

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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	)	<b>Chapter 11</b>
<b>In re:</b>	)	<b>Case No. 12-51502-659</b>
	)	<b>(Jointly Administered)</b>
<b>PATRIOT COAL CORPORATION, et al.,</b>	)	
	)	<b>Response Deadline:</b>
<b>Debtors.</b>	)	<b>April 16, 2013 at 4:00 p.m.</b>
	)	<b>(prevailing Central Time)</b>
	)	
	)	<b>Hearing Date:</b>
	)	<b>April 23, 2013 at 10:00 a.m.</b>
	)	<b>(prevailing Central Time)</b>
	)	

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**JOINDER OF WILMINGTON TRUST COMPANY, AS  
INDENTURE TRUSTEE, TO MOTION OF AURELIUS CAPITAL  
MANAGEMENT, LP, AND KNIGHTHEAD CAPITAL, LLC,  
FOR ENTRY OF AN ORDER, PURSUANT TO 11 U.S.C. §§ 105(a)  
AND 1104(a), DIRECTING THE APPOINTMENT OF A CHAPTER 11  
TRUSTEE FOR “NON-OBLIGOR DEBTORS”**

Wilmington Trust Company (“Wilmington”), in its capacity as indenture trustee for \$250 million principal amount of 8.25% Senior Notes due 2018 (the “Senior Notes”) issued by Patriot Coal Corporation (“Patriot” or the “Corporate Parent”) and unconditionally guaranteed by each of the other above-captioned debtors and debtors in possession (together with Patriot, the “Debtors”),<sup>1</sup> for its Joinder (this “Joinder”) to and Statement in Support of Motion of Aurelius

<sup>1</sup> In addition to Patriot Coal Corporation, the Debtors are as follows: (1) Affinity Mining Company; (2) Apogee Coal Company, LLC; (3) Appalachia Mine Services, LLC; (4) Beaver Dam Coal Company, LLC; (5) Big Eagle, LLC; (6) Big Eagle Rail, LLC; (7) Black Stallion Coal Company, LLC; (8) Black Walnut Coal Company; (9) Bluegrass Mine Services, LLC; (10) Brook Trout Coal, LLC; (11) Catenary Coal Company, LLC; (12) Central States Coal Reserves of Kentucky, LLC; (13) Charles Coal Company, LLC; (14) Cleaton Coal Company; (15) Coal Clean LLC; (16) Coal Properties, LLC; (17) Coal Reserve Holding Limited Liability Company No. 2; (18) Colony Bay Coal Company; (19) Cook Mountain Coal Company, LLC; (20) Corydon Resources LLC; (21) Coventry Mining Services, LLC; (22) Coyote Coal Company LLC; (23) Cub Branch Coal Company LLC; (24) Dakota LLC; (25) Day LLC; (26) Dixon Mining Company, LLC; (27) Dodge Hill Holding JV, LLC; (28) Dodge Hill Mining Company, LLC; (29) Dodge Hill of Kentucky, LLC; (30) EACC Camps, Inc.; (31) Eastern Associated Coal, LLC; (32) Eastern Coal Company, LLC; (33) Eastern Royalty, LLC; (34) Emerald Processing, LLC; (35) Gateway Eagle Coal

Capital Management, LP (“Aurelius”), and Knighthead Capital, LLC (“Knighthead” and, together with Aurelius, the “Moving Noteholders”), for Entry of an Order, Pursuant to 11 U.S.C. §§ 105(a) and 1104(a), Directing the Appointment of a Chapter 11 Trustee for “Non-Obligor Debtors” [Docket No. 3423] (the “Trustee Motion”), respectfully represents:

### **INTRODUCTION**

1. The concerns and issues raised in the Moving Noteholders’ Trustee Motion are legitimate and troubling.<sup>2</sup> As set forth in the Trustee Motion and other pleadings filed in these cases,<sup>3</sup> the Debtors have recently asked this Court to approve a Proposal<sup>4</sup> to the UMWA that would take significant value away from the creditors of the numerous Non-Obligor Debtors to

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Company, LLC; (36) Grand Eagle Mining, LLC; (37) Heritage Coal Company LLC; (38) Highland Mining Company, LLC; (39) Hillside Mining Company; (40) Hobet Mining, LLC; (41) Indian Hill Company LLC; (42) Infinity Coal Sales, LLC; (43) Interior Holdings, LLC; (44) IO Coal LLC; (45) Jarrell’s Branch Coal Company; (46) Jupiter Holdings LLC; (47) Kanawha Eagle Coal, LLC; (48) Kanawha River Ventures I, LLC; (49) Kanawha River Ventures II, LLC; (50) Kanawha River Ventures III, LLC; (51) KE Ventures, LLC; (52) Little Creek LLC; (53) Logan Fork Coal Company; (54) Magnum Coal Company LLC; (55) Magnum Coal Sales LLC; (56) Martinka Coal Company, LLC; (57) Midland Trail Energy LLC; (58) Midwest Coal Resources II, LLC; (59) Mountain View Coal Company, LLC; (60) New Trout Coal Holdings II, LLC; (61) Newtown Energy, Inc. (62) North Page Coal Corp.; (63) Ohio County Coal Company, LLC; (64) Panther LLC; (65) Patriot Beaver Dam Holdings, LLC; (66) Patriot Coal Company, LP; (67) Patriot Coal Sales LLC; (68) Patriot Coal Services LLC; (69) Patriot Leasing Company LLC; (70) Patriot Midwest Holdings, LLC; (71) Patriot Reserve Holdings, LLC; (72) Patriot Trading LLC; (73) PCX Enterprises, Inc.; (74) Pine Ridge Coal Company, LLC; (75) Pond Creek Land Resources, LLC; (76) Pond Fork Processing LLC; (77) Remington Holdings LLC; (78) Remington II LLC; (79) Remington LLC; (80) Rivers Edge Mining, Inc.; (81) Robin Land Company, LLC; (82) Sentry Mining, LLC; (83) Snowberry Land Company; (84) Speed Mining LLC; (85) Sterling Smokeless Coal Company, LLC; (86) TC Sales Company, LLC; (87) The Presidents Energy Company LLC; (88) Thunderhill Coal LLC; (89) Trout Coal Holdings, LLC; (90) Union County Coal Co., LLC; (91) Viper LLC; (92) Weatherby Processing LLC; (93) Wildcat Energy LLC; (94) Wildcat, LLC; (95) Will Scarlet Properties LLC; (96) Winchester LLC; (97) Winifrede Dock Limited Liability Company; and (98) Yankeetown Dock, LLC. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors’ chapter 11 petitions.

<sup>2</sup> Although the Moving Noteholders assert that they hold a majority of the Senior Notes for which Wilmington serves as Indenture Trustee, the Moving Noteholders are not “directing” Wilmington to act here pursuant to the provisions of the governing Indenture, dated May 5, 2010. Wilmington shares the significant concerns that the Moving Noteholders have with the Debtors’ disregard of their fiduciary duties to the estates and creditors of the Non-Obligor Debtors and file this Statement in support of the Trustee Motion because of such concerns and to avoid an injustice occurring in these cases.

<sup>3</sup> See Wilmington’s Objection to the Debtors’ 1113/1114 Motion [Docket No. 3606] (the “Wilmington 1113/1114 Objection”), which is incorporated herein by reference. In the interests of brevity, the lengthy background and arguments set forth in the Wilmington 1113/1114 Objection are also in all respects incorporated herein by reference.

<sup>4</sup> Capitalized terms used and not otherwise defined herein, including “Obligor Debtors” and “Non-Obligor Debtors,” shall have the meanings ascribed to such terms in the Wilmington 1113/1114 Objection.

satisfy the UMWA's claims against the limited number of Obligor Debtors. The Debtors' Proposal, which would effectively "pool" all of the Debtors' assets and "substantively consolidate" their estates to satisfy the UMWA's claims, when only a handful of the Debtors are liable to the UMWA, evidences that: (i) Debtors' management is conflicted and/or (ii) Debtors' management will do "anything" to deleverage and emerge from chapter 11, regardless of whether their actions violate their duties to all of the Debtors' creditors. In either case, the Debtors have shown that they cannot or will not act in the best interests of, and in fulfillment of mandatory fiduciary duties to, creditors of the Non-Obligor Debtors. As such, an impartial and independent trustee should be appointed to oversee reorganization matters for the Non-Obligor Debtors.

2. The need for a trustee for the Non-Obligor Debtors is not to take over "day-to-day" operational control of the Debtors' mining operations. Wilmington strongly suspects that any chapter 11 trustee appointed or elected for the Non-Obligor Debtors would continue to engage the Debtors' existing "day-to-day" operational management for the Non-Obligor Debtors, as the Bankruptcy Code permits. A trustee to oversee the reorganization of the assets, liabilities and capital structure of the Non-Obligor Debtors through the conclusion of their cases would ensure that the integrity of the bankruptcy process and the interests of all of the Debtors and their creditors are protected.

3. The Bankruptcy Code requires the appointment of an independent, disinterested trustee when a debtor and its management are conflicted and/or breach fiduciary duties owed to a debtor's estate (and its unsecured creditors). In multi-debtor cases, such fiduciary duties include the responsibility not to favor any particular debtor's estate (or its creditors) at the expense of any other debtor's estate (or its creditors). *See In re InnKeepers USA Trust*, 442 B.R. 227, 235

(Bankr. S.D. N.Y. 2010) (describing as “bankruptcy 101” that debtors in multi-debtor cases have fiduciary duties “to refrain from favoring or appearing to favor one or another of the of their estates and its creditors over another.”). Management’s failure to satisfy such duties to the Non-Obligor Debtors and their respective creditors is the factual thrust of, and basis for, the Trustee Motion and this Joinder.

4. The Debtors’ intention to sacrifice the interests of some Debtors for the benefit of others has not been dispelled since the Trustee Motion was filed. The Debtors have had ample time to show, or otherwise clarify, that the Debtors’ Proposal does not contemplate Non-Obligor Debtors’ becoming liable for the UMWA’s claims or that the Debtors were not seeking, in effect, substantive consolidation of the Debtors or “pooling” of their respective assets and liabilities. Instead, the Debtors sought to delay the hearing on the Trustee Motion until after the hearing on the Debtors’ 1113/1114 Motion. *See, e.g.*, Letter from Debtors’ Counsel Seeking Adjournment of Hearing on Trustee Motion, April 3, 2013 [Docket No. 3538].

5. By seeking to favor the interests of certain Debtors (i.e., the Obligor Debtors) over the interests of others (i.e., the Non-Obligor Debtors), the Debtors’ management (and/or their professionals) have made clear that they cannot, and do not intend to, manage the Debtors’ estates in compliance with their fiduciary duties to creditors of the Non-Obligor Debtors. As a consequence, this Court should appoint a chapter 11 trustee to oversee the reorganization of the Non-Obligor Debtors.

**JOINDER AND STATEMENT IN SUPPORT**

**I. A CHAPTER 11 TRUSTEE SHOULD BE APPOINTED  
UNDER SECTIONS 1104(A)(1) AND (A)(2) OF THE BANKRUPTCY CODE**

**A. Section 1104(a) of the Bankruptcy Code**

7. Section 1104(a) of the Bankruptcy Code requires the appointment of a chapter 11 trustee if (i) cause exists or (ii) if such appointment is in the best interests of creditors. The primary purpose of Section 1104(a) is to preserve the “integrity” of the bankruptcy process. *In re Suncruz Casinos, LLC*, 298 B.R. 821, 828 (Bankr. S.D. Fla. 2003) (citations omitted); *In re Celeritas Techs., LLC*, 446 B.R. 514, 518 (Bankr. D. Kan. 2011). The appointment of a trustee is mandatory when “cause” exists to do so. *See, In re Sharon Steel Corp.*, 871 F. 2d 1217, 1226 (3rd Cir. 1989). A trustee may also be appointed where the moving party shows that such appointment is in the “best interests” of creditors, equity holders, and other interests of the estate. *See, e.g., In re G-I Holdings, Inc.*, 385 F. 3d 313, 317 (3rd Cir. 2004).<sup>5</sup>

8. Courts have held that a debtor may not continue to act as a debtor in possession, and that “cause” exists to appoint a trustee, when management has conflicts of interest that will prevent them from fulfilling their fiduciary duties to creditors. *See, e.g., In re Ridgemour Meyer Properties, LLC*, 413 B.R. 101, 113 (Bankr. S.D.N.Y. 2008); *Matter of Embrace Systems Corp.*, 178 B.R. 112, 128-29 (Bankr. W.D. Mich. 1995); *In re Euro-American Lodging Corp.*, 365 B.R. 421, 428 (Bankr. S.D.N.Y. 2007) (citing *In re L.S. Good & Co.*, 8 B.R. 312, 315 (Bankr. W. Va.

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<sup>5</sup> The appointment of a trustee under the “best interests” standard is within the Court’s discretion, and requires a weighing of equities to determine whether “the balance of interests [weigh] in favor of appointing a trustee.” *In re Marvel Entertainment Group, Inc.*, 140 F. 3d 463, 475 (3rd Cir. 1998) (citing *Petit v. New England Mort. Servs.*, 182 B.R. 64, 71 (D. Me. 1995)).

Factors that the Court can weigh in determining whether to appoint a chapter 11 trustee under the “best interests” standard include: (i) the trustworthiness of the debtor; (ii) the debtor in possession’s past and present performance and prospects for the debtor’s rehabilitation; (iii) the confidence - - or lack thereof - - of the business community and of creditors in present management; and (iv) the benefits derived by the appointment of a trustee, balanced against the costs of the appointment. *See In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 169 (Bankr. S.D.N.Y. 1990).

1980); *See, e.g., In re Altman*, 230 B.R. 6, 16 (Bankr. D.Conn. 1999) (*aff'd* in part, vacated in part, 254 B.R. 509 (D. Conn. 2000)) (a factor relevant to determining whether “cause” exists include, among other things, “conflicts of interest, including inappropriate relations between corporate parents and the subsidiaries...”).

9. A conflict of interest is not the only type of breach of fiduciary duty that constitutes “cause” to appoint a trustee. If a debtor in possession or its control persons disregards any of their fiduciary duties, “cause” exists for appointment of a trustee under Section 1104(a). *See, e.g., In re Nartron Corp.*, 3303 B.R. 573, 593 (Bankr. W.D. Mich. 2005); *In re Colby Constr. Corp.*, 51 B.R. 113, 116 (Bankr. S.D.N.Y. 1985); *In re Russell*, 60 B.R. 42, 45 (Bankr. W.D. Ark. 1985).

**B. In Multi-Debtor Cases, Debtors in Possession and Their Management May Not Favor Some Debtors and Their Creditors at the Expense of Others**

10. It is a fundamental tenet of bankruptcy law that a debtor in possession (and its directors and management) owes fiduciary duties to the estate and its creditors. *See, e.g., Wolf v. Weinstein*, 372 U.S. 633 (1963); *In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 361 (Bankr. S.D. N.Y. 2001) (“The United States Supreme Court has made clear that a debtor in possession, like a chapter 11 trustee, owes the estate and its creditors a duty of loyalty.”); *In re Centennial Textiles, Inc.*, 227 B.R. 606, 612 (Bankr. S.D.N.Y. 1998); *Nartron Corp.*, 330 B.R. at 593 (Bankr. W.D. Mich. 2005) (the debtor in possession owes creditors of its estate the “highest duties of care and loyalty...”).

11. In multi-debtor cases, each debtor in possession and its directors and management has fiduciary duties to its respective estate and its creditors. *See In re Adelpia Communs. Corp.*, 336 B.R. 610, 669-71 (Bankr. S.D. N.Y. 2006); *see also Mission Iowa v. Enron Corp (In re Enron)*, 291 B.R. 39, 43 (S.D. N.Y. 2003) (holding that there is a duty to preserve the integrity of

separate bankruptcy estates in multi-debtor cases and to allocate value to the estate that has an asset sold). The Court in *In re Innkeepers USA Trust* summarized this fundamental duty as follows:

In a bankruptcy case, it is ‘Bankruptcy 101’ that a debtor and its board of directors owe fiduciary duties to the debtor’s creditors to maximize the value of the estate, and each of the estates in a multi-debtor case. As Judge Gerber held in *Adelphia*, in a case with multiple debtors, the debtors, as fiduciaries, have duties to refrain from favoring or appearing to favor one or another of their estates and its creditors over another.

*In re Innkeepers USA Trust*, 442 B.R. 227, 235 (Bankr. S.D. N.Y. 2010) (citing *Adelphia Communs.*, 336 B.R. at 669-71).

**C. A Chapter 11 Trustee Should Be Appointed Under the “Cause” and “Best Interests of Creditors” Standards**

12. Appointment of a disinterested chapter 11 trustee to oversee the reorganization of the Non-Obligor Debtors is necessary here under each of the “cause” and the “best interests” standards of section 1104(a) of the Bankruptcy Code. As discussed in detail in the Trustee Motion, the Wilmington 1113/1114 Objection and the Moving Noteholders’ objection to the 1113/1114 Motion [Docket No. 3608], the Debtors have shown that they are willing to sacrifice the interests of, and violate their fiduciary duties to, the majority of their estates (i.e., the Non-Obligor Debtors) and their unsecured creditors to appease or otherwise consummate a deal with the UMWA. The Debtors’ Proposal would “transfer” the responsibility to satisfy the obligations under the UMWA CBAs from the limited number of Obligor Debtors to all of the Debtors, including the Non-Obligor Debtors that are not liable on the UMWA’s claims. Such favoring of certain Debtors and their creditors, at the expense of other Debtors and their creditors, is a material conflict of interest, constitutes “cause” under the Bankruptcy Code, and mandates appointment of a disinterested and impartial trustee.

13. Wilmington anticipates that the Debtors (and others) may argue against entry of an Order directing the appointment of a chapter 11 trustee because such appointment could cause a technical default under the Debtors' DIP Facility. The Court and the creditors of the Non-Obligor Debtors, however, cannot be held "hostage" by the fact that a technical, non-monetary default could exist under the Debtors' DIP Facility as a consequence of granting the Trustee Motion. Appointment of a trustee is necessary here to avoid injustice to the creditors of the Non-Obligor Debtors (including Wilmington). If the choice is between (x) allowing breaches of fiduciary duties to occur and (y) having a technical default under a DIP loan, there should be no question that requiring compliance with fiduciary duties is paramount (and that any technical default under the DIP loan will be appropriately dealt with by this Court).

14. As noted in Wilmington's Objection to the Debtors' 1113/1114 Motion (at ¶¶ 12, 17), Wilmington does not dispute that resolution of Bankruptcy Code section 1113 and 1114 issues is important to the Obligor Debtors. That, however, cannot justify obligating creditors of the Non-Obligor Debtors for claims resulting from relief under sections 1113 and 1114 when the Non-Obligor Debtors are not liable to the UMWA. It is also arguable, but far from certain, that, outside of a sale context, the Non-Obligor Debtors may have difficulty reorganizing completely separate from the Obligor Debtors.<sup>6</sup> That likewise would not affect the need for an independent, disinterested trustee to ensure that the Non-Obligor Debtors and their creditors would not become liable for UMWA claims against the Obligor Debtors when no liability exists, or that all

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<sup>6</sup> For example, the United Mine Workers of America 1974 Pension Trust (the "1974 Trust") contends that upon termination of the Debtors' multi-employer pension plan (the "MEPPA"), the 1974 Trust would have a claim in the amount of nearly \$1 billion against each Debtor under a "control group" theory. *See* Docket No. 3625. In fact, however, liability under the MEPPA could be satisfied with annual payments of approximately \$26 million (or less). *See* Trustee Motion, fn. 5; Statement of Official Committee of Unsecured Creditors in Response to 1113/1114 Motion, fns. 6, 7 [Docket No. 3609].



of the Debtors' assets would not be "pooled" or "substantively consolidated" when no factual or legal basis exists to do so.

15. The Debtors cannot sacrifice their duties to the estates and creditors of the Non-Obligor Debtors in order to resolve issues with the UMWA because Debtors' management is indifferent as to who would own the stock of the Reorganized Debtors. By submitting a Proposal that is plainly in violation of their fiduciary duties, the Debtors and their management have apparently lost sight of their responsibilities to the bulk of the Debtors' estates and their unsecured creditors. By appointing a chapter 11 trustee to oversee the reorganization of the Non-Obligor Debtors, this Court can ensure that resolution of section 1113 and 1114 issues and any plan process in these cases is handled appropriately and that the value of the Debtors' estates is maximized for all, and not just some, of the Debtors' unsecured creditors.

WHEREFORE, Wilmington respectfully requests that the Court (i) deny the Debtors' 1113/1114 Motion and (ii) grant such other and further relief as may be just and proper.

Dated: April 16, 2013

ANDREWS KURTH LLP

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was served this 16<sup>th</sup> day of April, 2013, on all persons on the Court's CM/ECF notice list, and, in addition, on the following parties via first class United States mail, postage prepaid:

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