UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
	)	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	)	**Case No. 12-51502-659**
	)	**(Jointly Administered)**
Debtors.	)	
	)	**Re: Docket No. 3214**
	)	
	)	**Hearing Date:**
	)	**April 29, 2013 (10:00 a.m. CT)**
	)	
	)	

LIMITED OBJECTION OF U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE, TO DEBTORS' MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§ 1113, 1114 OF THE BANKRUPTCY CODE

U.S. Bank National Association, as indenture trustee (the "**Trustee**") with respect to the 3.25% Convertible Senior Notes due 2013 in the aggregate principal amount of $200,000,000 (the "**Notes**"), issued pursuant to that certain Indenture, dated as of May 28, 2008, between Patriot Coal Corporation and the Trustee, in response to the Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code (the "**1113/1114 Motion**") respectfully states as follows:

PRELIMINARY STATEMENT

1. The Trustee takes no position on the 1113/1114 Motion and the issues raised therein, with one limited but important exception. The Trustee objects only to the extent that the relief requested in the 1113/1114 Motion requests the Court directly or indirectly to rule on the substantive consolidation or non-consolidation of the Debtors' estates. Any such determination ought to be made by this Court only after appropriate disclosure to and an opportunity to be heard from all creditors of these estates, including the holders of the Notes, under the safeguards

of a confirmation process pursuant to sections 1125, 1126, 1129 and other applicable provisions of the Bankruptcy Code. With respect to all other issues raised in the 1113/1114 Motion, the Trustee takes no position.

2. Unsurprisingly, the Debtors' proposal[1] (the "**1113/1114 Proposal**") has evolved over time. First, the proposal included the allowance of an unsecured claim "against Patriot's **estate**" in favor of the UMWA. (Debtors' Memorandum of Law at pg. 52) (emphasis added). "Patriot" is defined in the 1113/1114 Motion and 1113/1114 Proposal as "Patriot Coal Corporation and its affiliated debtors." Now, the latest proposal includes granting the UMWA "a direct 35% equity stake in the reorganized enterprise." Regardless of the form, in requesting the Court for an order approving the 1113/1114 Proposal, the Debtors may effectively be requesting an order substantively consolidating the Debtors' estates to a single enterprise in which the UMWA would be granted a claim or an equity stake and thereby granting the UMWA an interest in Debtor estates that are not currently obligated to the UMWA. Such relief amounts to an impermissible *sub rosa* plan.

3. Whether or not substantive consolidation is warranted in these cases is an issue on which the Trustee does not take a position at this time. The Trustee respectfully submits that this Court should also not take a position on this issue at this time because (i) to do so would mean that the 1113/1114 Proposal would dictate the future terms of a plan of reorganization without affording the Trustee and the holders of the Notes the statutory protections of the reorganization process under 11 U.S.C. §§ 1125, 1126 and 1129, and (ii) the Debtors' pleadings have not substantively addressed the issue of substantive consolidation and, in the hearing on the 1113/1114 Motion, parties will not be afforded an opportunity to be fully heard on that issue.

[1] On April 11, 2013, the Debtors filed a Notice of Fourth 1113 Proposal and Fifth 1114 Proposal [ECF No. 3583], indicating that the proposals submitted with the 1113/1114 Motion were revised as set forth in the Fourth 1113 Proposal and Fifth 1114 Proposal.

ARGUMENT

No Statutory Protections Under 11 U.S.C. §§ 1125, 1126 And 1129

4. Courts have recognized that debtors may not "short circuit the requirements of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a proposed transaction." *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (internal quotations omitted) (quoting *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983)); *see also In re Flight Transportation Corp. Securities Litigation*, 730 F.2d 1128, 1135 (8th Cir. 1984) (recognizing the holding in *Braniff* but distinguishing the facts of *Braniff*). Any transaction that dictates the terms of a future plan of reorganization must afford creditors with the protections set forth in 11 U.S.C. §§ 1125, 1126 and 1129. *In re Continental Airlines, Inc.*, 780 F.2d at 1228 (indicating that a court may fashion protections for creditors modeled on plan of reorganization). Substantive consolidation of debtor entities outside of a plan of reorganization (without a showing of compelling equitable considerations) has been held to impermissibly dictate a future plan of reorganization. *In re DRW Property Co.*, 54 B.R. 489, 498 (Bnkr. N.D. Tex. 1985).

5. The 1113/1114 Proposal cannot be allowed to dictate the future terms of a plan of reorganization that consolidates the Debtors' estates in order to allow a claim in favor of the UMWA or grant equity to the UMWA in the reorganized Debtors. Whether such a consolidation may ultimately be appropriate is not the point; the issue is one of process and timing. To allow an order approving the 1113/1114 Proposal to have any preclusive effect on the consolidation or non-consolidation of these estates would deny the Trustee and the holders of the Notes the statutory protections of the reorganization process, including without limitation (i) the right to adequate information as required under 11 U.S.C. § 1125 and (ii) the right to vote on a plan under 11 U.S.C. § 1126. Because the 1113/1114 Proposal does not afford the statutory

protections of the reorganization process, to the extent that the relief requested therein requires the Court to rule on the substantive consolidation or non-consolidation of the Debtors' estates, the 1113/1114 Proposal constitutes an impermissible *sub rosa* plan of reorganization. Respectfully, the Court should refrain from allowing a *sub rosa* plan.

No Disclosure Regarding A Basis For Substantive Consolidation

6. Notwithstanding the prohibition against *sub rosa* plans of reorganization, it may be appropriate to allow a debtor in certain contexts to file a motion to substantively consolidate debtor entities outside the context of a plan of reorganization. *See e.g. In re Augie/Restivo Baking Co.*, 860 F.2d 515 (2nd Cir. 1988). Courts consider a variety of factors to determine whether consolidation is appropriate. *See e.g. In re Giller*, 962 F.2d 796, 799 (8th Cir. 1992) (indicating that factors "include 1) the necessity of consolidation due to the interrelationship among the debtors; 2) whether the benefits of consolidation outweigh the harm to creditors; and 3) prejudice resulting from not consolidating the debtors.").

7. The 1113/1114 Motion, however, is not such a motion. The 1113/1114 Motion does not provide any disclosure or basis on which parties may formulate informed positions on this issue. For example, the 1113/1114 Motion cites no cases on the issue of substantive consolidation, does not propose a test for substantive consolidation, and does not provide a reason for granting substantive consolidation. Furthermore, the hearing on the 1113/1114 Motion does not afford parties in interest a full opportunity to participate by restricting the parties that can examine or present witnesses—presumably this limitation exists because the hearing on the 1113/1114 Motion is not and should not be about issues outside of the subject matter one expects to be adjudicated at a "traditional" or "pure" hearing pursuant to sections 1113 & 1114 of the Bankruptcy Code. Finally, an 1113/1114 Proposal that grants an equity

interest in a reorganized debtor(s) can only be fully and finally approved pursuant to a plan confirmation process.

8. Because the issue of substantive consolidation or non-consolidation has not been addressed in the Debtors' pleadings requesting relief and an order from this Court, to the extent this Court enters an order granting the 1113/1114 Motion such order should not determine the substantive consolidation or non-consolidation of the Debtors' estates. Instead, any such order should reserve the issue of consolidation or non-consolidation of the estates for a subsequent request to be brought to this Court pursuant to the Bankruptcy Code—under a plan process in light of the current 1113/1114 Proposal. With respect to any such subsequent request, the Trustee reserves all of its rights and takes no position on that issue at this time.

[*Remainder of Page Left Blank*]

CONCLUSION

9. The Trustee takes no position on the 1113/1114 Motion but only objects to the entry of an order at this time to the extent it rules on the substantive consolidation or non-consolidation of the Debtors' estates. For the reasons set forth above, the Trustee respectfully requests that the Court refrain from entering any order on the 1113/1114 Motion that has a preclusive effect on the substantive consolidation or non-consolidation of the Debtors estates.

Dated: April 12, 2013

/s/ Eric Lopez Schnabel
Eric Lopez Schnabel (Admitted Pro Hac Vice)
Patrick J. McLaughlin (Admitted Pro Hac Vice)
(MN Bar No. 71080)
Erik G. Detlefsen (Admitted Pro Hac Vice)
(MN Bar No. 391086)
Dorsey & Whitney LLP
51 West 52nd Street,
New York, New York 10019-6119
T: (212) 415-9368
F: (302) 425-7177
schnabel.eric@dorsey.com

Counsel to the Trustee

Lisa Epps Dade (48544MO)
Eric L. Johnson (53131MO)
Spencer Fane Britt & Browne LLP
1000 Walnut Street, Suite 1400
Kansas City, Missouri 64106-6214
T: (816) 292-8881
F: (816) 474-3216
E-mail: leppsdade@spencerfane.com

Local counsel to the Trustee

CERTIFICATE OF SERVICE

I certify that on April 12, 2013, I caused a copy of the foregoing pleading to be served through the Court's CM/ECF system on those parties receiving ECF notices in these proceedings.

/s/ Eric Lopez Schnabel
Eric Lopez Schnabel
(Admitted Pro Hac Vice)