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

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Objection Deadline:** **April 12, 2013 at 4:00 p.m. (Central)** **Hearing Date:** **April 29, 2013 at 10:00 a.m. (Central)** **Hearing Location: Courtroom 7 North**

BRIEF IN SUPPORT OF OBJECTION OF THE OHIO VALLEY COAL COMPANY AND THE OHIO VALLEY TRANSLOADING COMPANY TO THE MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§ 1113, 1114

The Ohio Valley Coal Company[1] and The Ohio Valley Transloading Company (collectively, "Ohio Valley Coal") file this brief in support of their objection (the "Objection") to the Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [Docket No. 3214] and the Memorandum of Law in Support of the Rejection Motion [Docket No. 3219] (collectively, the "Rejection Motion") filed by Patriot Coal Corporation, *et al.* (collectively, "Patriot" or the "Debtors"), and in support hereof respectfully state as follows:

I. PRELIMINARY STATEMENT

This Court should deny the relief sought in the Rejection Motion to the extent that it seeks authorization to cease contributions to, and withdraw from certain multi-employer pension plans ("MEPPs"), including the UMWA 1974 Pension Plan and Trust (the "1974 Plan"). The 1974 Plan is a multi-employer pension plan that was established by the National Bituminous

[1] On March 19, 2013, The Ohio Valley Coal Company acquired Claim No. 3578 against Pine Ridge Coal Company, LLC from Top Notch Custodial Care, Inc. [Docket No. 3325].

Coal Wage Agreement of 1974. It currently provides pension benefits to more than 93,000 participants and beneficiaries. Motion to Intervene by the United Mine Workers of America 1974 Pension Trust and the United Mine Workers of America 1993 Benefit Plan at 3, ¶ 2[2] (the "Motion to Intervene"). Certain Debtors in these bankruptcy cases are participating employers in the 1974 Plan, with collective contributions of approximately $20.8 million in 2012. Rejection Motion at 41-42. Ohio Valley Coal is also a participating employer in the 1974 Plan and makes significant annual contributions to the 1974 Plan as well.

In the Declaration of Mark N. Schroeder, the Senior Vice President and Chief Financial Officer of Patriot Coal Corporation, (the "Schroeder Declaration"), Patriot acknowledged having "substantial and unsustainable legacy costs, primarily in the form of medical benefits and pension obligations" and that "[t]he Debtors return to long-term viability depends on their ability to achieve savings with respect to these liabilities." Schroeder Declaration at 13, ¶ 33 [Docket No. 4].

The Rejection Motion should be denied because, *inter alia*, the Debtors' proposal fails to assure that "*all of the affected parties* are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A) (emphasis added). If the Debtors are permitted to use section 1113 of the Bankruptcy Code to withdraw from the 1974 Plan, it will shift the admittedly "substantial and unsustainable" pension obligations from the Debtors to the other participating employers, including Ohio Valley Coal. This additional burden will cause serious financial distress to the other participating employers struggling to survive in an industry with drastically increased economic pressures, through absolutely no fault of their own. Indeed, it is not unreasonable to foresee future insolvencies due to the additional liabilities and increased contributions caused by Patriot's unadvised withdrawal. Worst of all, in the event that the 1974 Plan itself fails as a

[2] Citing to the Declaration of Dale Stover in Support of the Motion to Intervene at 2, ¶ 4. Mr. Stover is the Director of Finance and General Services for the United Mine Workers of America Health & Retirement Funds.

result of the other participating employers' inability to fund these extra obligations, over 93,000 participants and beneficiaries would be irreparably harmed.

Furthermore, it is not at all clear that the relief sought in the Rejection Motion is "necessary to permit the reorganization of the Debtors," as required by section 1113(b)(1)(A) of the Bankruptcy Code. 11 U.S.C. § 1113(b)(1)(A). Based on the Rejection Motion, it is unclear whether the Debtors have explored alternative options to address their labor related costs, which in turn may limit the extent of future liability of non-debtor MEPP participants, including Ohio Valley Coal.[3] As described below, an alternative approach to complete withdrawal by Patriot from the 1974 Plan, which the Debtors have apparently yet to propose, may provide an opportunity to reduce Patriot's pension costs while also restricting the financial harm to the other members of the 1974 Plan. Finally, an arrangement under which the 1974 Plan and other MEPPs receive a portion of any future recovery in the lawsuit against Peabody Energy Corporation ("Peabody") and Arch Coal, Inc. ("Arch") would provide a potential financial upside for the participating employers. Overall, the Rejection Motion is unfair and inequitable to Ohio Valley Coal and the other participating employers in the MEPPs, as it shifts Patriot's significant pension obligations to its healthy competitors without satisfying the requirements for relief under section 1113 of the Bankruptcy Code.

II. BACKGROUND

On October 31, 2007, Patriot became an independent public company after a spin-off from Peabody. Rejection Motion at 17. On July 23, 2008, Patriot acquired Magnum Coal Company ("Magnum"), which had previously acquired certain assets from Arch. Id. The Rejection Motion and the Declaration of Patriot Chief Executive Officer Bennett Hatfield ("Hatfield Declaration") make it clear that "Patriot inherited many of its current subsidiaries – and many of its retiree obligations – through these transactions," as "[a] large percentage of the

[3] Indeed, on April 11, 2013, the Debtor filed their Notice of Fourth 1113 Proposal and Fifth 1114 Proposal confirming that all avenues to avoid rejection have not been fully explored [Docket No. 3583].

operations that Patriot inherited had unionized employees." Hatfield Declaration at 7, ¶ 17 [Docket No. 3222] .

The Schroeder Declaration provides additional insight into the challenges that resulted from these transactions:

> Among other things, as a result of the spin-off from Peabody and the acquisition of Magnum, the Debtors assumed certain liabilities relating to former employees and retirees of Peabody and Arch who retired prior to the formation of Patriot. Indeed, the Debtors currently provide benefits to more than three times the number of retirees and non-active employees and those parties' dependents than to active employees. Especially in an era of declining demand and price for coal, there is a mismatch between the cost of the Debtors' legacy obligations and their ongoing ability to generate revenue. The Debtors' return to long-term viability depends on their ability to achieve savings with respect to these liabilities.
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> Schroeder Declaration at 13, ¶ 33.

Thus, Patriot was saddled with overwhelming legacy and pension costs from the start. After factoring in the millions of dollars in environmental liabilities that it assumed through these transactions, it is not surprising that Patriot ended up in bankruptcy less than five years after the spin-off. It is for these reasons that Patriot and the Official Committee of Unsecured Creditors (the "Creditors Committee") are investigating whether these transactions give rise to a fraudulent transfer claim. Rejection Motion at 17.

As set forth above, Ohio Valley Coal is a creditor in these bankruptcy cases and a participating employer in the 1974 Plan, along with Patriot. Within days after the Rejection Motion was filed, Ohio Valley Coal filed its Objection [Docket No. 3326] to the Rejection Motion in an effort to protect against the harm that would be inflicted on Ohio Valley Coal and other MEPP participants if the Rejection Motion were approved by this Court. This brief in support of its objection is filed pursuant to this Court's order of April 5, 2013 [Docket No. 3544].

III. OBJECTION

A. The Requested Relief is Not Fair and Equitable

Section 1113(b) of the Bankruptcy Code "requires that the proposed modifications affect *all parties* in a fair and equitable manner." In re AMR Corp., 477 B.R. 384, 408 (Bankr. S.D.N.Y. 2012) (emphasis added). "This requirement 'spreads the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.'" Id. (citing Truck Drivers Local 807, etc. v. Carey Transp., Inc., 816 F.2d 82, 90 (2d Cir. 1987)). Thus, "section 1113 imposes requirements on the debtor to prevent it from using bankruptcy as a judicial hammer to break the union." In re Maxwell Newspapers, Inc., 981 F.2d 85, 89 (2d Cir. 1992).

As part of its attempt to satisfy the requirements of section 1113 of the Bankruptcy Code, Patriot notes in the Rejection Motion that it contributed $2.00 per hour worked to the 1974 Plan in 2007, whereas it is currently paying $5.50 per hour worked today. Rejection Motion at 41-42. This amount is expected to increase to a minimum of $12.50 per hour worked in 2017 and $21.50 per hour worked in 2020. Id. Due to these projected increases, Patriot "expects" that its cumulative contribution of $20.8 million in 2012 will triple to at least $60.7 million in 2021. Id. at 42.

The Declaration of Dale F. Lucha, Patriot's Vice President of Human Resources, in Support of the Rejection Motion (the "Lucha Declaration") explains that the significant increase in required contribution rates in 2017 is due to the 1974 Plan being certified as "seriously endangered" as of July 1, 2012. Lucha Declaration at 15-16, ¶ 33 [Docket No. 3223]. As a result of this status, the 1974 Plan's sponsors developed and adopted a funding improvement plan, under which the hourly contribution rate would increase to $12.50 starting in 2017 and increase further in each subsequent year thereafter through at least 2022. Lucha Declaration at 16, ¶ 33.

The Debtors' proposal, if approved, would eliminate Patriot's obligation to contribute to the 1974 Plan even though it is the second largest participating employer. This would enable

Patriot to avoid paying its current obligations to the 1974 Plan and, more importantly, escape the increased future contribution requirements as a result of the 1974 Plan's "seriously endangered" status. Even if Patriot is permitted to withdraw, however, all of its participants and beneficiaries will continue to receive full benefits from the 1974 Plan, which will necessarily be funded by Ohio Valley Coal and the other participating employers in the 1974 Plan. Lucha Declaration at 17, ¶ 35.

In a non-bankruptcy setting, a participating employer that withdraws from a MEPP is liable for funding a proportionate share of the plan's unfunded vested liabilities by paying withdrawal liability to the plan. 29 U.S.C. § 1381(a)-(b)(1) (Section 4201 of ERISA). Withdrawal liability is essentially an exit fee requiring the participating employer to pay its allocation of the plan's future benefit obligations that have not been paid through prior contributions.

If the Rejection Motion is approved by this Court and the Debtors are permitted to withdraw from the 1974 Plan, it will create a claim of approximately $959 million in withdrawal liability against Patriot. Motion to Intervene at 8-9, ¶ 16. The Debtors propose to treat this withdrawal liability as an unsecured claim, meaning the 1974 Plan would likely receive a fraction of Patriot's total withdrawal liability. Rejection Motion at 47.[4] Withdrawal from the 1974 Plan coupled with substantially less than a full recovery on the withdrawal liability claim against Patriot will shift the substantial burden of paying the remainder of Patriot's withdrawal liability to Ohio Valley Coal and the other participating employers. Thus, authorizing Patriot's withdrawal from the 1974 Plan through the Rejection Motion has the impact of shifting the financial obligations of Patriot under the 1974 Plan to its closest competitors with nearly $1 billion in withdrawal liability and significantly higher contribution obligations in the future. This outcome

[4] Note that the Energy West Mining Company Objection to Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefit Pursuant to Sections 1113 and 1114 of the Bankruptcy Code [Docket No. 3586] properly suggests that a portion of the withdrawal liability claim against Patriot may be afforded administrative priority status. Ohio Valley Coal reserves all of its rights regarding the classification of any withdrawal liability that may result from the grant of the Rejection Motion.

cannot be what Congress intended when it enacted section 1113 of the Bankruptcy Code. After reviewing the proposed relief and the effect it will have on Ohio Valley Coal and the other participating employers, it is clear that the Debtors' proposal is not "fair and equitable to all parties".

B. The Requested Relief is Not Necessary to the Debtors' Reorganization

Pursuant to section 1113(b)(1)(A) of the Bankruptcy Code, the relief sought in the Rejection Motion must be "necessary to permit the reorganization of the debtor." 11 U.S.C. § 1113(b)(1)(A). "Necessary" modifications, however, "are not limited to changes in wages, but can also include non-economic modifications to the collective bargaining agreement that have a significant economic impact on the debtor's financial operations." In re AMR, 477 B.R. at 407.

In addressing the necessity requirement, the Debtors cite case law which states that the inquiry "requires a court to determine 'what must be extracted by way of wage and benefit reductions and other employee concessions to so improve the [d]ebtor's cash flow that it could emerge from Chapter 11, financially stable and viably competitive . . . and remain so[.]'" Rejection Motion at 66-67 (quoting In re Mesaba Aviation, Inc., 341 B.R. 693, 731 (Bankr. D. Minn. 2006)). The Debtors further argue that "a debtor's ability to compete with its competitors is crucial to its long-term health" and later note that "[t]he coal industry is highly competitive and Patriot is poorly positioned to compete with its peers." Rejection Motion at 66, 69.

Patriot must acknowledge that the coal industry is extremely competitive, but its current proposal under the Rejection Motion could very well lead to the destruction of its competitors, while freeing the Debtors of sizeable pension obligations that Ohio Valley Coal and other participating employers also face. Furthermore, it appears that the Debtors assume that neither the coal industry nor interest rates (which affect the 1974 Plan's funding) will improve for their benefit prior to potential contribution increases in 2017. Conversely, it is unclear whether the 1974 Plan will remain "seriously endangered" going forward, as the economic climate

surrounding the price of coal and interest rates could help to remedy the 1974 Plan's underfunded status.

Rather than being permitted to impose potentially significant harm on its competitors in order to better position itself, the Debtors should be required to negotiate a solution that incorporates other cost saving mechanisms and business strategies, while continuing to participate in the MEPPs in some manner. For example, there is a potential "hybrid" approach to Patriot's withdrawal from the MEPPs that avoids significant potential liability to which the Rejection Motion speaks, but nevertheless, imposes substantially less financial harm to the MEPPs and its non-debtor participating employers. Through this hybrid approach, Patriot would withdraw from the MEPPs (and be assessed corresponding withdrawal liability, which would constitute a claim in the Patriot bankruptcy proceedings), and then, subsequently participate in the MEPPs as a new employer in a new and separate employer pool (the "Alternative MEPP Approach"). If the Alternative MEPP Approach were to occur, Patriot would be insulated from the MEPPs' historical underfunding, and as a new participating employer in a new employer pool within the MEPP, have significantly lower exposure to future mass withdrawal liability. This is true because Patriot's mass withdrawal liability would only take into account its participation in the new employer pool. The benefit afforded to the MEPP and its non-debtor participating employers, including Ohio Valley Coal, is that Patriot will remain a contributing participating employer in the MEPP, although, at substantially lower contribution rates. In order for the Alternative MEPP Approach to occur, however, the current MEPP would be required to approve certain amendments to the MEPP and approval by the PBGC would also be required. See 29 U.S.C. § 1391(c)(5)(A).

It should be noted that in the Hostess Brands, Inc. bankruptcy proceedings pending in the United States Bankruptcy Court for the Southern District of New York (jointly administered at Case No. 12-22052-RDD), the Interstate Brands Corporation – International Brotherhood of Teamsters National Negotiating Committee (the "Teamsters") proposed this approach in

response to Hostess's request to withdraw from participation in approximately 22 multi-employer pension plans. This approach was opposed by Hostess and ultimately not adopted, but the Teamsters and the Central States, Southeast and Southwest Areas Pension Fund ("Central States") extensively briefed the viability of the concept suggesting to the Bankruptcy Court for the Southern District of New York that the approach was both viable and legally sustainable. In fact, the Central States' brief suggests that certain MEPPs have already established new employer pools that have been approved by the PBGC. See Central States Pension Fund's Brief Concerning Potential Legal Challenges to the IBT's Bargaining Proposal at 11 [Hostess Docket No. 870].

Without appropriate exploration of the Alternative MEPP Approach, Patriot cannot fairly suggest that withdrawal from the MEPPs is necessary to the reorganization of Patriot. This is particularly true where as an alternative to Patriot's participation in the MEPPs, Patriot will create a defined contribution plan for the benefit of UMWA members that has substantial annual costs associated with the funding of such plan.

By exploring opportunities such as the Alternative MEPP Approach, the Debtors may be able to achieve substantial benefits for the reorganized Debtors without doing such harm to the MEPPs and the other participating employers, including Ohio Valley Coal. At a minimum, the Debtors' Rejection Motion should be denied until Debtors have analyzed all other means of reorganizing – including the Alternative MEPP Approach – before implementing the inequitable measures sought in the Rejection Motion.

C. The Possibility of Future Recovery from Peabody and Arch is Not Irrelevant

Based on their conduct, Patriot and the Creditors Committee both recognize that the spin-off from Peabody and the acquisition of Magnum very well may constitute a fraudulent transfer. Rejection Motion at 72. As the Rejection Motion confirms, the Debtors are currently investigating to determine whether they should pursue claims against Peabody and/or Arch. Id.

Nevertheless, in the Rejection Motion, the Debtors argue that any recovery from litigation against Peabody and Arch is "wholly speculative" and "irrelevant to the necessity inquiry." Id. This is patently incorrect. The potential recovery from litigation against Peabody and Arch is premised on recouping the very liability the Debtors seek to terminate through the Rejection Motion and foist it upon Ohio Valley Coal and the other participating employers. The Debtors are effectively seeking to "have it both ways" – shed the liability, yet recover the indemnity claim for it.

Numerous parties have argued that Patriot was doomed to fail from the start. If Ohio Valley Coal and the other participating employers in the MEPPs are going to be required to fulfill the bulk of Patriot's withdrawal liability, it is only fair that they share in any financial upside that may occur through the litigation against Peabody and Arch. See Carey Transp., 816 F.2d at 90 (stating that "in virtually every case, it becomes impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health."). Accordingly, Ohio Valley Coal requests that the Rejection Motion also be denied because it fails to provide that Ohio Valley Coal and the other participating employers in the MEPPs will share in the upside if litigation against Peabody and Arch occurs in the future and is ultimately successful.

IV. CONCLUSION

Ohio Valley Coal recognizes the Debtors need to obtain certain cost savings in order to reorganize, but the idea that a debtor may use the Bankruptcy Code to inflict substantial harm upon its competitors is directly contrary to the equitable nature of the bankruptcy process. Entities such as Ohio Valley Coal, which are already burdened by increasing pension obligations in an extremely competitive industry, do not have the resources to withstand the liability and future contribution increases that will be imposed upon them should Patriot withdraw from the 1974 Plan. The harm that would be inflicted on the remaining participating employers is disproportionately large when compared to the potential benefits that Patriot may receive if

the Rejection Motion is granted. In sum, the relief requested in the Rejection Motion is far from fair and equitable, unnecessary to the Debtors' reorganization, and unfairly prevents Ohio Valley Coal and the other participating employers from potential financial upside if litigation against Peabody and Arch occurs. Accordingly, Ohio Valley Coal requests that this Court deny the Rejection Motion.

WHEREFORE, for the reasons set forth herein, Ohio Valley Coal respectfully requests that the Court enter an order denying the relief requested in the Rejection Motion and grant such further relief as the Court deems just and proper.

Date: April 12, 2013

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2013, a copy of the foregoing was served via electronic filing in the CM/ECF system for the United States Bankruptcy Court for the Eastern District of Missouri. I also certify that a copy of this document also was served via e-mail, on April 12, 2013 to the Core Parties listed below to the extent the foregoing was not served via CM/ECF.

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