
18 Towers and the Mercer data; whether you use Towers, Mercer, and  
19 the coal survey; whether you use coal survey only; whether you  
20 use national data; or even if you used only regional adjusted  
21 data, the result would be the same.

22 Q. Thank you. Did you look at any other data to assess the  
23 reasonableness of the plans, other than what you've already  
24 testified to?

25 A. Yes, we did.

1 Q. Can you elaborate?

2 A. Sure. Towers maintains a database of information about  
3 other Chapter 11 incentive programs and CERPs. And so I used  
4 the data from that database to compare Patriot's proposal to  
5 the information that we had in that database.

6 Q. Could you tell us a little bit more about what information  
7 you had in that database?

8 A. Well, in that database we had sufficient cost information  
9 on twenty-three other annual incentive programs, and thirteen  
10 other CERPs.

11 Q. Why isn't there more data than that?

12 A. Well, we all know that bankruptcy courts have approved a  
13 lot more than twenty-three annual incentive plans and more than  
14 thirteen CERPs. But the data can be very difficult to come by;  
15 in some cases, these programs are part of the first-day  
16 motions, so there's no disclosure. A lot of times the  
17 disclosure that you will find in a motion or in a judge's order  
18 approving the plan isn't totally complete; there might be key  
19 missing cost data. So it's not perfect, but it's what we got  
20 and so I thought it would be appropriate to, again, compare  
21 what Patriot proposed to the information that we had in the  
22 database.

23 Q. So given that it isn't -- I think you described that it's  
24 not a perfect data set -- why did you consider it useful to  
25 look at?

1 A. Well, again, I think it was directionally -- I think it  
2 would -- I think it would show directionally whether Patriot's  
3 proposal was in line with what other Chapter 11 companies have  
4 done. And I think, as I said, we had the data, so I wanted to  
5 use it.

6 Q. Were your overall conclusions that we've talked a little  
7 bit about in the context of your benchmarking analysis, was  
8 that dependent upon your assessment of the Chapter 11 database  
9 data?

10 A. No. As I've already testified, I think the benchmarking  
11 analysis by itself supports my conclusion, but I also think  
12 that the data in the database also supports the conclusions.

13 Q. And did you reach any conclusions as a result of your  
14 review of the Chapter 11 data?

15 A. Yes, I did.

16 Q. Have you prepared an exhibit to illustrate those  
17 conclusions?

18 A. Yes, I have.

19 Q. And is that on page 3 of your packet?

20 A. I believe it is; yes.

21 Q. Great. If you could just walk us through your  
22 conclusions?

23 A. In the case of the AIP, it turns out it's the fifth  
24 cheapest plan in the aggregate out of the twenty-three  
25 comparables. It's the second cheapest plan as a percentage of

1 pre-petition revenue. And it's the cheapest plan on a per-  
2 participant basis. And in the case of the CERP, the aggregate  
3 cost is slightly above the median cost of those thirteen  
4 companies, but the per-participant cost is a little below the  
5 median.

6 Q. Thank you. Mr. Bubnovich, are you aware that subsequent  
7 to your analysis, the debtors reached an agreement with the  
8 United States Trustee, whereby seven individuals were removed  
9 from the CERP and at that point were solely in the AIP?

10 A. Yes. While I wasn't a part of any of those discussions, I  
11 am aware of the change.

12 Q. Could that change have any impact on your benchmarking  
13 analysis?

14 A. No, because when we did the benchmarking analysis we  
15 included both the annual incentive plan opportunity and the  
16 CERP opportunity for the participants. And so what's happened  
17 here is it's just moved from one pocket to the other. It had  
18 absolutely no effect on the -- on the benchmarking analysis.

19 Q. Did that change as a result of the settlement with the  
20 United States Trustee have any impact at all on your overall  
21 conclusions regarding the reasonableness of the plans?

22 A. Well, the only potential effect it could have is that  
23 since a substantial number of dollars, if you will, were moved  
24 from the CERP to the annual incentive plan, to the extent the  
25 metrics under the AIP are not achieved, Patriot will, in fact,

1 pay out fewer dollars than it otherwise would have.

2 Q. Just a few more questions for you. Did Patriot have a  
3 pre-petition, long-term incentive plan?

4 A. Oh, yes.

5 Q. And did that plan involve the vesting of equity over time?

6 A. Oh, yes; definitely.

7 Q. And did the vesting of equity over time have a retentive  
8 affect, in your opinion?

9 A. Oh, sure.

10 MR. RUSSANO: I have no further questions, Mr.  
11 Bubnovich.

12 THE COURT: All right, thank you.

13 Mr. Perillo, do you have any cross-examination for  
14 this witness?

15 MR. PERILLO: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. PERILLO:

18 Q. Good afternoon, Mr. Bubnovich; it's good to see you again.

19 A. Good afternoon, Mr. Perillo.

20 Q. You testified you were hired in 2008 -- or rather, Towers  
21 was hired in 2008, correct?

22 A. Yes.

23 Q. I believe that you were paid approximately 150,000  
24 dollars -- by "you", I'm talking Towers, not you personally --  
25 150,000 dollars to design the compensation programs in 2012

1 that are at issue in this case?

2 A. Well, I think when you asked me about this during my  
3 deposition, the question was how much was Towers paid over a  
4 twelve-month period, and the answer I gave was 150,000 dollars.  
5 So for 2012, Towers was paid for its assistance in designing  
6 the 2012 annual incentive program, the 2012 long-term incentive  
7 program, you know, attendance at meetings, telephone calls, and  
8 then, additionally, work on the CERP and the AIP.

9 Q. And I think you told me that that was typical; that in  
10 2008, 2009, and so forth, it was roughly that same amount of  
11 money each year?

12 A. Yeah, I would think on average our fees have been 125- to  
13 150,000 dollars per year.

14 Q. And you told us that you spent roughly seventy-five hours  
15 since the filing of the Chapter 11 working on the two bonus  
16 programs, up through the date of your deposition?

17 A. I actually don't remember that, but if you say so, I'll  
18 take it as correct.

19 Q. Well, I'm not trying to catch you on something --

20 A. No, no; it sounds right to me.

21 Q. It's a reasonable estimate --

22 A. Yes.

23 Q. -- of the amount of time? You characterize the plan, I  
24 think, as being a bit beyond the executive level, at roughly  
25 225 employees; do you remember that?

1 A. Well, there are 225 participants in the AIP.

2 Q. But the phrase you used was that it goes a bit beyond the  
3 executive level?

4 A. Again, I don't remember using that phrase, but yes.

5 Q. Okay.

6 A. It certainly goes beyond the executive level.

7 Q. Take your deposition at tab 3, please. It's on page 9 of  
8 your deposition; would you turn to that please, at line 15? I  
9 asked you if that -- i.e., the plan -- was limited executives  
10 or for all employees of the debtor, and you said it was  
11 essentially -- it was limited, it was essentially limited to  
12 approximately 225 employees, which I would describe as a little  
13 bit beyond just the executive level; do you see that?

14 A. Yes, I see it.

15 Q. Is that still your belief today?

16 A. Well, I don't -- you know, if I had it to do over again, I  
17 don't know that I would have used the phrase "little bit", but  
18 I said it.

19 Q. Okay. The original post-bankruptcy plan that you  
20 conceived as a retention plan was limited to about sixty to  
21 seventy employees, correct?

22 A. The pre-petition CERP? Yes.

23 Q. That would be the June 2012 CERP you're speaking of?

24 A. Yes. Is that what your question was about?

25 Q. Yes. And you characterized that as applying to select

1 corporate employees?

2 A. Yes.

3 Q. Somewhere along the way that 60 to 70 grew to 119?

4 A. Not really. What happened was the mine-level retention  
5 program which was adopted in 2009 was just consolidated with  
6 the pre-petition corporate CERP into, you know, into one new  
7 post-petition CERP.

8 Q. And that is how the plan grew from the original 60 to 70  
9 to 119 or -- today, I guess it's about 112?

10 A. Right. Well, I don't know that "grew" is exactly the  
11 right word because again, the two pre-petition totaled about  
12 110 to 120, and really for administrative reasons, the plans  
13 were combined, after the Chapter 11 filing, into one plan. So  
14 the numbers -- or the total -- remains essentially the same.

15 Q. Now the forty or so people that were in the mine-level  
16 plan, that was a plan that preexisted, correct?

17 A. It was adopted in 2009, yes.

18 Q. Okay. So it had existed for several years prior to the  
19 contemplation of the CERP?

20 A. Yes.

21 Q. Okay. Now, the people that you worked with in order to  
22 design these programs, was Mr. Hatfield, correct?

23 A. Yes.

24 Q. The board of directors' compensation committee?

25 A. Let me stop here; when you say "these plans", are you



1 talking about the proposed AIP and the CERP? Are we going all  
2 the way back to what has transpired since 2008?

3 Q. I'm talking about the plans that Patriot is asking the --

4 A. Okay.

5 Q. -- Court to approve.

6 A. Okay; okay. Can you ask your question again for me,  
7 please?

8 Q. The people that you worked with when you consulted with  
9 Patriot included Mr. Hatfield, for one?

10 A. Yes.

11 Q. The board of directors' compensation committee?

12 A. Yes.

13 Q. The VP of HR that was mentioned during Mr. Hatfield's  
14 testimony?

15 A. I think I was out of the room at the time, but yes, I  
16 talked to that individual.

17 Q. And the senior manager of compensation and employee  
18 relations?

19 A. Yes. Again, I had several conversations with her, but  
20 same as the immediate preceding person; you know, their roles  
21 were largely ministerial; their job was to get me data. And in  
22 the case of the VP of HR, he was new to the position so he  
23 really didn't have a whole lot of background about some of the  
24 stuff we were doing. And that's why I worked primarily with  
25 the woman who was the manager of compensation. I can't quite

1 remember her exact title.

2 Q. Besides those four groups -- Hatfield, the board of  
3 directs' committee, VP of HR, and the senior manager that you  
4 just mentioned -- is there anyone else that you consulted with?

5 A. Oh yes, I had a number of conversations with Mr. Bean  
6 about the process of getting the programs approved.

7 Q. Anyone else?

8 A. None that I can think of at the moment.

9 Q. Now, if I understood your testimony, you made no judgment  
10 whatsoever about whether any particular participant ought to be  
11 included in the program?

12 A. That's correct.

13 Q. Or how long a tenure an employee should have before they  
14 would be included in the CERP?

15 A. That's correct. I made no judgment about that.

16 Q. Or their job duties?

17 A. That's correct. I made no judgment about that.

18 Q. Or their job duties?

19 A. Correct. I made no judgment about that.

20 Q. And you made no judgment about how likely they were to  
21 leave Patriot?

22 A. True.

23 Q. Or whether they had job opportunities elsewhere?

24 A. True.

25 Q. Or whether they had transferred from other coal companies?

1 A. Sure. True.

2 Q. You also indicated that the threshold level was intended  
3 to provide the same level of compensation as if the company had  
4 not gone into bankruptcy, and the person had achieved their old  
5 incentive rates. Is that correct?

6 A. I'm not sure I said that, but I answer the question as  
7 such because I'm not sure I understood what you said. So why  
8 don't we see if we could clarify your question?

9 Q. Well, is it true that the thresholds were set -- and by  
10 the thresholds, I mean these percentages that people are going  
11 to earn just by staying with the company through certain dates.  
12 Those were set to give them the same level of compensation that  
13 they would have had pre-bankruptcy if they had hit the targets  
14 on their old incentive.

15 A. Well, in the AIP, the payment levels were substantially  
16 reduced by, you know, seventy-five or eighty-three and a third  
17 percent.

18 Q. I'm asking you now about the sixty-percent level set at  
19 the top end of the CERP -- excuse me, the forty-five percent  
20 level set at the top end of the CERP. That number, you  
21 believe, was set to give people the same level of compensation  
22 as if they hadn't been in bankruptcy?

23 A. I think what I testified -- if this is what you're driving  
24 at -- that I recommended to the company that it consider as  
25 appropriate compensation levels an amount equal to competitive

1 annual incentive levels. But I also testified that it's up to  
2 the company, in this case, to make the determination as to what  
3 the actual levels ought to be.

4 Q. But your recommendation to them was to give people cash  
5 compensation essentially equal to what they had prior to the  
6 restructuring or the Chapter 11. So that would suggest, for  
7 the most senior participants in the CERP, an opportunity of  
8 approximately sixty percent of salary. Isn't that what you  
9 told me?

10 A. Yes. That -- yeah, that would be, essentially, the  
11 equivalent of my advice.

12 Q. That was your advice, wasn't it? That was the advice --

13 A. Well, again --

14 Q. -- you gave the company?

15 A. -- again, it's what I told management to consider. And,  
16 yes, if you take what I recommended or told them to consider,  
17 and, you know, apply it to a Patriot employee who had a sixty  
18 percent target annual incentive, there would be a sixty percent  
19 retention incentive.

20 Q. And the way we would know what that percentage should be,  
21 is we'd look at the pre-bankruptcy target incentive program,  
22 then?

23 A. Well, yeah. That'd be one place to start, sure.

24 Q. You made no determination that some people ought to  
25 participate at either a higher or a lower percentage level.

1 You left that all to management, correct?

2 A. That is correct. That's what I testified to.

3 Q. And your sole guidance to them in terms of selecting  
4 employees was to tell them to choose people you think are  
5 critical to restructuring. Is that true?

6 A. I said critical to restructuring, and also, you know,  
7 important to the business operations of the company.

8 Q. And, again, as I asked you previously, you didn't give  
9 them suggestions about who should be included by pay grade?

10 A. I don't remember doing that in this particular context,  
11 no.

12 Q. Or by tenure?

13 A. No, I don't believe tenure is that important.

14 Q. You made no analysis whether the CERP participants have  
15 realistic opportunities elsewhere?

16 A. No, except to the extent I answered certain of the  
17 questions that Mr. Russano proposed to me.

18 Q. And even assuming that people did have opportunities  
19 elsewhere in the country or in another industry, you made no  
20 attempt to ascertain whether such opportunities exist, also  
21 true?

22 A. That's true.

23 Q. You did not check whether attrition in late 2012, post-  
24 bankruptcy -- whether those people had been included in the  
25 plan or not, correct?

1 A. Correct.

2 Q. You didn't do any study of attrition yourself, also  
3 correct?

4 A. Well, let me answer that one this way. You know, as the  
5 song says, you don't need a weatherman to know which way the  
6 wind is blowing.

7 Q. I am glad to know you are a fan of Bob Dylan, Mr.  
8 Bubnovich, and thus you betray your age. But --

9 A. We discussed that during my -- my deposition, didn't we?

10 Q. I think we traded on that, and you gave as good as you  
11 got. But just to get to the answer to my question, though.  
12 You didn't actually do a study of attrition?

13 A. No, we did not.

14 Q. And you didn't study whether the plan is top heavy or  
15 bottom heavy?

16 A. No.

17 Q. I think you also told me you don't know if there has ever  
18 been a CERP in a mining concern?

19 A. I don't remember that, but okay, yes.

20 Q. Well, I mean, if one comes to mind --

21 A. No. No.

22 Q. -- tell us right now.

23 A. No.

24 Q. And you don't know if Patriot's range of eleven to forty-  
25 five percent of compensation compares to other plans in the

1 mining industry?

2 A. Well, obviously, I can't know that, since I said that I  
3 didn't know of any such programs at other coal companies.

4 Q. You were not involved at all in selecting the goals or the  
5 targets in the AIP, is that correct?

6 A. That's correct.

7 Q. You made no analysis whether the targets are actually  
8 aggressive or not?

9 A. That's correct.

10 Q. You made no effort to determine whether individual levels  
11 of efforts were geared toward the targets?

12 A. Again, of course not. That -- there's --

13 Q. Or even if --

14 A. -- no possible way for me to do that.

15 Q. Or even if the particular individuals in the incentive  
16 program had a function that could affect the target?

17 A. That's correct. I relied on management's judgment for  
18 that.

19 Q. And you don't have any information about the personal  
20 goals that make up the twenty-five percent of the program?

21 A. That is correct.

22 Q. Now, you mentioned in your direct testimony a hypothetical  
23 that actually came up during your deposition. This is the  
24 example of an industry supervisor who had the skill set of  
25 managing a lot of people and knew how to use heavy equipment

1 and so forth. What about the people that we've been discussing  
2 today who are general managers of underground or surface mines  
3 and who have held those positions for a substantial period of  
4 time? If you're correct that they have other industry  
5 opportunities and were undercompensated, why didn't they just  
6 go to other industries?

7 A. I don't know. You'd have to ask them.

8 Q. Because there apparently is something keeping them at  
9 Patriot despite the levels of compensation. Is that true?

10 A. I don't know.

11 Q. If you have not examined where Patriot gets its executives  
12 from or its high-level managers, how do you know that they can  
13 cross industry lines with this facility?

14 A. I certainly don't know that for a fact, and I was just  
15 suggesting in my testimony that certain skill sets would  
16 transfer from one industry to another.

17 Q. Were you in the courtroom when Mr. Hatfield testified  
18 about the eons-old practice of coal companies swiping each  
19 other's employees?

20 A. Yes, I was.

21 Q. You don't have any reason to doubt that he's correct about  
22 that, do you?

23 A. Well, I don't have any reason to doubt that it's limited  
24 to the coal industry, no.

25 Q. Your familiarity with the coal industry is that you have



1 some knowledge about Peabody. You've done some work for them,  
2 I take it?

3 A. Peabody -- Alpha.

4 Q. Besides those -- and Alpha is an energy company?

5 A. No, no. Alpha is a -- Alpha Natural Resources, primarily  
6 coal company.

7 Q. Okay. Beside Alpha Natural Resources and Peabody, do you  
8 have other experience in the coal industry?

9 A. No.

10 Q. Now, you talked a little bit about these Chapter 11 plans  
11 that you built into this database of approximately thirteen  
12 companies, and you said we all know that there have been more  
13 plans approved other than just those thirteen. But you're also  
14 aware that there have been plans that have been disapproved?

15 A. Oh, yes.

16 Q. Did you check Patriot's plan against any of them?

17 A. No, I did not.

18 Q. And in fact, some of the companies that are listed in that  
19 thirteen had their plans disapproved in part, is that true?

20 A. I believe that's true.

21 Q. Did you take out the disapproved parts when you did the  
22 comparison?

23 A. Well, I assume that the disapproved parts were taken out.  
24 As I testified during my deposition, you know, the database is  
25 maintained in our Washington, D.C. office. You know, it's

1 their job to gather the data and put what's appropriate into  
2 the database. I did not gather the data.

3 Q. In the Delphi case that Mr. Russano questioned you about  
4 where the court rejected one of your recommendations -- the one  
5 that the court rejected regarding emergence bonuses. The court  
6 cut the amount by eighty percent. Is that true?

7 A. I believe that's true.

8 MR. PERILLO: Your Honor, I'm going to -- pursuant to  
9 the same arrangement we had with Mr. Hatfield, just adopt the  
10 additional questioning that Ms. Hillyer will make --

11 THE COURT: All right.

12 MR. PERILLO: -- rather than be repetitive.

13 Thank you.

14 THE COURT: Thank you.

15 CROSS-EXAMINATION

16 BY MS. HILLYER:

17 Q. Good afternoon, Mr. Bubnovich.

18 A. Good afternoon.

19 Q. I'd like you to turn to tab 13 in your binder, please.

20 These are the companies' incentive plans to which you compared  
21 Patriot's 2013 AIP, is that correct?

22 A. Yes.

23 Q. And the title on top: Chapter 11 Incentive Plan Market  
24 Data, the market you're referring to there is the companies you  
25 selected from Towers Watson's database, not the entire universe

1 of Chapter 11 incentive plans ever approved, correct?

2 A. Correct.

3 Q. The range of employees eligible for the incentive plans on  
4 this list varies quite a bit, from 5 to over 3,000, isn't that  
5 right?

6 A. Well, I don't -- I wouldn't describe them as -- are you  
7 talking about the third column?

8 Q. The fourth.

9 A. Well --

10 Q. Oh, yes -- number of participants.

11 A. -- oh, well, I'm sorry. I was in the wrong column.  
12 Yes -- the answer to your question is yes.

13 Q. And these aren't -- these companies identified here --  
14 they're not limited to the regions in which Patriot does  
15 business, correct?

16 A. That's correct.

17 Q. And none of these are mining or coal companies like  
18 Patriot, correct?

19 A. That's correct.

20 Q. And you didn't choose these companies based on whether  
21 they have a unionized workforce like Patriot does, correct?

22 A. That's correct.

23 Q. And you didn't choose these companies based on whether  
24 they were in distressed industries, did you?

25 A. That's correct.

1 Q. And you didn't choose these companies based on whether  
2 they filed for bankruptcy before or after October of 2005, did  
3 you?

4 A. That's correct.

5 Q. And you didn't choose these companies based on whether  
6 they were liquidating or reorganizing, did you?

7 A. That's correct.

8 Q. And the page following that, the other Chapter 11 CERP  
9 programs?

10 A. Um-hum.

11 Q. Again, you only looked at retention plans of the companies  
12 in Towers Watson's database, and the market that you referred  
13 to -- that is the market, correct?

14 A. Yes, in this circumstance. Yes.

15 Q. And the number of CERP participants under these programs  
16 varies significantly from 5 to over 400, correct?

17 A. Correct.

18 Q. You did not investigate whether any of these companies are  
19 unionized either, did you?

20 A. That's correct.

21 Q. Or whether they're located in the same geographic region  
22 as Patriot, correct?

23 A. Correct.

24 Q. You also didn't investigate the circumstances of each  
25 retention program at each of these companies, did you?

1 A. Correct.

2 Q. And you didn't look into whether -- when these companies  
3 filed for bankruptcy either, did you?

4 A. Correct.

5 Q. And you didn't analyze the percentage of base salary  
6 awarded under each of these retention plans, did you?

7 A. Correct.

8 Q. So you can't say whether Patriot's eleven to forty-five  
9 percent of base salary under the CERP is comparable to these  
10 retention programs in terms of percentage of base salary,  
11 correct?

12 A. That's correct.

13 Q. You didn't study other coal company incentive plans,  
14 correct?

15 A. In what context?

16 Q. Why don't we turn to your declaration, which is tab 1B?  
17 In paragraph 17, your declaration states -- references --

18 A. Hold on a second. I'm not there yet.

19 Q. -- "the breadth of the participant" -- I'm sorry?

20 A. I'm not there yet. I'm not there yet.

21 Q. Okay. I'm sorry.

22 A. I don't have it.

23 Q. Let me know when you're there.

24 A. Again, what paragraph?

25 Q. 17 --

1 A. Okay.

2 Q. -- second line. "The breadth of the participant pool is  
3 typical by coal industry standards" -- do you see that?

4 A. Yes.

5 Q. You did not study other coal company incentive plans, did  
6 you?

7 A. Well, I happen to know that within the coal industry, the  
8 annual incentive plans tend to be what I'll call deep, or they  
9 reach deep into the organization. I didn't do a formal study.

10 Q. You testified during direct about the benchmarking  
11 analysis that you performed in connection with the CERP and the  
12 AIP. And you testified that you could only perform  
13 benchmarking for approximately half of the employees eligible  
14 for the AIP, correct?

15 A. When I was using the Towers and Mercer data only, yes.

16 Q. And you concluded that Patriot's total pay to its  
17 employees was, on average, below market, correct?

18 A. Correct.

19 Q. And your average included only those you could benchmark,  
20 correct -- about half?

21 A. Correct.

22 Q. And you just assumed that the others for whom you couldn't  
23 benchmark wouldn't affect that average?

24 A. Correct.

25 Q. The benchmarking that you did for the CERP -- the data

1 that you used -- that was not controlled by geography, correct?

2 A. Correct. I so testified.

3 Q. It was not controlled for cost of living, correct?

4 A. Correct.

5 Q. And you testified about the cost of living in St. Louis,

6 but that's not the only place where the AIP and CERP

7 participants reside or work, correct?

8 A. Correct.

9 Q. The benchmarking data that you used is also not controlled

10 to account for a particular employees' level of responsibility

11 or the size of the company, correct?

12 A. Not true. As I testified, we used data from companies

13 whose revenue range -- depending on which survey -- 1 to 3

14 billion or 1 to 2.5 billion, is similar to Patriot's projected

15 2013 revenue. So yes, it does take into account size.

16 Q. And they include companies that are larger and smaller

17 than Patriot, correct?

18 A. Correct.

19 Q. None of the companies in the Towers Watson or Mercer

20 surveys were in bankruptcy like Patriot when they reported the

21 data for the survey, correct?

22 A. That's true. Those companies' data is generally thrown

23 out.

24 Q. And you also used coal industry survey information, you

25 testified, correct?

1 A. Correct.

2 Q. And you don't know whether those coal companies were  
3 limited to the eastern basin, do you?

4 A. I do know.

5 Q. I'm sorry?

6 A. I do know.

7 Q. During your deposition, you testified you did not, and you  
8 know now?

9 A. Yes, I know now.

10 Q. At the time you used the data, you didn't know that, did  
11 you?

12 A. Yes, that's true. I did not know that.

13 MS. HILLYER: If I may confer, Your Honor, for a  
14 moment?

15 THE COURT: You may.

16 MS. HILLYER: No further questions at this time, Your  
17 Honor. Thank you.

18 THE COURT: All right. Thank you.

19 Is there any brief redirect for this witness?

20 MR. RUSSANO: Very brief.

21 REDIRECT EXAMINATION

22 BY MR. RUSSANO:

23 Q. Mr. Bubnovich, you made recommendations with respect to  
24 the CERP regarding the ranges -- the appropriate ranges, is  
25 that right -- incentive ranges?



1 A. Yes, I did.

2 Q. Sorry?

3 A. Yes, I did.

4 Q. And it was up to management to decide whether or not to  
5 follow your recommendations to the -- down to the specific  
6 exact point of your recommendation, is that right?

7 A. That's right. And I think I've testified to that effect a  
8 couple of times already, but yes.

9 Q. And in this particular instance with respect to the CERP,  
10 did management follow your recommendation exactly with respect  
11 to the ranges and the CERP?

12 A. No.

13 Q. Is it typical and necessary to conduct an attrition study  
14 in order to perform a benchmarking analysis and provide  
15 consulting services?

16 A. No.

17 Q. Is it typical to challenge management's selection of  
18 participants for inclusion in a retention program?

19 A. By me as the consultant?

20 Q. Correct. Is that typical?

21 A. No.

22 Q. Would it be typical for you, as the consultant, to assess  
23 whether or not management's targets for a particular metrics  
24 and incentive plan are aggressive enough?

25 A. No. That's based on, in many cases, confidential

1 information that I, of course, would have no access to.

2 Q. In your opinion, are the employment opportunities of the  
3 participants in the AIP -- are they limited to the coal  
4 industry?

5 A. My opinion, as I believe I've testified, is no.

6 Q. Thank you very much. No further.

7 THE COURT: All right. Thank you.

8 MR. PERILLO: Just one, very briefly, Your Honor?

9 THE COURT: Briefly.

10 RE-CROSS-EXAMINATION

11 BY MR. PERILLO:

12 Q. Okay. Mr. Bubnovich, I think in -- just to summarize a  
13 colloquy we had in our deposition, briefly, you told me that  
14 management shouldn't be "a slave to the data"?

15 A. Oh, yeah, I --

16 Q. It's a favorite -- favorite phrase of yours, isn't it?

17 A. -- that is true.

18 Q. And when I asked you -- so they could choose anything  
19 inside the parameters, you told me, or outside"?

20 A. That's true.

21 Q. Thank you.

22 THE COURT: Anything else?

23 MR. PERILLO: No further for the witness.

24 MR. RUSSANO: Your Honor, that's our final witness.

25 THE COURT: All right. You may step down. Thank you,

1 Mr. Bubnovich.

2 All right. Then are we ready to proceed with a brief  
3 closing statement?

4 MR. RUSSANO: I think the -- do you have a witness? I  
5 think the objectors have a single witness.

6 THE COURT: All right. Let me take a five-minute  
7 recess, and then we'll pick up with that witness.

8 MR. RUSSANO: Okay.

9 THE COURT: We'll be in recess for five minutes.

10 MR. RUSSANO: Thank you.

11 THE COURT: Don't go far.

12 (Recess from 4:53 p.m. until 5:05 p.m.)

13 THE CLERK: Your Honor, we're back on the record.

14 THE COURT: All right. Thank you. Be seated, please.

15 All right, then, Mr. Perillo or Ms. Hillyer, do you  
16 all have a witness this afternoon?

17 MS. HILLYER: Yes, Your Honor. We'd like to call  
18 David Juza. And just so Your Honor is aware, his testimony  
19 will be a counterpart to Mr. Bubnovich's testimony.

20 THE COURT: All right. All right, then, Mr. Juza,  
21 will you step up to the podium first, please, to be sworn?

22 (Witness sworn)

23 THE CLERK: Please have a seat in the witness box,  
24 sir. There is a step up.

25 MR. KAMINETZKY: Your Honor, Benjamin Kaminetzky with

1 Davis Polk for the debtors. Just one note -- we're going to be  
2 challenging whether Mr. Juza can be an expert in this matter.  
3 We don't think he's qualified at all. I don't know if you want  
4 me to do that voir dire first or wait until Ms. Hillyer tries  
5 to qualify him, and then I should do it at that time. Whatever  
6 your preference is.

7 THE COURT: Well, probably I want to hear what Ms.  
8 Hillyer has to say first --

9 MR. KAMINETZKY: That's fine.

10 THE COURT: -- and then we'll -- all right.

11 MS. HILLYER: Thank you, Your Honor.

12 THE COURT: Thank you.

13 VOIR DIRE EXAMINATION

14 BY MS. HILLYER:

15 Q. Would you please state your full name for the record?

16 A. David Juza.

17 Q. Mr. Juza, where are you presently employed?

18 A. With Navigant Consulting.

19 Q. And how long have you been with Navigant?

20 A. Since September of 2012.

21 Q. What is your job title at Navigant?

22 A. Director of human capital management.

23 Q. And what are your duties as director of human capital  
24 management?

25 A. I work closely with the business leaders to understand

1 their business objectives and then craft human capital  
2 workforce and compensation-related strategies to support  
3 achievement of those objectives.

4 Q. Do you deal with anything related to talent acquisition or  
5 retention there?

6 A. On a constant basis. The primary business of Navigant is  
7 providing human capital talent in support of consulting  
8 engagements.

9 Q. And where did you work before you started at Navigant?

10 A. For Sevatec Incorporated.

11 Q. And what clientele does Sevatec serve?

12 A. Sevatec's primarily a federal consulting company.

13 Q. During what period were you with Sevatec?

14 A. I started in December of 2010, and my employment ended in  
15 September of 2012.

16 Q. And what was your job title there?

17 A. Director of consulting services for human capital  
18 management.

19 Q. And what were your responsibilities in that role?

20 A. I worked very closely with a variety of federal clients on  
21 their human capital-related initiatives associated with talent  
22 acquisition, talent retention, how they would ultimately  
23 develop their work force members, and, subsequently,  
24 incentivize them to achieve the business objectives for those  
25 federal agencies.

1 Q. Where did you work before Sevatec?

2 A. Interactive Technologies Group.

3 Q. And how long were you there?

4 A. For approximately two and a half years, ending in November  
5 of 2010.

6 Q. And what was your most recent role when you left  
7 Interactive Technologies Group?

8 A. Director of human capital consulting services.

9 Q. And were you promoted to that role?

10 A. Yes.

11 Q. What was the role you had before that?

12 A. Prior to that, I was the senior subject matter expert in  
13 human capital management.

14 Q. What does it mean to be a senior subject matter expert in  
15 human capital management?

16 A. I was specifically hired by the company to support the  
17 Department of Defense with many of their human capital-related  
18 concerns and issues. I was identified on the contract as a  
19 key -- key member by virtue of my background and expertise in  
20 human capital management.

21 Q. And what were your responsibilities as senior subject  
22 matter expert in human capital management?

23 A. The client was the Department of Defense, and primarily,  
24 that entity -- the entity that I worked with -- was focused on  
25 the defense acquisition workforce, which is about a 140,000-

1 member community. In working with the senior executives at the  
2 Department of Defense, I looked at that population in terms of  
3 their ability to attract and retain talent, their ability to  
4 compensate, and subsequently, retain that workforce over time.  
5 I helped to identify different incentives that would encourage  
6 those workforce members to achieve the business objectives for  
7 the agencies across the department.

8 Q. And what were your responsibilities as director of human  
9 capital management at Interactive Technologies Group?

10 A. Very similar, except that I worked with a broader -- I  
11 guess a broader swath of clients. In addition to the  
12 Department of Defense itself, I also worked with the Defense  
13 Acquisition University, the Defense Media Activity, and one or  
14 two small private clients.

15 Q. And where did you work before Interactive Technologies  
16 Group?

17 A. I was with Accenture for approximately eight years.

18 Q. And what period were you there?

19 A. I started in May of 1998 and concluded my employment in  
20 February of 2006.

21 Q. And between Accenture and Interactive Technologies Group,  
22 where did you work?

23 A. My apologies. I was with Lockheed Martin for  
24 approximately one year, and prior to that, a company that was  
25 acquired by Lockheed Martin, Management Systems Designers.

1 Q. And what was your title at Lockheed Martin?

2 A. Director of human resources.

3 Q. And what were your responsibilities as director of human  
4 resources?

5 A. I oversaw the workforce in terms of how they were hired,  
6 retained, compensated for the company.

7 Q. And did any of your work for Lockheed Martin focus on any  
8 business divisions or entities that were shutting down or  
9 distressed?

10 A. It did. In fact, the acquisition that Lockheed Martin  
11 executed of the company that I worked for resulted in the  
12 elimination of a variety of management positions.

13 Q. And you mentioned that before Lockheed Martin, you were at  
14 Accenture, correct?

15 A. Yes.

16 Q. Okay. And what were your responsibilities at Accenture?

17 A. Over time, they changed. I started as a generalist from a  
18 human resources perspective, so focused on workforce-related  
19 support activities, helping to attract and subsequently retain  
20 talent for the organization. Over the course of my eight  
21 years, the role changed from my transactional one, primarily  
22 early in my career, to a more strategic one, helping to work  
23 with the executives to understand the business objectives of  
24 the company and also our clients and then position the  
25 workforce subsequently to achieve those objectives.



1 Q. And where did you work before Accenture?

2 A. With Express Human Resources.

3 Q. During what period were you there?

4 A. For approximately two years, from May of 1996 through May  
5 of 1998.

6 Q. And what were your titles there?

7 A. I started as a -- just a staff member doing recruiting-  
8 related work and talent identification and attraction for the  
9 company. The second half of my tenure with the company, I was  
10 an office manager overseeing the consulting to -- to private-  
11 sector businesses, specifically on their talent acquisition and  
12 retention strategies.

13 Q. And what were your responsibilities, in general, at  
14 Express Human Resources?

15 A. Again, really, in the consulting space focused on helping  
16 those clients achieve their business objectives.

17 Q. And in the course of your roughly sixteen-year career, it  
18 sounds like you've been a consultant to external companies and  
19 you've been in-house as an HR employee. What portion of your  
20 career have you done one versus the other?

21 A. It's about fifty-fifty, actually.

22 Q. And what is the difference, in terms of your role and  
23 responsibilities, between being a consultant and being an in-  
24 house HR employee?

25 A. I think in many respects they're similar. The -- the

1 opportunity to work internally gives me a chance to see  
2 recommendations in action up close, understand the risks  
3 inherent in different strategies that might be employed from a  
4 retention or performance-incentivizing perspective. As an  
5 external consultant, oftentimes you're turning over those  
6 recommendations to internal staff members for execution.

7 Q. And do you believe that your role as an in-house HR  
8 employee has helped you in any way to be a consultant?

9 A. Yes. It makes my recommendations, I think, significantly  
10 more realistic, puts me in a position to be able to understand  
11 the implications of the things that I'm suggesting, and also  
12 understand the risks inherent in those suggestions.

13 Q. And you've testified that you've done some work for public  
14 sector companies and some work in the private sector. Are  
15 there any differences between working for either of those?

16 A. There are certainly some differences. But in general,  
17 those companies are trying to attract and retain people from  
18 the same pool out there in employment land. So while the  
19 federal sector might be somewhat more prescriptive about what  
20 you can do in terms of either compensating or retaining  
21 individuals than the private sector, for the most part, the  
22 objectives are the same. You're still trying to keep people in  
23 jobs. You're still trying to attract them into your  
24 organization or incentivize them to achieve the business  
25 objectives that organization has established.

1 Q. Do you have experience performing compensation  
2 benchmarking?

3 A. Yes.

4 Q. What are your roles in carrying out compensation  
5 benchmarking?

6 A. It would really involve research from -- from every  
7 perspective of employment. So it would start with  
8 understanding the nature of the positions that are to be  
9 benchmarked and how those compare to the broader marketplace,  
10 be that either locally or nationally, depending on the nature  
11 of the company in question.

12 Q. Do you have experience preparing employee-retention plans?

13 A. Yes.

14 Q. And what are your responsibilities in preparing such a  
15 plan?

16 A. Well, first of all, it's to understand what the business  
17 objectives are for that organization, relative to retaining its  
18 talent. From there, it's making determinations about what  
19 ultimately will be successful in retaining the talent necessary  
20 to achieve those business objectives.

21 Q. Do you have experience preparing employee-incentive plans?

22 A. Yes.

23 Q. And what are your responsibilities in preparing those  
24 plans?

25 A. Very similar. The objective, again, is to understand the

1 business targets for that particular business, and design a  
2 program that elicits the type of behavior in the employees that  
3 support those business objectives.

4 Q. What is your educational background?

5 A. The bachelor of science degree in psychology.

6 Q. You testified earlier about your experience working with  
7 distressed companies. Have you ever worked with a company in  
8 bankruptcy?

9 A. I have not.

10 Q. Do you believe that your human capital experience is  
11 applicable in the bankruptcy context?

12 A. I think behavioral performance by a workforce is not  
13 specific to the type of reason that the company is going  
14 through change or the workforce itself is going through change.  
15 People's behavior is tied to the risk associated with the job  
16 that they're in or the business that they're in.

17 MS. HILLYER: Your Honor, the funds offer Mr. Juza as  
18 an expert on the subjects of human capital, compensation  
19 principles, talent acquisition, and talent retention.

20 THE COURT: All right.

21 Mr. Kaminetzky?

22 MR. KAMINETZKY: Your Honor, as previously noted, the  
23 debtors object. And if you will, I just have a few voir dire  
24 questions which I think could easily show the nature of our  
25 objection and why we believe Mr. Juza -- while a perfectly

1 nice, honest, good, smart fellow -- is not appropriate for  
2 expert testimony in this case.

3 VOIR DIRE EXAMINATION

4 BY MR. KAMINETZKY:

5 Q. Mr. Juza, my name is Ben Kaminetzky of Davis Polk. I  
6 represent the debtors. I just have a few questions for you  
7 about your qualifications to serve as an expert in this case.

8 Is your job at Navigant to consult with companies in  
9 Chapter 11 regarding compensation issues?

10 A. It is not.

11 Q. Okay. So you're not employed at Navigant as a consultant,  
12 are you?

13 A. Correct.

14 Q. You're in the -- you're an internal human resources  
15 employee, isn't that correct?

16 A. Yes.

17 Q. And Navigant doesn't hold you out in its Web site or its  
18 marketing materials as a professional. Is that correct?

19 A. True.

20 Q. What percentage of your time at Navigant is devoted to  
21 compensation benchmarking?

22 A. Not really any.

23 Q. So you don't do compensation benchmarking at Navigant.  
24 But does your work at Navigant involve helping to design  
25 employee incentive and retention programs?

1 A. I participate from an execution perspective, not in the  
2 design.

3 Q. How about the designing? Have you ever designed for  
4 Navigant a retention or incentive program?

5 A. No.

6 Q. Have you published articles on incentive or retention  
7 compensation?

8 A. No.

9 Q. Do you have any graduate degrees?

10 A. I do not.

11 Q. And you've mentioned that your one undergraduate degree is  
12 in psychology. Is that correct?

13 A. Yes.

14 Q. Do you have any other degrees whatsoever?

15 A. I do not.

16 Q. And how much experience do you have working on  
17 compensation issues in the coal industry?

18 A. The coal industry specifically?

19 Q. Yes.

20 A. None.

21 Q. How many incentive plans have you helped develop for  
22 companies in Chapter 11?

23 A. In Chapter 11?

24 Q. Yes.

25 A. None.

1 Q. And how many retention plans have you helped develop for  
2 companies in Chapter 11?

3 A. Again, in Chapter 11, none.

4 Q. Okay. Before this case, how many times have you been  
5 hired by either a debtor, a creditors' committee, a bank  
6 lender, a creditor, a union, or any other party-in-interest to  
7 give advice or testimony with respect to a Chapter 11 retention  
8 or incentive plan?

9 A. I have not.

10 Q. You've never had, have you?

11 A. No, sir.

12 Q. This is your first time.

13 A. Yes.

14 Q. Have you ever performed an analysis of how one Chapter 11  
15 incentive or retention plan compares to another Chapter 11  
16 incentive or retention plan?

17 A. Prior to looking at the circumstances of this --

18 Q. Yes. Prior to this engagement.

19 A. I have not.

20 Q. You've never done that before.

21 A. Correct.

22 Q. How many times have you submitted an expert report to a  
23 court?

24 A. To a court I have not.

25 Q. How many times has a court certified you as an expert?

1 A. It has not.

2 Q. Has an authoritative organization of any kind recognized  
3 you as an expert?

4 A. Again, as I stated earlier, I've been identified as a key  
5 staff member on federal contracts in the human capital  
6 management space, which would have included compensation and/or  
7 retention programs.

8 Q. Was your deposition taken last week?

9 A. Yes.

10 Q. Were you under oath at the time?

11 A. Yes, sir.

12 Q. Did you truthfully testify?

13 A. I believe so.

14 Q. We asked you the question is there an authoritative  
15 organization that has certified you as an expert. You answered  
16 no. Was that correct? You want me to show you that testimony?

17 A. No, I believe you, sir.

18 Q. Okay. Was that honest testimony?

19 A. It is.

20 Q. Did you make any effort, in connection with the  
21 preparation of your declaration, to identify authors who are  
22 authorities in Chapter 11 incentive programs?

23 A. I think in my testimony last week I -- I indicated that I  
24 researched authors that provided information, but not  
25 specifically Chapter 11s, no.



1 Q. So, in other words, you didn't attempt to identify any  
2 literature specifically related to Chapter 11 incentive  
3 programs. Is that correct?

4 A. Well, again, in -- in the materials that we provided  
5 there's people who commented on Chapter 11s, but --

6 Q. Okay. Do you want to, again, in your deposition last week  
7 a question was asked:

8 "Q. Did you make any effort, in connection with the  
9 preparation of your declaration, to identify authors who are  
10 authorities in the area of Chapter 11 incentive programs?

11 "A. I did not."

12 Was that truthful testimony?

13 A. Yes, sir.

14 Q. Did you make any effort to identify, in connection with  
15 the preparation of your declaration, authorities in the area of  
16 Chapter 11 retention programs?

17 A. No, sir.

18 Q. And you testified under oath last week that you are not an  
19 expert on Chapter 11 retention and incentive plans, correct?

20 A. Yes, sir.

21 Q. That was your testimony, that you're not an expert on  
22 Chapter 11 retention and incentive plans, correct?

23 A. Yes, sir.

24 MR. KAMINETZKY: Your Honor, based on this, the  
25 debtors move to strike the declaration David Juza and to

1 preclude him from offering any expert testimony or opinions.  
2 Under Federal Rule of Evidence 702, made applicable by  
3 Bankruptcy Rule 9017, Mr. Juza is not qualified as an expert.  
4 Under the plain terms of 702, expert testimony is only  
5 appropriate and admissible if the expert witness is qualified  
6 as an expert by knowledge, skill, experience, training or  
7 education.

8           And the Supreme Court has spoken on this issue and has  
9 said that a Court should only admit expert testimony if it  
10 would help the Court understand the evidence or determine a  
11 fact in issue. Mr. Juza lacks any expertise that will help the  
12 Court's evaluation of the debtors' proposed compensation plan.

13           As you just heard, this is about the debtors' proposed  
14 Chapter 11 incentive and retention plans, areas where Mr. Juza,  
15 quite honestly and quite frankly, just testified that he has no  
16 knowledge, skill, or experience, training, or education. He  
17 admitted he's not an expert in the design of compensation  
18 programs for companies in bankruptcy. He never analyzed  
19 retention plans or incentive plans of companies in bankruptcy.  
20 He has no experience whatsoever in designing compensation  
21 programs for companies in bankruptcy. He has never before  
22 worked on any case related to a company in bankruptcy.

23           He has never performed any work related to the coal  
24 industry. He's not published in the area of incentive or  
25 retention compensation. He has no degree that would make him

1 an expert in retention and compensation issues in Chapter 11.  
2 He has no relevant educational background. And quite frankly,  
3 as he's testified to last week, he made no effort to even  
4 educate himself about the relevant issues. He testified, both  
5 today and last week, that he didn't even make an effort to  
6 identify authorities on Chapter 11 incentive and retention  
7 plans.

8 Now, Mr. Juza seems like a wonderful guy. He's a  
9 great internal HR person. If he wants to get into this  
10 business, I wish him luck. But the first time you're asked to  
11 do something, Your Honor, it's not to be an expert witness in a  
12 litigation. It's like saying that I'm going to take up skiing,  
13 and I'm going to all of a sudden be an instructor. That's not  
14 the way it works.

15 For the reasons, Mr. -- for these reasons, Mr. Juza is  
16 not qualified. His opinions are not reliable. And his  
17 testimony would be of no assistance to the Court. If there was  
18 ever a case that called for a Court to invoke its "gatekeeper  
19 function", in the words of the Supreme Court, this would be it.  
20 And I understand there's no jury here, and it's just a bench  
21 trial, but I think in this case, given the witness' utter lack  
22 of knowledge in the relevant areas, I don't think it's  
23 appropriate for this testimony to go any further.

24 Thank you.

25 THE COURT: Ms. Hillyer?

1 MS. HILLYER: Thank you, Your Honor. In brief, Mr.  
2 Juza has significant knowledge and experience that qualifies  
3 him as an expert in the field of human capital management. He  
4 has over sixteen years of applicable human resources experience  
5 consulting for both internal and external clients. He  
6 regularly advises companies on matters related to compensation  
7 and talent acquisition and retention, as well as organizational  
8 and performance improvement.

9 He has significant experience benchmarking salaries  
10 and preparing and reviewing incentive and retention plans. He  
11 is very knowledgeable about the considerations for those  
12 projects as well as the various methodologies and approaches to  
13 them.

14 His testimony and opinions go directly to the heart of  
15 whether the proposed AIP and CERP were diligently researched  
16 and are necessary or appropriate at this time in the debtors'  
17 case. The Court should qualify Mr. Juza as an expert and treat  
18 his testimony accordingly. And further, should the Court take  
19 any issue with Mr. Juza's credentials, such concern should not  
20 be the basis to exclude his testimony altogether but should go  
21 to the weight this Court should accord his testimony.

22 Thank you, Your Honor.

23 THE COURT: Ms. Hillyer, I'm a little concerned about  
24 the witness' experience with, I guess, the creation of the  
25 compensation programs. Whether in or outside of bankruptcy, it

1 appears as though his experience is somewhat limited more  
2 towards, as he indicated, I believe, in his questions by Mr.  
3 Kaminetzky, about more actually executing but not the actual  
4 design of the program, and that seems to be more the question  
5 that we have here is the design: Is this the appropriate kind  
6 of program that is going to meet the goals that the debtor has  
7 indicated? So I would be inclined to grant the request and not  
8 qualify Mr. Juza as an expert.

9 MS. HILLYER: Thank you, Your Honor.

10 THE COURT: Thank you.

11 THE WITNESS: Am I excused?

12 THE COURT: Yes, you are. Thank you.

13 MR. KAMINETZKY: Your Honor, I guess that brings us to  
14 brief closing remarks, if that makes sense to the Court. Would  
15 it make sense for the Court now to hear if there's other  
16 constituencies other than the debtor and the objectors that  
17 want to make some statements to the Court in support or  
18 whatever? Could we do that now, and then we'll conclude with  
19 the objectors and the debtor?

20 THE COURT: Yes. That's certainly fine. If there are  
21 other parties here that wish to be heard briefly in support of  
22 the motion?

23 MR. WILLARD: Your Honor, may it please the Court,  
24 Greg Willard on behalf of the official unsecured creditors'  
25 committee. My co-counsel, Tom Mayer, has been the person on

1 our team directly involved with these discussions, and I think  
2 it would be most appropriate if he shared some observations  
3 with Your Honor from the committee's standpoint, so I'll cede  
4 the podium to Mr. Mayer.

5 THE COURT: All right. Mr. Mayer?

6 MR. MAYER: Thank you, Your Honor. Again, for the  
7 record, my name is Thomas Moers Mayer of the law firm of Kramer  
8 Levin Naftalis & Frankel LLP, as counsel with Carmody MacDonald  
9 to the official committee of unsecured creditors.

10 Your Honor, the committee supports the debtors' motion  
11 for approval of these management compensation plans, and we  
12 didn't start out that way. We started out as skeptics, as our  
13 papers indicated. In our own manner, we tried to analyze these  
14 programs the way that we think the Court should analyze them  
15 today, and the first time we looked at them we said no.

16 The debtors came and they presented to us, and the  
17 committee deliberated, and they sent me back to tell the  
18 debtors no way. Start over. But the debtors kept working, and  
19 we kept commenting, and they kept making changes, and we  
20 support the plans today, because they got to where we think  
21 they make sense. Their cost has been cut by forty-four  
22 percent.

23 Very important to us, the management compensation  
24 plans were delinked from retiree sacrifices on medical  
25 benefits, which -- this is further explained in our papers, I

1 won't take more time; the hour is late -- but that was  
2 important. We wanted to make sure that if retiree medical  
3 benefits were cut, that cut wouldn't boost management's  
4 compensation, and that goal has been achieved. These plans are  
5 delinked from the sacrifices that retirees may be called upon  
6 to make.

7           And we extended the time that managers had to stay in  
8 order to get the biggest piece of their payment under the  
9 retention plans, so we think we got a lot in these  
10 negotiations, and we got the plans to where we could support  
11 them. And we didn't just rely on the debtors' business  
12 judgment. We made our own judgment.

13           You've heard testimony today. It's not seriously  
14 contested that the debtors need managers to run the debtors.  
15 Mines don't run themselves. Computer systems don't run  
16 themselves. Sales don't get made without sales managers.  
17 Vendors don't ship. Service companies don't provide service  
18 without managers to make sure payables get paid. The  
19 accounting department can't keep the books that we need to keep  
20 the DIP lenders happy and to get out of Chapter 11. And  
21 managers will not stay around if they don't get paid.

22           Now, I'm a great admirer of Section 503(c), and I  
23 think Congress put it there for a reason, to make sure that the  
24 insiders who brought us this bankruptcy don't profit from the  
25 bankruptcy. But none of the managers here fit that

1 description. First, the top executives aren't in the program.  
2 The men and women who weren't in the program were doing their  
3 jobs and got caught up in this Chapter 11.

4 Second, they're in no sense profiting from the  
5 bankruptcy. You've already heard testimony. The total  
6 compensation for the management has, in fact, gone down.

7 But the third, with respect to the incentive  
8 targets -- Mr. Perillo referred to them as "gimmies" -- we think  
9 the debtors are right about this. The committee's economic  
10 professionals spent a lot of time looking at those targets, and  
11 you heard the testimony. The debtors are on pace to miss at  
12 least one of their targets, and if things continue as they were  
13 in February, they're on pace to miss another one.

14 I won't speak to safety, because that's not something  
15 that the committee looked at, but these do not look to us to be  
16 easy targets to make. We, frankly, will be thrilled if the  
17 debtors get their EBITDA up to the point of the targets in the  
18 DIP loan agreement.

19 We understand the position of the union and the  
20 pension plan. To union members facing the prospect of lower  
21 wages and eliminated benefits, 6.9 million looks like a lot of  
22 money, and the payments promised to individual managers look  
23 like a lot of money. But in the context of this case, spending  
24 6.9 million as a percentage of total revenues, as a percentage  
25 of the claims in the case, as a percentage of just about any



1 other metric in terms of case significance, it's not an  
2 enormous amount of money. And we thought that there was a  
3 substantial risk of damage to the company if management  
4 attrition continued to happen.

5 So that's why we ended up supporting this. And Your  
6 Honor, I want you to think about who's not present in court  
7 today, because you've heard objections from the union and the  
8 union pension plan. And as I've said, we understand their  
9 position. But there are thousands of creditors who aren't in  
10 court today. There are thousands of nonunion employees. There  
11 are thousands of trade creditors and bondholders. There are  
12 lots of creditors, and the committee represents them as well,  
13 and that's why we're here supporting the debtors' compensation  
14 programs. We think they make sense. We reached our own  
15 judgment as to whether or not they made sense, and we hope and  
16 ask that this Court reach the same judgment.

17 And unless the Court has questions I have nothing  
18 further.

19 THE COURT: I don't. Thank you.

20 MR. WILLARD: Okay.

21 THE COURT: All right. Are there any other parties  
22 that wish to be heard in support of the motion?

23 MS. ALFONSO: Very briefly, Your Honor. Ana Alfonso  
24 for Bank of America, which is the second out DIP agent. We  
25 filed a statement of support for the plan. And I don't want to

1 repeat anything that's been said; it's late in the day. But we  
2 join with the debtors and the committee in asking that the plan  
3 be approved as soon as possible so that it can be implemented  
4 and announced to the personnel as soon as possible.

5 Thank you.

6 THE COURT: All right. Thank you. Are there other  
7 parties that wish to be heard in support of the motion? All  
8 right. And on the telephone, was there anyone who wished to  
9 say anything in support of the motion? Hearing none. All  
10 right.

11 And are there any parties in the courtroom that wish  
12 to be heard in opposition to the motion, other than the union  
13 and the union funds? All right.

14 Then hearing none, Mr. Kaminetzky, then, would you  
15 like to proceed at this time?

16 MR. KAMINETZKY: Yes. Yes, Your Honor. Very briefly.  
17 I just have a couple of remarks, and then I've asked Mr. Walsh  
18 from Bryan Cave to give the brief closing. I just wanted to  
19 note five, again, very brief bullet points, I think there are,  
20 and if there are six, you'll forgive me.

21 One way to gauge who wins and who loses is to see who  
22 keeps their promises from the opening statements. And I wrote  
23 down very carefully the main points that Mr. Perillo made in  
24 his opening statement. The first thing he said, and I don't  
25 have a transcript so I apologize if I'm paraphrasing, is that

1 there's something, quote, "unseemly" about the efforts to  
2 insulate management from sacrifice. I think you heard the  
3 testimony of Mr. Hatfield, summarized in slides 5 and 6 of his  
4 presentation, that sacrifice is exactly what management has  
5 done, and continues to do, and will continue to do even if  
6 every one of these dollars are earned under these very modest  
7 programs. And quite frankly, it doesn't look like every  
8 dollar's going to be earned, given where we are with a number  
9 of the metrics.

10 Mr. Perillo then kept on talking about necessary and  
11 equitable: Are these programs necessary and are they  
12 equitable? The problem is that that's not what we're talking  
13 about, here. I understand that that's the standard for,  
14 perhaps, 1113 and 1114, but this litigation is not about 1113  
15 and 1114. Here, as we'll talk about in a second, the standard  
16 is very clear. It's 503(c)(3), business judgment.

17 And, quite frankly, Your Honor, if the union truly  
18 believed that this very modest program was unfair and  
19 inequitable, they would be sending the debtors flowers instead  
20 of objecting to this motion, because that would make their  
21 1113, 1114 litigation a lot easier. If this program, in fact,  
22 lines the pockets of managers at the expense of the union, they  
23 get to win their 1113 and 1114, and this little retention plan,  
24 they wouldn't be here objecting. They'd be here jumping up and  
25 down in excitement, because we've just given them a huge bullet

1 in their 1113 gun.

2 We've also heard -- Mr. Perillo then talked about  
3 insiders. Well, unfortunately for them, this is a very well  
4 tread area of law. We spent a lot of time in both our initial  
5 brief and our reply going through almost every case that has  
6 considered what is an insider and what is not. And what the  
7 cases consistently say is you don't look at the title; you look  
8 at their function. As we saw in slide number 1, which attempts  
9 to summarize that case law, of Mr. Hatfield's testimony, that  
10 simply the shoe doesn't fit with respect to the participants in  
11 the plan. They're not insiders under the law.

12 Next, Mr. Perillo said well, these are gimmes. These  
13 aren't really -- this incentive program is a ruse, it's a  
14 farce, because these hurdles, these metrics are nothing more  
15 than a bunch of gimmes. Well, I think Mr. Hatfield testified  
16 that that's absurd, and I think, quite frankly, he was being  
17 kind. How could something be a layup if you're missing it as  
18 we speak, and we're missing it by a lot with respect to some  
19 metrics. And, as you heard Mr. Hatfield say, with respect to  
20 the other financial metrics, liquidity, if we continue on the  
21 current course, we're going to be missing that as well.

22 Mr. Perillo then talked about the lack of diligence  
23 and said that Your Honor's going to be surprised by the lack of  
24 diligence. Well, as you heard the testimony, since  
25 Thanksgiving we've been meeting with the unsecured creditors'

1 committee. I would say that they're the body that has the most  
2 at stake, as fiduciaries for the creditors, with respect to  
3 letting dollars leave the door that aren't absolutely  
4 necessary.

5 As you heard the testimony, we met with the committee  
6 and its professionals repeatedly since November in trying to  
7 get them on board with these plans; as you just heard from Mr.  
8 Mayer, we've gotten them there.

9 In addition, we met with the DIP lenders and the U.S.  
10 Trustee, and we made the suggestions -- and we met the  
11 suggestions and demands of those constituencies. And that's in  
12 addition to the consultation that the debtors did with Towers  
13 Perrin, Mr. Bubnovich, and Blackstone.

14 Next, Mr. Perillo called these plans enormous. Well,  
15 nope. They're, as Mr. Mayer said, under any measure  
16 whatsoever, they're teeny. We're talking about one-half less  
17 than one-half of one percent of revenue.

18 A judge I know once said to me that this job would be  
19 a lot harder if it wasn't for the burden of proof. And the  
20 issue here, again, is business judgment. And under the Eighth  
21 Circuit that means the Court should approve it if it's, quote,  
22 "not manifestly unreasonable or made in bad faith and appears  
23 to enhance the debtor's estate". I think it's pretty clear  
24 that that is not the case, and therefore it comports with the  
25 business judgment.

1           And one more word, Your Honor. We heard -- and I want  
2 to be very sensitive to this, but I think it's extraordinarily  
3 important, because this has come up a couple of times in this  
4 case already. The debtors are going to fulfill their fiduciary  
5 duty. They're not going to respond to threats. Period.  
6 They're not going to respond to threats in court, and they're  
7 not going to respond to threats at the bargaining table.  
8 Threats about shutting down the company, Your Honor, if you do  
9 this we'll do that, is not the way that this debtor can  
10 function under its duties as a fiduciary to all constituencies,  
11 and, quite frankly, of course it's not the way judges decide  
12 cases, with a gun to their head. And that's not how we're  
13 going to work here, and that's not how we're going to work in  
14 the future.

15           We are embracing our duty to meet and to try to hash  
16 out an agreement with the union. We expect there to be  
17 agreement. We hope there'll be an agreement. But the  
18 agreement's going to become, as all agreements come, with  
19 people meeting at the negotiating table and trying to hash out  
20 their differences in good faith.

21           Before I turn it over to Mr. Walsh, I just want to  
22 make a statement that the committee asked us to make. The  
23 debtors have agreed to give the committee five days notice of  
24 any payment under the financial metric of the AIP as well as  
25 the calculation for determining the EBITDAP and liquidity

1 numbers. We have agreed to work with the committee in good  
2 faith to address any question they may have.

3 Mr. Walsh?

4 MR. WALSH: Your Honor, Brian Walsh, again, for the  
5 record, on behalf of the debtors. Your Honor, I have an eye on  
6 the clock, and so I will keep this brief; some things are in my  
7 notes that I'm going to skip over or short-circuit.

8 I want to talk about three things. First is what this  
9 hearing is not about. It's not about providing bonuses to  
10 management. You'll hear the term bonus, I think, frequently,  
11 from those who speak next. Senior management is not  
12 participating at all, as the Court has heard. Those who are  
13 participating in these proposed programs had their compensation  
14 reduced. You saw the bar chart earlier. I'm not going to put  
15 it up on the ELMO again and take time to do that. The question  
16 here is whether those who are participating in this plan will  
17 have an opportunity to earn back a portion of what they have  
18 lost because of this bankruptcy case if they continue to work  
19 hard and if the debtors achieve the particular goals in the AIP  
20 program.

21 This motion is not about providing retention payments  
22 to insiders. Mr. Kaminetzky covered that. I will move on.

23 This motion is not about disguising retention payments  
24 as incentive payments. The targets will not be easy to meet.  
25 The testimony is uncontradicted on that point. Choose your

1 metaphor, Your Honor; it's not a layup, it's not a gimme, it's  
2 not a cakewalk, it's not a milk run -- which I think is a  
3 metaphor, but I should have looked it up before I said it,  
4 frankly, Your Honor.

5 No one is getting an incentive payment in this case  
6 just for hanging around or just for being in the right place at  
7 the right time. It's not that easy. And this hearing is  
8 definitely not about whether collective bargaining agreements  
9 should be rejected or retiree benefits should be modified.  
10 That's coming soon, but that's not today, and the fair and  
11 equitable language used by the objectors in their pleadings is  
12 for another time, as well.

13 The second point, Your Honor, is the deferential  
14 nature of the business judgment standard, which is the  
15 governing test here. Management is in the best position by far  
16 to determine what is likely to work for the debtors in their  
17 business. The Food Barn test, which Mr. Kaminetzky covered,  
18 emphasizes this. Is the debtors' request manifestly  
19 unreasonable? I submit that it's not. Is it made in bad  
20 faith? I submit that it's not. Does it appear to enhance the  
21 debtors' estate? I submit that it does appear to do that, Your  
22 Honor.

23 Now, the objecting parties disagree with the debtors'  
24 judgment. They say, in effect, that it would be better to do  
25 this differently, structure these plans differently. Maybe not



1 have plans at all. But that's a long way from the showing  
2 that's necessary to defeat a motion that's governed by the  
3 business judgment rule.

4 At most, viewing things very charitably, Your Honor,  
5 we have a situation in which reasonable people would disagree  
6 about what precisely is best for the debtors, and that's no  
7 justification for denying a motion governed by business  
8 judgment.

9 And most important of all, the creditors' committee  
10 supports the motion for the reasons that Mr. Mayer has  
11 outlined. If the debtors have misjudged the circumstances  
12 here, if this money does not accomplish what it's intended to  
13 accomplish, the creditors will bear the loss here. They have  
14 concluded, they've weighed the alternatives and concluded that  
15 this is the better way to go. And as you consider whether the  
16 debtors' request is manifestly unreasonable, the support of the  
17 unsecured creditors fiduciary is a critically important fact.

18 And the third issue is timing, Your Honor. The motion  
19 includes a request for a waiver of the fourteen-day stay of  
20 Rule 6004(h), and the reason is simple; the debtors need to get  
21 on with their reorganization. Management needs to focus on  
22 mining coal, selling coal, rationalizing liabilities,  
23 formulating a plan, and emerging from bankruptcy. Mr. Hatfield  
24 and his management team need to stop worrying about who's going  
25 to be around to execute from the business plan and, instead,

1 execute from the business plan.

2 As a result of the emergency motion for a continuance  
3 we've had twenty additional days built into this process. Your  
4 Honor, at our last omnibus hearing, David Sosne requested that  
5 Your Honor enter an order promptly on a particular motion that  
6 was uncontested, and he characterized that request as  
7 impertinent. I don't know that it was really impertinent; his  
8 client was facing a statutory deadline, and he had a good  
9 reason to make that request. But, just to be safe, I'll ask  
10 Your Honor to excuse me if I am impertinent in requesting a  
11 prompt ruling on this motion, including a waiver of that  
12 fourteen-day stay, so the debtors can implement their plans and  
13 inform their employees what to expect.

14 As I mentioned, debtors need to get down to business.  
15 Get down to business, and the employees need to be focused on  
16 the business as well. And Mr. Hatfield's uncontradicted  
17 testimony was that his belief is that a delay in approval of  
18 the motion means that there is a substantial risk that the  
19 reorganization will fail.

20 For these reasons, Your Honor, we respectfully request  
21 that the motion, as modified, to remove seven participants, or  
22 now six participants from their retention program, be granted.

23 Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Walsh. Mr. Perillo or Ms.  
25 Hillyer?

1 MR. PERILLO: Good afternoon, Your Honor.

2 THE COURT: Good afternoon.

3 MR. PERILLO: I agree with Mr. Kaminetzky about one  
4 thing. Both of us promised you wine; let's see who brought  
5 lemon juice.

6 Mr. Kaminetzky says that the business judgment  
7 standard applies. Well, it does if you assume the conclusion,  
8 but the burden of proof is on the debtor, not on the objector,  
9 to show who is an insider, who is not an insider. As you sit  
10 here, you have zero evidence as to what the job duties of any  
11 plan participant are -- zero evidence, other than what I  
12 elicited from Mr. Hatfield on cross. You don't even have a  
13 one-sentence job description for the people in the program.

14 The debtor asks you to believe something that's  
15 breathtaking in its audacity, that a mining company -- with 19  
16 mines, 11 complexes, 4,000 employees -- is run by just 6  
17 people. Just six. And that nobody else -- nobody else -- is a  
18 "person in control of the debtor", even though the debtor has  
19 given them titles, lofty titles. And I asked Mr. Hatfield,  
20 with respect to the general managers and the regional VPs, were  
21 those just morale boosters, fake titles to make them feel good  
22 about themselves, or did they reflect their real duties. And  
23 he said they reflected their real duties.

24 What do they do? Well, they have authority to spend  
25 up to a million dollars, small change like that. I realize

1 that there has been a kind of conspiracy today to tell you that  
2 millions of dollars are small sums of money. And maybe at  
3 JPMorgan Chase, where they lose six billion in a trade and  
4 shake the world financial markets, it is. But here, this is a  
5 substantial authority to spend the money, commit the resources  
6 of the debtor. It couldn't be otherwise. How else could Mr.  
7 Hatfield say these are the people driving the bus? If the  
8 people driving the bus are not insiders, than who are?

9           It is clear beyond, I think, any cavil that general  
10 managers, the VPs that we've identified, the chief information  
11 officer, the man who is a member of the board of directors, the  
12 people who were involved in the design of the compensation  
13 program itself, those are insiders, and for that reason this  
14 program should not be permitted to go forward as to either the  
15 CERP or, as I'll explain in a moment, the AIP. But on this  
16 issue, where the debtor has the burden of proof and there isn't  
17 a word in the record about what the actual function of any  
18 specific employee is, the debtor promised you wine and brought  
19 you lemons.

20           Now, is the AIP a retentive program or is it a true  
21 incentive? Let's begin with what it does. Like the retention  
22 program, it makes three payments over time. Like the retention  
23 program, they're spaced throughout the case. And like the  
24 retention program, you can't get them unless you stay put long  
25 enough to hit the trigger gate. So it looks like a retention

1 program.

2 But -- the debtor says -- we have these high and  
3 aggressive hurdles. Very high. These are stretch goals.  
4 Except that for twenty-five percent of the bonus, no witness  
5 has testified that they even know what the personal goals are  
6 or that they can be characterized as aggressive. So there's  
7 zero testimony in the record on that.

8 And whose burden of proof is this again? Is it my  
9 burden of proof to go out and find the personal goals for these  
10 hundreds of people? No. It was the debtors' burden of proof  
11 to show you that that was an aggressive goal. And Mr. Hatfield  
12 admitted on the stand he can't say that they are. So there's  
13 no evidence in the record on that.

14 Now, as to the other two main metrics there, I  
15 characterize them as gimmes, and they are. And I will explain  
16 why, and no one can dispute this. These goals are either not  
17 going to be achieved at all, or they're going to be achieved  
18 totally. It's an either/or proposition, like two sides of a  
19 coin. And how do we know this? Well, because if the union  
20 employees do not give these concessions, as Mr. Hatfield  
21 forthrightly admitted, Patriot is kaput. There won't be  
22 payments to anybody. And so sixty percent of that metric is  
23 gone, gone, gone.

24 Did I threaten to strike? I don't think you heard  
25 those words from my mouth, Your Honor. I'll tell you why. I

1 don't get a vote on that proposition, and, in fact, with the  
2 exception of, perhaps, some of the people sitting in the back  
3 of the courtroom today, nobody here gets a vote on that  
4 proposition. Nobody at the debtor does; nobody at the  
5 committee does. And with all due respect, Your Honor, you  
6 don't.

7 This is a democratic organization. It is a fiercely  
8 militant union, and it is democratic right to its core, and it  
9 is required by federal law that it be run as a democracy, and  
10 it is. When the day comes that Patriot makes its final offer  
11 to the employees, they will vote whether to accept it or reject  
12 it, and nobody but them -- and I mean nobody but them -- will  
13 make that determination.

14 If they decide to give 150 million dollars to Patriot,  
15 there isn't any question, no serious question, that those  
16 metrics are going to be achieved just like a threshing machine,  
17 and what's literally happening is those employees will be  
18 voting to take money out of their own pockets and handing it  
19 over to managers.

20 So, a gimme? You bet it's a gimme. An enormity? You  
21 bet it's an enormity. I cannot speak for them. They will  
22 decide, when the day comes, whether to make that transfer  
23 payment or not, but if they do, there isn't any question the  
24 metrics will be met, and if they don't, there's no question  
25 that they can't be met.

1           What the debtor has done is to set up that old  
2 bankruptcy two-step. First the managers give themselves  
3 bonuses, and then they balance the budget on the backs of the  
4 workers, just like I said in the opening. So I did bring you  
5 the wine, and the debtor brought you the lemons.

6           Now, I want to pause for a moment and shed some tears  
7 for the sacrifices made by management for that poor  
8 administrative assistant who has to set up luncheons with  
9 bankers that Mr. Hatfield told us about, for all the people who  
10 are losing two and a half percent and getting forty-five  
11 percent back. That's sacrifice. No one is offering the people  
12 in the back of this courtroom a forty-two and a half percent  
13 bonus. Nobody is offering them this kind of sacrifice. The  
14 kind of sacrifice they're looking at is called poverty. It  
15 means not having even the median income in the United States,  
16 the average income in the United States, having something tens  
17 of thousands of dollars less than that, losing their pension,  
18 losing their healthcare, and for the retirees, looking into the  
19 abyss. That is sacrifice. Taking a two and a half percent  
20 wage cut and getting an eleven percent wage increase or a  
21 forty-five percent wage increase is not sacrifice.

22           I promised you that there would be a lack of  
23 diligence. Well, did you hear anyone -- anyone who testified  
24 that they've studied the attrition at this company? Did you  
25 hear anyone say that they have checked whether or not other

1 people, these managers, have job opportunities at other  
2 companies or are likely to leave or that anybody knows that  
3 anybody who actually would have changed their mind if money had  
4 been thrown at their feet? No such person testified to that  
5 today. This is all pure speculation that there is some type of  
6 bankruptcy magic that giving people huge bonuses keeps them  
7 around.

8 Mr. Bubnovich gave away the game. I asked him did you  
9 look to see if Patriot's program compares with programs that  
10 haven't been approved by courts? No. Nobody's bothered to  
11 look at that. Nobody's bothered to look and see what programs  
12 have succeeded and what programs have failed and how this  
13 program compares to them. I couldn't imagine, Your Honor, what  
14 would be less diligence than this?

15 I could imagine someone bringing a program to the  
16 Court that tells the judge oh, here are the job functions of  
17 these people and here's why they're not insiders. But that  
18 wasn't done. Or bringing to the Court a program that has  
19 targets that don't depend on one event in the case, that is  
20 whether the 1113 or 1114 motion succeeds. But that's not the  
21 case. Or bringing to you a program that was deeply researched,  
22 that has examples that show this type of incentive has kept  
23 this particular type of employee in place. But that wasn't  
24 done.

25 So once again, Your Honor, I wish I could say that the



1 debtor promised you wine and brought you lemons, but this time  
2 they brought you nothing. If this program can be achieved on  
3 the statement, nothing more, than that management shouldn't be  
4 a slave to the data and that they can pick anything that's  
5 either inside the parameters or outside the parameters, which  
6 raises the question, Your Honor, why do we have parameters if  
7 you don't even have to be inside them? If this program can  
8 pass, what program will fail?

9           There has been practically no proof brought to bear on  
10 this question that is relevant to whether or not this program  
11 is covered under 503(c)(1) or 503(c)(3). Because there is no  
12 proof that these are not insiders -- and they apparently are,  
13 they presumptively are, because they are officers or people in  
14 control of significant parts of the debtors' operations,  
15 virtually all of them -- the standards in 503(c)(1) command  
16 that these people can get the bonuses if, and only if, they  
17 show up in court with a job offer in hand. That wasn't done.  
18 That part of the program must be denied.

19           With respect to the AIP, I've already addressed that  
20 it's obviously a retention program rather than an incentive  
21 program. And there is the barest of evidence -- I mean, hardly  
22 anything other than just the normal tendency that people will  
23 stick around for money -- that suggests that the retention  
24 program actually would fulfill its function. But even there,  
25 the evidence produced by the debtor is actually significantly

1 contrary to that conclusion. The people who talked to Mr.  
2 Hatfield told him there wasn't any amount of money that would  
3 have kept them to stay, because they're afraid that Patriot  
4 will collapse. What is the justification, then, for taking the  
5 money out of my members' pockets and handing it over to people  
6 making 340,000 dollars a year or 236,000 dollars a year or some  
7 other great sum of money? There is no such justification.

8 Now, Your Honor, I just have a couple of other things.  
9 Mr. Mayer told you something I think you probably already knew,  
10 that unless there is a vice president of coal sales probably  
11 coal sales will suffer, and unless there are other people in  
12 charge of the various functions of Patriot -- yes, right, the  
13 debtor has to have employees to do its business. And I have  
14 another shocking revelation. Coal doesn't leap out of the  
15 ground by itself. It takes miners. Why, alone, amongst the  
16 debtors' constituency, is the presumption that miners will bend  
17 their knee and suffer, take less, and do the same or more but  
18 that everybody else will do nothing unless they get more? This  
19 is class warfare on stilts, and the stilts are not very tall.

20 Now, one last thing, Your Honor. I never said that  
21 fairness and equity ought to rule your decision. I said that  
22 the program was unfair, and it is. I said that if you do this,  
23 you are setting up a catastrophic collision between the workers  
24 and management, and that is my guess. But as I said before,  
25 they, and only they, know if they will vote whether to withhold

1 their labor from this company, and the future hangs upon that  
2 as it does upon a nail.

3 But at the end of the day, Your Honor, this is the  
4 same old wine. Management lines its pockets. It takes the  
5 money off the back of the worker. It's the oldest story in  
6 mining. It's the reason why these workers have chosen a strong  
7 union and have bargained hard and have achieved what they have  
8 achieved. Over decades they've taken less money on the check  
9 so that they would have more money for pension and health and  
10 welfare and for the care of the old and retired miners, who are  
11 sick.

12 These things are now being used as weapons against  
13 them. Sheep, Your Honor, sometimes devour men, as Thomas More  
14 told us. As if you'll pardon me to mix the metaphor, I will  
15 tell you at least once more in this case that the hammer has  
16 not yet been made that can break an anvil. As George Orwell  
17 reminded us, it is always the reverse, and so the various  
18 creditors and others who attended this proceeding today and are  
19 currently enjoying the prospect of how these concessions will  
20 be hammered out of workers may get a surprise.

21 Thank you, Your Honor.

22 THE COURT: Thank you. Ms. Hillyer?

23 MS. HILLYER: Your Honor, the funds fully support Mr.  
24 Perillo's statements, and I have nothing further to add to his  
25 closing.

1 THE COURT: All right. Thank you.

2 MR. KAMINETZKY: Your Honor, do you have time for  
3 three points, or have you completely had it and you're going to  
4 shoot me? Here we're in the West and there might be a gun  
5 behind you.

6 THE COURT: No, I promise I won't shoot you. Briefly.  
7 You got about --

8 MR. KAMINETZKY: That's about it.

9 THE COURT: -- two minutes.

10 MR. KAMINETZKY: Okay. Just I want to clarify  
11 something that Mr. Perillo said that's just factually false.  
12 The forecasts at issue with respect to the financial metrics  
13 assume 1113 relief will be achieved by April of this year. So  
14 it's not like the 1113s would be incremental to the forecast.  
15 They're already baked in.

16 Again, I just want to, kind of, maybe state the  
17 obvious. We have two objectors here. How many law firms -- I  
18 think there's four law firms on the other side, right? Can't  
19 count how many different lawyers have showed up to the various  
20 depositions. They couldn't find one witness, not a single  
21 expert witness, which I think is a first in the history of any  
22 litigation, that would do a benchmarking study that would show  
23 that our benchmarking study wasn't one hundred percent correct.  
24 They couldn't find any witness to compare our plans to other  
25 Chapter 11 plans. Where is their witness? They tried to put

1 someone up that had absolutely no experience in bankruptcy  
2 retention and incentive plans, and Your Honor excluded their  
3 testimony.

4 Talking about lemon juice or no lemon juice or  
5 whatever soft drink Your Honor wants to indulge, there's  
6 nothing there. Where's the beef? They have absolutely no  
7 evidence. All our evidence is a hundred percent  
8 uncontroverted.

9 They then start talking about insiders. You heard  
10 testimony from Mr. Hatfield that he looked at the criteria set  
11 out in the case law and none of these people qualified.  
12 Period. That's unrebutted at all.

13 And, again, I don't think I have to respond to the  
14 last ten minutes of Mr. Perillo's argument, which is exactly  
15 the closing argument for 1113 and 1114 litigation, which,  
16 again, is not for today.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 All right. Thank you all for appearing here today. I  
20 have been impressed of the urgency of the nature of this  
21 matter, and I will take that into consideration, but I'm going  
22 to take the matter under submission, and I will rule as quickly  
23 as possible.

24 All right. Is there any other request, then, this  
25 afternoon, on behalf of the debtors?

1 MR. KAMINETZKY: No, Your Honor. Thank you.

2 THE COURT: All right. Thank you. Any other requests  
3 on behalf of the union or the funds?

4 MR. PERILLO: I have one, Your Honor, but it doesn't  
5 relate to today's motion.

6 THE COURT: Okay.

7 MR. PERILLO: I understand that we're going to have a  
8 conference either tonight or tomorrow.

9 THE COURT: Not tonight. I can assure you that.

10 MR. PERILLO: Would you kindly tell us when we should  
11 reappear?

12 THE COURT: The conference, I was under the  
13 impression, will be tomorrow at the end of the docket that's  
14 set for tomorrow. That was --

15 MR. PERILLO: I thought the hearing for tomorrow  
16 cancelled, however.

17 UNIDENTIFIED SPEAKER: Yes.

18 THE COURT: Is everything off the docket? I thought  
19 there was something left.

20 MR. KAMINETZKY: I think at most it'll be a very short  
21 docket.

22 MR. HUEBNER: Yes. Your Honor, let me jump in, if I  
23 may, just to help. This is Marshall Huebner of Davis Polk here  
24 by remote. There is one emergency motion that was filed by  
25 Arch on Friday.

1 THE COURT: That is correct. Right.

2 MR. HUEBNER: And I am not quite sure what the current  
3 status on that motion is.

4 THE COURT: Oh.

5 MR. HUEBNER: I think from the debtors' perspective,  
6 the good news, we promised you early on that our MO is to  
7 cancel every omnibus hearing we possibly could by settling  
8 everything with everyone, and it does look from where we sit  
9 this evening that with the possible exception of Arch's  
10 emergency motion that arrived rather by surprise on Friday, the  
11 matters that the debtors have currently scheduled or continued  
12 to tomorrow's hearing have all been resolved, so I think that  
13 this probably could be taken up at the open of business  
14 tomorrow to allow the various parties to make their exits as to  
15 this would be convenient for the Court.

16 THE COURT: All right. Mr. Huebner, Mr. Hall, who has  
17 filed that emergency motion, happens to be here in the  
18 courtroom and is at the podium. Mr. Hall?

19 MR. HALL: Thank you, Judge. Yes. Just to confirm  
20 that we have scheduled an emergency hearing for tomorrow at 10  
21 a.m., and, as I understand it, that is set for hearing, and so  
22 we intend to present our motion at that time.

23 THE COURT: That is my understanding. Your motion to  
24 expedite the hearing is on, and we'll take that up, and then  
25 based on that we'll take up the actual motion.

1 MR. HALL: Correct. Thank you, Your Honor.

2 THE COURT: All right.

3 MR. KAMINETZKY: Okay. Just so it's clear just for  
4 everyone here. So we're going to do the docket first and then  
5 have the meeting with Your Honor in chambers. Is that correct?

6 THE COURT: Yes. Yes. Mr. Hall, you don't anticipate  
7 that the hearing is going to be lengthy tomorrow?

8 MR. HALL: No. No. There's --

9 THE COURT: Okay.

10 MR. HALL: -- no evidence and --

11 THE COURT: All right. That's what I assumed; it  
12 would be argument.

13 MR. HALL: Correct.

14 THE COURT: So, yes. So we'll take up -- then we'll  
15 take up the conference at the end. So come at 10 o'clock, Mr.  
16 Perillo, tomorrow.

17 MR. HUEBNER: Thank you, Your Honor.

18 THE COURT: And shortly thereafter we should be able  
19 to discuss the other matters then.

20 MR. KAMINETZKY: Thank you, Your Honor. That should  
21 do it for today, and we appreciate your indulgence.

22 THE COURT: All right. No problem. Are there any  
23 other requests by any other parties present in the courtroom?  
24 And are there any requests by any other parties on the phone?  
25 All right. Then hearing none, we'll be on recess until



1 tomorrow morning. I have a matter at 9 o'clock before I see  
2 you all at 10. Thank you.

3 (Whereupon these proceedings were concluded at 6:06 PM)

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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*

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UNITED STATES BANKRUPTCY COURT  
Eastern District of Missouri  
Thomas F. Eagleton U.S. Courthouse  
111 South Tenth Street, Fourth Floor  
St. Louis, MO 63102

In re: Debtor(s):  
Patriot Coal Corporation

Case No.: 12-51502 -A659

CHAPTER 11

**Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction**

To: All Persons of Record at Hearing

A transcript of the proceeding held on March 18, 2013 was filed on March 19, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: March 26, 2013. Personal data identifiers **include: social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice: April 9, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no *Statement of Transcript Redactions* is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: April 19, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: June 17, 2013, unless extended by court order. However, during this 90-day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244-4801.

FOR THE COURT:

/s/Dana C. McWay  
Clerk of Court

Dated: 3/19/13

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Rev. 12/10