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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **April 29, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North** **Re: ECF Nos. 3214, 3326, 3585, 3586, 3605, 3606, 3608, 3609, 3610, 3616, 3617, 3618, 3623, 3624**

OMNIBUS REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE DEBTORS' MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§ 1113, 1114

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Patriot Coal Corporation and its affiliated debtors (collectively, "**Patriot**" or the "**Debtors**") respectfully submit this reply memorandum in further support of their motion for relief under 11 U.S.C. §§ 1113(c) and 1114(g) (the "**Motion**").[1]

[1] Ten of the ninety-nine Debtors are signatories to collective bargaining agreements ("**CBAs**") with the United Mine Workers of America ("**UMWA**"). These ten Debtors are referred to as the "Obligor Companies." For convenience, this memorandum of law uses the term "Patriot" to refer to both the Debtors and the Obligor Companies.

Patriot has made multiple proposals to the UMWA in an effort to seek a consensual resolution. On November 15, 2012, Patriot made its original proposal to modify the CBAs pursuant to 11 U.S.C. § 1113 (the "**Original 1113 Proposal**") and its original proposal to modify retiree benefits pursuant to 11 U.S.C. § 1114 (the "**Original 1114 Proposal**," and together with the Original 1113 Proposal, the "**Original Proposal**"). On January 17, 2013, shortly after the UMWA made its first counterproposal, Patriot provided the Second 1113 Proposal and the Second 1114 Proposal (together, the "**Second Proposal**"). On February 19, 2013, shortly after the UMWA made its second counterproposal, Patriot provided the Third 1113 Proposal and the Third 1114 Proposal (together, the "**Third Proposal**"). On February 27, 2013, Patriot made further revisions to the 1114 Proposal in response to certain points raised by the UMWA (the "**Fourth 1114 Proposal**" and together with the Third 1113 Proposal, the "**Pre-Application Proposal**"). On April 10, 2013, shortly after the UMWA made its third counterproposal, Patriot provided the Fourth 1113 Proposal and the Fifth 1114 Proposal, and on April 23, 2013, Patriot provided the Fifth 1113 Proposal (together, the "**Post-Application Proposal**"). For the sake of convenience, Patriot refers to the Original 1113 Proposal, as modified, as the "**1113 Proposal**," and the Original 1114 Proposal, as modified, as the "**1114 Proposal**" (together with the 1113 Proposal, the "**Proposals**").

PRELIMINARY STATEMENT

Patriot is responding to several objections and statements in response to its Motion for relief under Sections 1113 and 1114, some of which have been filed by parties whose motivations are unclear at best, and at worst marred by self-interest. What should not be lost among the various filings is that Patriot has satisfied its burden of proof. In its opening memorandum and supporting declarations, Patriot established that:

- Patriot will run out of cash entirely at the beginning of 2014 without the cash savings contemplated by the Proposals;
- Patriot likely will be unable to secure exit financing without the cash savings contemplated by the Proposals;
- Patriot will be unable to compete with its peers, which have leaner cost structures and higher margins per ton of coal sold, without the cash savings contemplated by the Proposals;
- Patriot's Proposals are based on complete and reliable internal data, an updated, comprehensive business plan that incorporated revised market trends, and analyses by industry experts;
- Patriot supplied 43,000 pages of data to the UMWA prior to filing the Motion and responded to over 200 requests for data made by the UMWA and its advisors;
- Patriot supplied detailed business records to the UMWA, generated documents and schedules specifically in response to the UMWA's requests, and scheduled meetings and conference calls to provide context to the information;
- Patriot provided the UMWA with full access to its functional business plan model;
- Patriot actively engaged in negotiations through twelve formal pre-motion negotiating sessions, dozens of conference calls, and hundreds of e-mail exchanges;
- before seeking one dollar in concessions from its UMWA-represented employees and retirees, Patriot identified approximately in savings by rejecting or renegotiating unprofitable contracts, selling surplus assets, eliminating management positions, and making

significant cuts to the wages and benefits available to its non-union workforce and retirees;

- the UMWA stalled during the negotiations, provided counterproposals with little or no backup support that included purported "savings" that would materialize under no reasonable set of facts, and remained singularly focused on Peabody and Arch, rather than on the task at hand;[2] and

- Patriot will likely liquidate if the Proposals are not implemented, which will result in the loss of jobs – both union and non-union, the elimination of all retiree benefits, and the evaporation of value for all of Patriot's creditors.

Unable to contradict any of this, the UMWA resorts to asserting a series of half-truths and outright falsehoods that appear aimed at the media or the public, rather than advancing arguments that would enable it to prevail in a court of law. For example, the UMWA makes the following assertions that are devoid of real support:

- The UMWA asserts that Patriot is experiencing a short-term liquidity crisis and is using its bankruptcy to extract more concessions than it needs because Patriot harbors an "anti-union" bias. There can be no genuine dispute that coal markets continue to be weak – indeed, the UMWA's own witnesses have conceded that point. Nor can there be any dispute that the regulatory environment has reduced customer demand and that the changes that Patriot has proposed would still leave UMWA employees and retirees in a better position than their non-union counterparts;

- The UMWA asserts that Patriot manufactured its liquidity crisis by securing DIP financing that included restrictive covenants. However, DIP financing did not cause Patriot's problems – in fact, it provided a necessary lifeline that enabled Patriot to begin restructuring its liabilities, which were unsustainable both before and after the DIP financing. Indeed, Patriot would have liquidated long ago had it not secured its DIP financing;

- The UMWA asserts that Patriot refuses to identify and implement an additional in supposed non-labor savings over four years.

[2] Capitalized terms not defined herein have the meaning ascribed to them in the Memorandum of Law in Support of the Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [ECF No. 3219] ("**Opening Mem.**").

However, the UMWA provided no support for these purported "savings," and some of the suggested measures could gravely harm Patriot;

- The UMWA asserts that Patriot's unionized workforce is far more productive than its non-union workforce. However, the UMWA based this assumption on a botched statistical analysis, and willfully ignored the reality that the productivity and staffing levels at a mine turn on geologic conditions and other factors, not whether its workers carry a union card;

- The UMWA asserts that Patriot is asking for concessions from its UMWA-represented employees that far surpass what it has demanded from its non-union employees. However, the UMWA fails to acknowledge that UMWA-represented employees receive a compensation package that is far more generous than what Patriot pays to more than a thousand non-union miners performing the same jobs, that Patriot has already secured tens of millions in savings from its non-union employees through wage cuts and benefit reductions, and that the UMWA's own fuzzy math is incorrect and has been disproven during depositions;

- The UMWA repeatedly and incorrectly suggests that UMWA-represented employees have been asked to "shoulder" percent of the burden here. This is entirely false. As the UMWA's own expert witness conceded, the UMWA inflated this statistic by ignoring hundreds of millions in savings that Patriot has already identified and secured;

- The UMWA asserts that Patriot is trying to fund more than $1 billion in retiree healthcare costs with $15 million. Of course, the UMWA deliberately ignores the fact that it will receive hundreds of millions of dollars in funding for retiree healthcare through an equity stake in the reorganized company (or an unsecured claim under prior versions of the Proposals), and that it can receive tens of millions of dollars in additional funding through profit-sharing and royalty contributions;

- The UMWA asserts that Patriot rebuffed UMWA counterproposals that supposedly included real and sufficient savings. However, Patriot has established that the UMWA's counterproposals either offered negligible savings or were all-or-nothing offers that included terms that would have been impossible for Patriot to satisfy, such as funding a retiree health trust with $1 billion. It is no wonder then that the UMWA's own expert witness conceded that the UMWA's Second Counterproposal may not have been "feasible";

- The UMWA asserts that Patriot has failed to provide sufficient information to the UMWA. However, Patriot's personnel and advisors have made herculean efforts to respond to the UMWA's requests, no matter how far afield, and – by any measure – have provided an extraordinary amount of information to the UMWA. In fact, the UMWA has not identified a shred of relevant paper that Patriot has refused to turn over; and

- The UMWA asserts that Patriot "has essentially dismissed the idea of pursuing its former parent for fraudulent conveyances . . . ." This may be the most surprising claim of all. As the UMWA – and every stakeholder in these cases – knows, Patriot is conducting a thorough investigation into Peabody and Arch, has commenced a declaratory judgment action against Peabody to prevent Peabody from reducing benefits to thousands of retirees and dependents, and has filed a Rule 2004 motion against Peabody in which Patriot demanded that Peabody turn over documents needed for the investigation.

Stripping out the rhetoric, veiled threats, and falsehoods, the clear and unfortunate facts emerge: Patriot cannot survive in the near term (it will run out of cash), it cannot survive in the medium term (it will be unable to exit bankruptcy), and it cannot survive in the long term (it will be unable to compete) absent the savings requested in its Proposals and at issue in this Motion. A more compelling case of necessity is hard to imagine.

The UMWA 1974 Pension Trust (the "**1974 Pension Plan**") and the UMWA 1993 Benefit Plan (the "**1993 Benefit Plan**," and together with the 1974 Pension Plan, the "**UMWA Funds**") also filed an objection to Patriot's Motion. However, the arguments advanced in the UMWA Funds' objection are similarly flawed and do not alter the conclusion that Patriot has satisfied its burden.

At least ten additional submissions were filed on behalf of parties with highly varied interests, some of whom support the UMWA and some of whom think the UMWA is being enriched at their expense. As a threshold matter, none of these submissions move the needle in terms of Patriot's evidentiary showing. Moreover, the spectrum of submissions is among the strongest evidence of the fairness of the Proposals: the UMWA thinks it is getting too little and

that its interests could be diluted by the UMWA Funds; the UMWA Funds think they are getting too little; the Official Committee of Unsecured Creditors supports the Motion but thinks the UMWA is getting *too much*; the senior noteholders and the indenture trustees for the noteholders think that Patriot is giving away the company for free; and Patriot's competitors think that the Proposals are designed to harm them. That parties with such diametrically opposed interests each think the others are running off with a windfall suggests that Patriot reached the fair and equitable result.

For all of these reasons, and for the reasons set forth below and in Patriot's opening memorandum and supporting declarations, the Motion should be granted.[3]

POST-FILING DEVELOPMENTS

Patriot filed its Motion on March 14, 2013, after four months of negotiating with the UMWA. Prior to filing, Patriot participated in twelve negotiation sessions and delivered four proposals to the UMWA, each of which included additional concessions. (Reply Declaration of Gregory B. Robertson, dated April 23, 2013 ("**Robertson Reply Decl.**") ¶ 4.) These concessions forced Patriot to forego needed savings, but Patriot viewed them as important to reach a

[3] In this omnibus reply brief, Patriot responds to objections or statements of position filed by the following parties: Ohio Valley Coal Company and The Ohio Valley Transloading Company (together, "**Ohio Valley Coal**") [ECF Nos. 3326, 3617], Drummond Company, Inc. ("**Drummond**") [ECF No. 3585], Energy West Mining Company ("**Energy West**") [ECF No. 3586]; U.S. Bank National Association ("**U.S. Bank**") [ECF No. 3605]; Wilmington Trust Company ("**Wilmington Trust**") [ECF No. 3606]; Aurelius Capital Management, LP ("**Aurelius**") and Knighthead Capital Management, LLC ("**Knighthead**") [ECF No. 3608]; the Official Committee of Unsecured Creditors ("**Creditors' Committee'**") [ECF No. 3609]; the UMWA [ECF No. 3610]; Argonaut Insurance Company, Indemnity National Insurance Company, US Specialty Insurance, Westchester Fire Insurance Company, and Travelers Casualty and Surety Company of America (together, the "**Sureties**") [ECF No. 3616]; Cliffs Natural Resources Inc., Oak Grove Resources, LLC, and Pinnacle Mining Company, LLC (together, "**Cliffs**") [ECF No. 3618]; the UMWA Funds [ECF No. 3623]; and the United Mine Workers of America 2012 Retiree Bonus Account Trust ("**Retiree Bonus Plan**") [ECF No. 3624]. Patriot does not respond to the amicus brief filed by the National Coordinating Committee for Multiemployer Plans, which the Court struck on April 22, 2013 [ECF Nos. 3611, 3611-1, 3767].

Concurrently herewith, Patriot is filing a motion to strike the second objection of Ohio Valley Coal Company [ECF No. 3617].

consensual resolution with the UMWA, a result that it continues to prefer. (Robertson Reply Decl. ¶ 4.)

Since March 14, 2013, Patriot has participated in two negotiation sessions, with one scheduled for later this week, has continued to supply requested information to the UMWA, and has participated in numerous meetings, conference calls, and e-mail exchanges. (Robertson Reply Decl. ¶ 5.) Consistent with its continuing obligation to negotiate in good faith, Patriot has also provided two revised proposals to the UMWA. (Robertson Reply Decl. ¶¶ 5.) The Post-Application Proposal, which the UMWA's president described as a "step forward," included several additional concessions, each of which was designed to respond to concerns articulated by the UMWA at the bargaining table. (Robertson Reply Decl. ¶¶ 32-34, 39-40.)

The Fourth 1113 Proposal included two major concessions. First, Patriot offered to delay the modification of the CBAs until June 1, 2013, two months later than originally proposed, which would erase millions in needed cash savings. Second, Patriot committed to ensuring that the 1974 Pension Plan would not receive an unsecured claim, which would have been dilutive to the UMWA and to other unsecured creditors. Instead, Patriot promised to commit to a payment stream that was acceptable to both Patriot and the 1974 Pension Plan, or that otherwise conformed to federal law. (Robertson Reply Decl. ¶ 32.)

The Fifth 1113 Proposal included a further concession in response to concerns articulated by the UMWA and the UMWA Funds. Specifically Patriot agreed that the Obligor Companies that currently contribute to the 1974 Pension Plan would not withdraw from the 1974 Pension Plan if: (1) the UMWA agreed not to increase Patriot's contribution rates before January 1, 2017; and (2) the 1974 Pension Plan agreed to allow Patriot to (a) withdraw from the 1974 Pension Plan on or after December 31, 2016 if contribution rates increased above a stated threshold and

(b) pay any resulting withdrawal liability in annual installments. This modification would benefit the UMWA (because the 1974 Pension Plan would not receive an unsecured claim), it would benefit the 1974 Pension Plan (because it would receive a continued source of funding), and it would benefit Patriot (because it would eliminate the uncertainty that threatens Patriot's ability to secure exit financing and that threatens Patriot's ability to compete in the long term).[4] (Robertson Reply Decl. ¶¶ 40-41.)

The Fifth Section 1114 Proposal included multiple concessions as well. First, in response to the UMWA's concerns about providing liquidity to the VEBA, Patriot agreed to grant the UMWA a 35 percent equity stake in the reorganized enterprise. The equity stake could be monetized, in whole or in part, generating hundreds of millions of dollars that could promptly be contributed to the VEBA. Second, in response to the UMWA's concerns about the timing of the transition of retiree healthcare to the VEBA, the transition date would be postponed to January 1, 2014. The six-month extension would allow the UMWA additional time to monetize its equity stake, establish the VEBA, and make decisions concerning the administration of the VEBA, and would coincide with the opening of healthcare exchanges under the federal healthcare legislation.[5] Third, in response to the UMWA's concerns about the adequacy of the profit-sharing mechanism, Patriot included a royalty contribution provision pursuant to which the Obligor Companies would pay a royalty to the VEBA for every ton of coal produced at all existing mines, a measure that Patriot projects will yield tens of millions of additional dollars for

[4] Additionally, prior versions of the Proposals included a 6 percent contribution to a 401(k) or similar plan in lieu of pension and retiree healthcare benefits for active employees. Because the Fifth 1113 Proposal contemplates continuing pension benefits for active UMWA-represented employees, Patriot would reduce the 401(k) contributions to 3 percent at operations other than those covered by the Gateway collective bargaining agreements. (Robertson Reply Decl. ¶ 40.)

[5] This modification was conditioned on the UMWA's consent to a funding mechanism through which the $15 million designated as the initial contribution, and a $21 million loan from the UMWA to the VEBA, would fund retiree health claims during 2013. (Robertson Reply Decl. ¶ 32.)

the VEBA. And fourth, Patriot accepted the UMWA's proposal for a litigation trust, except that it adjusted the proposed funding obligation to a level that Patriot could afford and evenly apportioned members of the trust between the UMWA and the Creditors' Committee. (Robertson Reply Decl. ¶ 32.)

At all times after the filing of the Motion, Patriot continued to negotiate in good faith and continues to do so to this day. (See generally Robertson Reply Decl..) Unfortunately, however, Patriot and the UMWA have been unable to reach a consensual resolution and Court-ordered relief is urgently needed.

ARGUMENT

A debtor is permitted to reject its collective bargaining agreements and modify retiree benefits if the proposed modifications comply with Section 1113 and Section 1114 of the Bankruptcy Code. 11 U.S.C. §§ 1113(c), 1114(g). (Opening Mem. at 64-65.) Because Patriot has satisfied its burden of proof for each element of the statute, the Motion should be granted.

POINT I.

THE UMWA HAS FAILED TO REBUT PATRIOT'S SHOWING THAT THE PROPOSALS SATISFY SECTIONS 1113 AND 1114

In its opposition to the Motion [ECF No. 3610], the UMWA failed to rebut Patriot's showing that the Proposals satisfy Sections 1113 and 1114 because it cannot contest Patriot's short-term and long-term need for savings, it cannot accurately assert that the Proposals are not fair and equitable, and it cannot reasonably challenge Patriot's dedication to the negotiations.

A. The UMWA Has Failed to Rebut Patriot's Showing that the Proposals Are Necessary for Patriot's Short-Term Survival and Long-Term Competitiveness

Patriot has carried its burden of proving that the proposed modifications are "necessary to permit the reorganization of the debtor." 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(A). Indeed, no one has disputed that absent labor savings:

- it will be extremely difficult if not impossible for Patriot to secure exit financing; and
- Patriot will not be able to compete with its well-capitalized and primarily non-union competitors.

(Opening Mem. at 68-72.) The UMWA has failed to rebut Patriot's showing that the Proposals are necessary for Patriot's short-term or long-term survival.

As a threshold matter, the UMWA has in fact acknowledged that the Proposals are necessary. The UMWA's own expert advisor expressly conceded that Patriot's requests for concessions in 2013 and 2014 are necessary. (Declaration of Perry Mandarino, dated April 3, 2013 [ECF No. 3622] ("**Mandarino Decl.**") ¶ 12 (chart acknowledging that Patriot's "Required Savings" for 2013 and 2014 is consistent with the amount sought by the Proposals); Deposition of Perry Mandarino ("**Mandarino Dep.**") at 267:12-268:2, 313:11-16.) Additionally, the UMWA's president and lead negotiator, Cecil Roberts, testified that Patriot was never "financially viable" in the normal coal market that prevailed prior to the spinoff, let alone in the "challenging" market that exists today. (Deposition of Cecil Roberts ("**Roberts Dep.**") at 34:16-39:21.) Mr. Roberts also testified that Patriot needed either "a cash infusion" or significant labor savings in order to survive, and that he was not aware of any prospects of a cash infusion.

(Roberts Dep. at 39:9-21.) In short, despite the UMWA's vocal opposition to the Motion, its own witnesses have testified that significant savings are necessary.

Additionally, each of the UMWA's challenges to Patriot's showing of necessity fail under the applicable standard.[6] First, the UMWA is incorrect when it argues that Patriot is seeking greater concessions than it needs. In support of its argument, the UMWA contends that Patriot is experiencing a temporary crisis and will be "profitable" in two years without any concessions from UMWA-represented employees or retirees. (UMWA Objection at 25-26; Mandarino Decl. ¶¶ 8, 12, 16-17.) This argument is based on a highly flawed analysis that does not withstand even limited scrutiny. In insisting that Patriot will make over in "profit" over the course of five years, the UMWA does not actually evaluate profit. Rather, it looks to EBITDA, a metric that does not factor in hundreds of millions of dollars that Patriot must spend on: (i) capital expenditures, such as the purchase of mining equipment; (ii) asset retirement obligations, such as spending on selenium treatment; (iii) interest expenses; or (iv) income taxes. (Reply Declaration of Paul P. Huffard, dated April 23, 2013 ("**Huffard Reply Decl.**") ¶ 9.) To highlight how different the two metrics are, while Patriot forecasts in EBITDA from 2013 through 2016, it projects of free cash flow over that same period. (Huffard Reply Decl. ¶ 9.)

.[7] (Huffard Reply Decl. ¶¶ 11-12, 14.)

[6] The UMWA suggests, but does not directly argue, that Patriot erred in relying upon the Second Circuit's construction of the "necessity" element in Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82, 90 (2d Cir. 1987). (UMWA Objection at 23 & nn.28-29.) As discussed in Patriot's opening memorandum, although the Court of Appeals for the Eighth Circuit has not ruled on the necessity element, every court in the Eighth Circuit to decide the issue has embraced the Second Circuit's reading of the statute. (Opening Mem. at 65-66 & n.34.) This debate, however, is academic because Patriot has demonstrated that its Proposals are necessary for both its short-term survival and its long-term competitiveness. (Opening Mem. at 68-72.)

[7] Ignoring the detailed projections by Patriot's experts, as well as some 48,000 pages of data, the UMWA asserts that the Proposals are based only on a "snap-shot of current finances." (UMWA Objection at 26.) Nothing could be further from the truth. The UMWA compounds this caricature by analogizing these proceedings to the (….continued)

Moreover, the UMWA's financial advisor, Mr. Mandarino, made critical errors that refute the UMWA's primary argument. While Mr. Mandarino initially asserted that Patriot would achieve a cash balance by 2016 even without any Section 1113 or 1114 savings, Mr. Mandarino conceded at his deposition that he had assumed for purposes of that calculation that Patriot had actually received all of its requested Section 1113 and 1114 savings for the years prior to 2016. (Mandarino Dep. at 264:7-265:3.) Mr. Mandarino admitted that if that mistake were corrected, Patriot's cash balance for 2016 would be grossly negative and Patriot would not be able to survive. (Mandarino Dep. at 266:24-267:11.)

Second, the UMWA errs when it contends that Patriot's proposals are not necessary because Patriot's business plan is based on "unreasonably conservative" coal price projections. To support this assertion, the UMWA relies on the analysis of Srinivas Akunuri, who testified that natural gas prices are increasing, coal prices will rebound, and third-party forecasts show that Patriot's revenues will exceed the projections in its five-year business plan. (UMWA Objection at 27; Declaration of Srinivas Akunuri, dated April 3, 2013 [ECF No. 3630] ("**Akunuri Decl.**") ¶¶ 10-12, 24-25.) Mr. Akunuri's analysis is fundamentally flawed. For example, he insists that thermal coal prices will increase as natural gas prices increase; however,

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(continued….)

circumstances in In re G & C Foundry, No. 06-30601, 2006 Bankr. LEXIS 4582 (Bankr. N.D. Ohio July 19, 2006). In sharp contrast to the facts here, the court in G & C found that the "sole basis" for the debtor's proposal was a "snap-shot view of its financial condition [that] include[d] no projection of revenues, which [the debtor's CFO] testified he fully expect[ed] to increase substantially by the end of the year." Id. at * 30. Moreover, the G & C court found that the debtor had failed to analyze any historical data in valuing its proposed savings. Id. at *7-8. In short, the facts of that case are nothing like those before the Court in this matter. Patriot's Proposals are based on extensive modeling of the company's current costs and future revenues, all of which have been shared with the UMWA.

Even more to the point, the UMWA accuses the Debtors of using this snap-shot to "give[] Patriot's future owners a windfall at the expense of workers and retirees." (UMWA Objection at 26.) Ironically, under the Post-Application Proposal, the UMWA would be one of Patriot's future owners.

natural gas prices have risen in recent months but thermal coal prices have not.[8] (Reply Declaration of Seth Schwartz, dated April 23, 2013 ("**Schwartz Reply Decl.**") ¶¶ 9-10.) Additionally, the "reasonable" coal prices on which Mr. Akunuri bases his revenue projections are neither reasonable nor appropriate. His prices use improper proxies for the types of coal that Patriot sells, suggesting that he fails to understand Patriot's coal products. Additionally, certain of the price forecasts upon which Mr. Akunuri relies are months old – and therefore do not reflect the deterioration in coal prices in recent months. Lastly, Akunuri treats taxes inconsistently when comparing Patriot's price forecasts to third-party forecasts. Akunuri incorrectly compares net revenues from Patriot's business plan, which exclude well over in taxes over the four-year period from 2013 to 2016, to revenues based on the third-party forecasts, which do not adjust for required taxes.[9] (Schwartz Reply Decl. ¶¶ 4-5, 13.) Making appropriate adjustments to these third-party forecasts brings Mr. Akunuri's estimates in line with Patriot's own estimates.

Third, the UMWA errs when it argues that Patriot's proposals are not necessary because the UMWA has identified – and Patriot could implement – in additional cash

[8] At his deposition, Mr. Akunuri conceded that material portions of his analysis were unsupported by data. For example, he testified that he had no data to support the conclusion that the "share of natural gas will ever decrease to these historical levels again" and that he does not have "any reason to expect that . . . will occur." (Compare Deposition of Srinivas Akunuri ("**Akunuri Dep.**") at 90:25-91:9 with Akunuri Decl. ¶¶ 12-14.) Mr. Akunuri testified that he has not "seen any data" to support the conclusion that "coal's share of US power generation [would] return to 2008 levels." (Akunuri Dep. at 95:5-16.) Indeed, he conceded that this conclusion was based on "possibilities . . . [and] not based on evidence." (Compare Akunuri Dep. at 95:24-96:2 with Akunuri Decl. ¶¶ 12-14.)

[9] The UMWA also asserts that Patriot's coal industry expert, Seth Schwartz, provides the industry with rosier forecasts than he provided to Patriot "for purposes of achieving concessions through §§ 1113 and 1114." (UMWA Objection at 13 & n.18.) As a threshold matter, neither Mr. Schwartz nor his colleagues provided any tailored forecasts to Patriot for the purpose of developing its business plan, developing the Proposals, negotiating with the UMWA, or litigating this Motion. (Schwartz Reply Decl. ¶ 6 n.9.) He has provided Patriot with the exact same industry report that his many industry customers purchase. Additionally, the UMWA's criticism is based on outdated forecasts from Mr. Schwartz's company, and a correct comparison would show that the prices used in the Five-Year Business Plan are reasonable and, if anything, optimistic.

savings over the next four years. (UMWA Objection at 27-28; Mandarino Decl. ¶¶ 9(c), 29.) The UMWA has made this claim without any meaningful support. (Robertson Reply Decl. ¶ 21.) The flaws in the UMWA's position include its failure to recognize that:

- **Patriot cannot secure in savings through the elimination of so-called "management bonuses"**

The UMWA criticizes planned expenditures for management compensation. (UMWA Objection at 27-28; Mandarino Decl. ¶¶ 29-30.) As a threshold matter, Patriot has already eliminated millions in earned incentive compensation for 2012 and has implemented significant cuts to the wages and benefits of non-union hourly and salaried employees. (Opening Mem. at 34-36.) Additionally, eliminating all non-salary compensation will leave Patriot at a competitive disadvantage in the labor market. (Huffard Reply Decl. ¶ 31; cf. Declaration of Bennett K. Hatfield in Support of Compensation Plans [ECF No. 2819] ("**Hatfield AIP/CERP Decl.**") ¶ 35; Omnibus Reply in Support of Compensation Plans [ECF. No. 3259] at 21.[10])

Moreover, one-half of this purported represents non-cash stock option expense. Because eliminating these expenses will not free up cash, Patriot will recognize no benefit from altering its treatment of stock options. The other half of the is salaried incentive compensation and, of that amount, was scheduled for 2013. That 2013 expenditure has already been reduced in the compensation and incentive plans that are being evaluated by the Court. (Huffard Reply Decl. ¶ 28 & n.10.)

Finally, Mr. Mandarino conceded at his deposition that he has previously supported incentive compensation programs in other bankruptcy cases (depending on who is paying his

[10] Patriot's management already has made significant sacrifices. For employees who have been with Patriot over the past three years, the loss of incentive and retention opportunities alone has resulted in a 20 percent decrease in average compensation from 2010-2011 to 2012-2013. (Hatfield AIRP/CERP Decl. ¶¶ 9-11.)

fees), and agreed that they are commonplace and potentially necessary for a company to operate. (Mandarino Dep. at 257:13-258:22.)

- **Patriot cannot secure in cash savings by adjusting staffing ratios**

The UMWA claims that Patriot's non-union-hourly-employee-to-supervisor ratio is less than that of its peers, and concludes that Patriot can adjust its "top-heavy management structure" by eliminating supervisors. (UMWA Objection at 4, 27-28; Mandarino Decl. ¶ 26.) The UMWA botched this analysis. The UMWA erroneously concluded that all salaried employees are "supervisors" but, in many cases, non-union employees – such as secretaries, human resources personnel, and information technology personnel – are paid on salary, creating an appearance of skewed ratios. (Reply Declaration of Dale Lucha, dated April 23, 2013 ("**Lucha Reply Decl.**") ¶¶ 19-25.) Needless to say, these employees (Patriot has hundreds of them) are not "supervisors," nor do they constitute "top-heavy management." (Lucha Reply Decl. ¶ 22.) The benchmarks upon which the UMWA relies are also flawed and cannot readily be applied universally, let alone to Patriot's mines. (Lucha Reply Decl. ¶ 25.) Additionally, Patriot has made significant non-union labor cuts, continually reevaluates staffing levels, and is as leanly staffed as possible while still operating safely. (Lucha Reply Decl. ¶ 20.) Because Patriot has already reduced headcount across the enterprise, it cannot simply fire these so-called "supervisors" as the UMWA suggests.

- **Patriot cannot secure in cash savings by further reducing capital expenditures**

The UMWA asserts that Patriot can further reduce its planned capital expenditures. (UMWA Objection at 27-28; Mandarino Decl. ¶¶ 29, 31.) Patriot, however, has already reduced capital spending by $144 million for 2012 and planned capital spending by approximately between 2013 and 2016. (Opening Mem. at 32-33.) At his deposition, Mr. Mandarino

conceded that the UMWA did not have any particular cuts in mind but had simply assumed that Patriot's capital expenditures could be reduced by 20 percent, which he called a "placeholder" for discussion. (Mandarino Dep. at 230:9-231:24.) In short, the UMWA has neither identified specific cuts nor explained how such cuts can be made without compromising worker safety or assuming a significant risk that mining equipment, which is integral to producing coal, will fail. (Huffard Reply Decl. ¶ 36.)

- **Patriot cannot secure in savings through the elimination of so-called "cushion"**

The UMWA asserts that Patriot can eliminate in unnecessary "cushion" in its business plan. (UMWA Objection at 27-28; Mandarino Decl. ¶ 29.) There is no cushion capable of elimination. Of the has already been consumed to compensate for unanticipated production delays, such as the idling of the Rocklick mining complex, production delays at the Federal mining complex, and the accelerated use of personal days among the UMWA-represented workforce. The remaining is not "cushion," but represents cash allocated to address costs that Patriot will incur, such as expenditures on workers' compensation. (Huffard Reply Decl. ¶¶ 37-42.)

In other words, under no reasonable set of facts could Patriot secure in cash savings by making further cuts to management compensation, supervisor headcount, capital expenditures, or cash already allocated for necessary, anticipated expenses.

Fourth, the UMWA incorrectly argues that the Proposals are not necessary because Patriot's union mines are more efficient than Patriot's non-union mines. In support of this argument, the UMWA argues that union mines have lower production costs, that they operate with less supervision, and that work rules do not reduce efficiency. Thus, they conclude that union wages and bonuses do not need to be reduced to improve Patriot's ability to compete.

(UMWA Objection at 28-33; Declaration of Micheal Buckner, dated April 11, 2013 [ECF No. 3613] ("**Buckner Decl.**") ¶¶ 58, 60.) This argument is misleading. A primary cause of differences in production costs is the geological conditions at a mine. Indeed, all other things being equal, a deep mine with thick coal will have lower production costs than a mine with thinner coal. Many of Patriot's non-union mines have thin coal seams, and thus the UMWA is drawing a conclusion about labor productivity when no such conclusion can reasonably be drawn. (Schwartz Reply Decl. ¶¶ 36-37.) Additionally, as discussed above, the UMWA's oft-repeated argument that union mines operate with less supervision is simply incorrect. (Lucha Reply Decl. ¶¶ 19-25; Huffard Reply Decl. ¶ 34.)

Fifth, the UMWA contends that Patriot's Proposals are not necessary because Patriot "set its obligations to all other parties in the bankruptcy in stone before coming to the [UMWA]." (UMWA Objection at 33.) The UMWA further argues that this "last man standing" strategy is a "blatant[] violat[ion of] the statutory command," and is an attempt to substitute the "business judgment" standard for the applicable statutory standards. (UMWA Objection at 33-34.) The UMWA deliberately misconstrues the facts here. Patriot did not "set its obligations to all other parties" in stone; rather, as is appropriate under the statute, it sought to secure all possible savings before approaching the UMWA with a request for only the necessary savings. (Opening Mem. at 32-36.) The UMWA's reliance on In re Delta Air Lines, 342 B.R. 685 (Bankr. S.D.N.Y. 2006), illustrates the flaw in its argument. In contrast to the facts here, the debtors in Delta argued that their proposals to a flight attendants' union were both necessary and non-negotiable because the debtors' agreements with two other unions were expressly conditioned on the acceptance of all the debtors' proposals intact. Id. at 696. The court rejected this reasoning, holding that the agreements with the two other unions could not "constrain[] [the] Court's

judgment and discretion in applying the subjective criteria prescribed in Section 1113(b) and (c)." Id. at 697. After five Proposals, significant concessions, and months of negotiation, it should be clear that Patriot has never contended that its position is "non-negotiable." Moreover, Patriot's use of its Five-Year Business Plan to minimize the savings requested and to explain its Proposals cannot seriously be compared to an argument that specific savings are necessary by virtue of an agreement with a third party.[11]

Sixth, the UMWA advances the baseless argument that Patriot's Proposals are not necessary because Patriot manufactured a "self-imposed" liquidity crisis by entering into the DIP agreements. (UMWA Objection at 35-36.) In advancing this argument, the UMWA wholly ignores the fact that there are multiple reasons why Patriot needs urgent relief,

Notwithstanding these facts, the UMWA suggests that Patriot entered into an unusual arrangement in an effort to circumvent the requirements of Sections 1113 and 1114. (UMWA Objection at 35.) This argument is wholly unsupported. The UMWA's own proposed expert

[11] The UMWA's citation to In re Lady H Coal Co., Inc., 193 B.R. 233 (S.D. W.Va. 1996), is equally inapposite. That case held that debtors failed to meet the requirements of Section 1113 where they "were, prior to any negotiations with the union, locked into [] an agreement where the purchaser [of the majority of the debtors' assets] was not assuming the NBCWA." Id. at 242. The history of negotiations in this case and Patriot's successive Proposals plainly show that Patriot has done nothing that would "likely preclude reaching a compromise," id., but has consistently taken a proactive approach toward seeking a negotiated resolution with the UMWA.

concedes that (i) liquidity covenants and EBITDA covenants are common in DIP facilities,

The only other UMWA witness to testify about the purported impropriety of the DIP covenants has conceded that he has absolutely no personal knowledge about DIP financing (or any corporate loan agreements). (Compare Amended Declaration of Arthur Traynor, dated April 15, 2013 [ECF No. 3642] ("**Traynor Decl.**") ¶ 29 (stating that the DIP liquidity covenant was set at a level "greater than necessary") with Deposition of Arthur Traynor ("**Traynor Dep.**") at 43:14-54:8 (denying independent knowledge concerning DIP financing) and Traynor Dep. at 98:12-21 (same).) For these reasons, neither the DIP facilities nor the related covenants are improper, nor do they render the Motion "lawless."[12]

Finally, the UMWA inappropriately challenges certain work-rule changes in Patriot's proposals, which it characterizes as non-economic concessions. (UMWA Objection at 36.) This argument lacks merit for a number of reasons. In stark contrast to the UMWA's assertion in this litigation, Patriot has ascribed a specific savings value to each of the four work rule changes in its Proposals.[13] (Opening Mem. at 49-50; Declaration of Gregory B. Robertson, dated March 14, 2013 [ECF No. 3220] ("**Robertson Decl.**") ¶ 35 & Ex. 11; Declaration of Dale F. Lucha, dated

[12] The inability of the UMWA to back up this argument with either expert or fact witness testimony speaks volumes – especially in light of the frequency with which this assertion is made in the UMWA's objection.

[13] Even if the UMWA misspoke in their objection, and intended to challenge the four items labeled "Other" in the Original Proposal, its challenge is flawed. Patriot has repeatedly informed the UMWA that even if it would be difficult to assign precise dollar values to these four modifications, they nevertheless provide valuable flexibility to Patriot. (Opening Mem. at 49-50.) More importantly, Patriot has eliminated three of the four issues through modifications in subsequent proposals. (Robertson Decl. Exs. 1-3.) The only remaining modification that has not been ascribed a specific dollar value for its savings estimate is Patriot's proposal that the CBAs terminate in 2018, rather than 2016. That modification, however, is critically needed so Patriot can attract investment and secure exit financing. (Declaration of Paul P. Huffard, dated March 14, 2013 [ECF No. 3224] ("**Huffard Decl.**") ¶¶ 49, 88; Lucha Decl. ¶ 62.)

March 14, 2013 [ECF No. 3223] ("**Lucha Decl.**") ¶¶ 52-57.) Thus, contrary to the UMWA's argument, Patriot has consistently viewed these changes as necessary to its ability to operate efficiently and in a cost-effective manner.[14] Additionally, the UMWA insists that work rules "save lives" and that "it is today beyond cavil that unionized mines are safer than their non-union counterparts." (UMWA Objection at 11.) However, Patriot's own data show that its non-union mines had better safety records in both 2011 and 2012 than its union mines.[15] (Lucha Reply Decl. ¶¶ 11-13.) Lastly, complaints about specific components of Patriot's Proposals are improper under Sections 1113 and 1114, which do not permit a party opposing modification to exercise a line-item veto over a debtor's proposals. (Opening Mem. at 67.)

[14] The economic nature of these work rule changes is clear. For example, Patriot has proposed to modify the number of unexcused absences that an individual can take during a specific period of time. Patriot has made that change because unexcused absences result in either (a) paying overtime for someone to work another shift to fill in for the absent employee, (b) not operating the equipment and losing production, or (c) carrying additional employees on the payroll to compensate for absences. The problem with unexcused absences is acute at certain mining complexes. For example, Federal No. 2, a union operation, averages seven unexcused absences per day among its 400-person workforce, which has resulted in production slow-downs. (Lucha Reply Decl. ¶¶ 8-9.) The UMWA's position that "[g]iven the physical damage caused by a lifetime of working in . . . mines, it is normal that miners have more absences than employees with less physically demanding jobs" is wrong for two reasons. (UMWA Objection at 36.) First, UMWA-represented employees now qualify for up to 47 days of paid-time off per year, as well as excused absences. The unexcused absences that are at issue are on top of the paid time-off and on top of the excused absences. Second, the appropriate comparison is not to employees with "less physically demanding jobs," but to non-union Patriot employees, who historically have much lower rates of unexcused absences. Indeed, in 2012, Dodge Hill (an unrepresented mine) had zero unexcused absences and Midland Trail (another non-represented mine) had a rate of unexcused absences that was seven times better than the rate at Federal. (Lucha Reply Decl. ¶ 10.)

[15] Patriot evaluates two primary indicia of safety. The first is the "Incidence Rate," which is the number of incidents – or "reportable events" – per 200,000 man-hours. Generally speaking, there are two types of reportable events: medical injuries and lost time. In 2011, Patriot's union operations had an incidence rate of 3.03 and Patriot's non-union operations had an incidence rate of 2.15. Thus, incidence rates at union operations were 41 percent higher. In 2012, Patriot's union operations had an incidence rate of 2.94 and Patriot's non-union operations had an incidence rate of 2.17. Thus, incidence rates at union operations were 35 percent higher. The second measure of safety is "VPID," or violations per inspection day. In 2011, the VPID for Patriot union operations was 0.89. The VPID for Patriot non-union operations was 0.87. VPID at union operations was 2 percent higher. In 2012, the VPID for Patriot union operations was 0.76. The VPID for Patriot non-union operations was 0.70. VPID at union operations was 8.6 percent higher. (Lucha Reply Decl. ¶¶ 12-13.)

For all of these reasons, and the reasons set forth in Patriot's Opening Memorandum and supporting declarations, Patriot has satisfied its burden of proving that its Proposals are necessary.

B. The UMWA Has Not Disputed that the Proposals Are Based on Complete and Reliable Information

Patriot has established that its Proposals are "based on the most complete and reliable information available." 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(A). No party has disputed that Patriot supported its proposals with complete and reliable internal data, an updated business plan that incorporated current market trends, and analyses by industry experts. (Opening Mem. at 75-76.) Accordingly, Patriot has carried its burden of proof.

C. The UMWA Has Failed to Rebut Patriot's Showing that It Provided the UMWA with Information Necessary to Evaluate the Proposals

Patriot has carried its burden of proving that it supplied the UMWA with "such relevant information as is necessary to evaluate" the Proposals, as required under Sections 1113 and 1114. 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(B). Here again, no one has disputed the following key points:

- Patriot provided a wealth of information about its business to the UMWA, amounting to nearly 43,000 pages prior to filing its Motion, and amounting to nearly 48,000 pages to date;
- Patriot responded to nearly 200 information requests from the UMWA and its advisors prior to filing its Motion;
- Patriot located and supplied preexisting business records to the UMWA and generated documents and schedules specifically in response to the UMWA's requests;
- Patriot never said no to a single relevant request for information; and
- Patriot offered to schedule, and has scheduled, meetings, conference calls, and site visits to provide context to the information.

(Opening Mem. at 76-78; Robertson Reply Decl. ¶¶ 4-5; see generally Robertson Decl.) In light of Patriot's robust showing, the burden shifts to the UMWA to establish that it did not receive relevant information. In re Am. Provision Co., 44 B.R. 907, 909-10 (Bankr. D. Minn. 1984) (holding that, once the debtor shows "what information it has provided to the [u]nion," the burden shifts to the union to dispute the relevance of the information). Each of the UMWA's three challenges are without merit and fail to satisfy its burden.

First, the UMWA makes a generic argument that Patriot "failed to fulfill information requests that were necessary to the UMWA's ability to evaluate the proposal[s]," and asserts that "[m]eaningful bargaining cannot be done with one party in the dark." (UMWA Objection at 51-52.) It is difficult to think of words any less applicable to the actual facts. The UMWA was given access to more than 11,000 pages of information weeks before it received the Proposals, and Patriot has supplied the UMWA with approximately 48,000 pages of information to date. (Opening Mem. at 76-78; Robertson Reply Decl. ¶ 5.) Patriot also timely responded to specific – and voluminous – requests made by the UMWA and its advisors. This was an all-hands-on-deck effort that involved a significant number of Patriot personnel, as well as Patriot's financial advisors, investment bankers, and attorneys. (Opening Mem. at 76-78.) Moreover, the UMWA consistently stated, at least during in-person discussions, that it was satisfied with the pace and scope of the information sharing. (Robertson Decl. ¶ 63; Traynor Dep. at 224:4-9 (acknowledging that Patriot responded promptly at times but that he failed to include that in his declaration).) The UMWA cannot now assert precisely the opposite position simply as a litigation tactic.

Second, the UMWA insists that Patriot has not developed a functional business plan model, and that this prevents the UMWA from properly evaluating the Proposals. (UMWA

Objection at 52-53; Mandarino Decl. ¶¶ 64-71; Traynor Decl. ¶¶ 64, 68.) This assertion is simply untrue. The model presented to the UMWA and its advisors is fully functional and capable of running multiple scenarios, such as adding or subtracting revenues, adding or subtracting operating expenses, adding or subtracting capital expenditures, adjusting capital structure assumptions, and inputting different balance sheet or working capital assumptions. (Huffard Reply Decl. ¶¶ 52-56.) The model does not allow someone to automate certain complex operational decisions, but that limitation applies to everyone – from Patriot, to the UMWA, to their respective advisors. (Huffard Reply Decl. ¶ 53.) Equally as important is the fact that Patriot shared the very model to which it has access, and the UMWA concedes that Patriot withheld nothing. The case law simply does not require a debtor to create new data systems or models that do not yet exist – it need only provide whatever data is available, and Patriot has done just that. Cf. In re Pinnacle Airlines Corp., 483 B.R. 381, 411 (Bankr. S.D.N.Y. 2012) ("While section 1113(b)(1)(B) requires the debtor to provide 'such relevant information as is necessary to evaluate the proposal' (and while information unavailable to the debtor could often be helpful, or even 'necessary,' at least in the sense of being the information that would be most helpful), section 1113(b)(1)(A) requires the proposal to be 'based on the most complete and reliable information available at the time of such proposal.'") (emphasis in original); In re Mesaba Aviation, Inc., 341 B.R. 693, 718 (Bankr. D. Minn. 2006), rev'd on other grounds, 350 B.R. 435 (D. Minn. 2006) ("Section 1113(b)(1)(B) cannot be read to mandate a debtor's performance of further analysis on existing source data; it only compels the disclosure of that data and any previously-performed analysis."). Finally, the UMWA's lead financial advisor, who claimed repeatedly in his declaration that Patriot failed to provide a "dynamic" model, admitted at his deposition that he was actually unfamiliar with Patriot's business model, did not

specifically recall ever opening the model, and never himself attempted to manipulate the model. (Mandarino Dep. at 125:3-129:2.)

Third, the UMWA falsely claims that Patriot and its advisors "refused" to provide a precise estimate of the value that would be provided to the VEBA. (UMWA Objection at 52.) In reality, Patriot's advisors have had extensive discussions with the UMWA on this topic, including an in-person meeting in early March during which Blackstone made a detailed presentation to the UMWA, as well as multiple meetings, conference calls and negotiation sessions where the value of the UMWA's unsecured claim was explored and discussed. (Robertson Decl. ¶¶ 165, 182-83.) The UMWA itself concedes this point, notwithstanding its repeated protests. Specifically, Mr. Mandarino's declaration reflects PwC's "weighted average recovery" estimate for the UMWA's claim (Mandarino Decl. ¶ 44), which Mr. Mandarino testified would equate to more than in cash. (Mandarino Dep. at 188:6-189:21.) Some degree of uncertainty is of course unavoidable, especially because the value of the enterprise turns on any number of variables – including whether Patriot and the UMWA can reach a resolution to restructure labor costs, and whether the Debtors should be substantively consolidated – but that uncertainty cannot be characterized as a failure to share information, nor does it justify the assertion that the VEBA will receive zero value from an unsecured claim or from an equity stake, as the UMWA has assumed for purposes of this litigation. Finally, any such uncertainty should have been eliminated by the Post-Application Proposal, in which Patriot agreed to grant the UMWA a 35 percent equity stake in reorganized Patriot, a step that allows the UMWA to form a concrete view of the cash that will be available for the VEBA – likely hundreds of millions of dollars according to PwC's own valuation estimates.

For all of these reasons, Patriot has provided relevant information and the UMWA has done nothing to rebut that showing.

D. The UMWA Has Failed to Produce Evidence that Patriot Failed to Meet at Reasonable Times or Act in Good Faith

Patriot has established that it has met with the UMWA "at reasonable times" and that it has "confer[red] in good faith" in an attempt to agree to modifications. The undisputed evidence in the record includes:

- the Patriot negotiating team took part in twelve negotiating sessions before the Motion was filed, two thereafter, and a third later this week;
- Patriot consistently agreed to meeting requests and repeatedly communicated that it stood willing to meet at any time and in any location;
- when Patriot was concerned that negotiations were proceeding at too slow a pace, it suggested numerous near-term meeting dates so that the parties could expedite the negotiation process;
- Patriot participated in dozens of conference calls, hundreds of e-mail exchanges, and continual responses to information requests from the UMWA and its advisors; and
- Patriot made five Proposals to the UMWA, each of which included modifications designed to address the UMWA's concerns and which reduced the savings available to Patriot.

(Opening Mem. at 79-80; Robertson Reply Decl. ¶¶ 4-6.) "[O]nce the debtor has shown that it has met with the [u]nion representatives, it is incumbent upon the [u]nion to produce evidence that the debtor did not confer in good faith." Am. Provision, 44 B.R. at 910; see also 11 U.S.C. §§ 1113(b)(2), 1114(f)(2). The UMWA has failed to do this.

The UMWA's single and totally insufficient challenge to Patriot's good faith is that Patriot provided the Post-Application Proposal to the UMWA after the Motion was filed. (UMWA Objection at 56-57.) This argument is devoid of merit and contrary to the statute. As

discussed in detail below, Sections 1113 and 1114 each contemplate that the debtor will continue to negotiate throughout the pendency of a motion, and that the debtor will make proposals through at least the time of the hearing, if not thereafter. For that reason, post-motion proposals are an almost universal feature of these types of negotiations. See infra Section II. Similarly, the statutes envision a short window of time between the date that a motion is filed and the date that the hearing commences – a mere fourteen days – so the suggestion that a proposal made three weeks before a hearing was made in bad faith is illogical. 11 U.S.C. §§ 1113(d)(1), 1114(h)(1); see also New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 91 (2d Cir. 1992) (holding that in the context of §§ 1113, 1114 negotiations, "ten hours is ample time to consider and respond to a proposal"). And, both Mr. Traynor and Mr. Roberts conceded at their depositions that the UMWA expected Patriot to continue to negotiate after filing the Motion (Traynor Dep. at 128:8-12; Roberts Dep. at 73:7-74:3) – exactly what Patriot has done.

This argument is also strikingly inconsistent with the facts. The UMWA complains that the Post-Application Proposal was somehow made "in bad faith" because lawyers are busy taking and defending depositions, and therefore will not have time to evaluate the Proposal. However, litigation counsel for the UMWA and for Patriot are not on the respective negotiating teams and deposition discovery was scheduled to end on April 19, 2013, ten days before the hearing begins. (Robertson Reply Decl. ¶¶ 8, 27; Stipulated Pretrial Order [ECF No. 3726].) The argument is also inconsistent with the UMWA president's own public statements that the Post-Application Proposal represents a "step forward." (Robertson Reply Decl. ¶ 34; Roberts

Dep. at 73:7-19.[16]) Finally, the argument has since been proven wrong – the UMWA's advisors delivered a lengthy diligence request regarding the Post-Application Proposal (Robertson Reply Decl. ¶ 37), demonstrating that the UMWA's advisors have had ample time to study the Post-Application Proposal and seek further information, which Patriot is providing.

Accordingly, Patriot has – without question – conferred in good faith and the UMWA has offered no evidence to the contrary.

E. The UMWA Has Failed to Rebut Patriot's Showing that Its Proposals are Fair and Equitable

Patriot has carried its burden of proving that the Proposals treat all parties "fairly and equitably." 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(A). Among other things, the record shows:

- Patriot has undertaken an exhaustive process to reduce non-labor costs and stem its losses, including by reducing production, eliminating unprofitable contracts, and selling surplus assets;
- Patriot has made a comprehensive effort to reduce non-union labor costs, including by cutting employee and contractor positions, reducing wages, and modifying medical and prescription drug benefits;
- Patriot's non-union cuts will yield cash savings of in 2014 alone;
- Patriot's 1113 Proposal is intended to treat the entire active workforce similarly, and would implement cuts to achieve parity of wages and benefits, while avoiding reduction of union headcount;
- Patriot's proposed healthcare plan for active employees compares favorably with the average plan of U.S. employers; and
- Patriot's healthcare proposal for retirees compares favorably with the average plan of U.S. employers.

[16] Notably, while Mr. Roberts agreed at his deposition that the Post-Application Proposal represented progress, Mr. Traynor sought to have it both ways, testifying that a "step forward" could also be indicative of bad faith negotiations, and also conceding – more than a week after they were supplied to the UMWA – that he had not reviewed or analyzed the Post-Petition Proposals. (Traynor Dep. at 141:9-145:24.)

The UMWA does not challenge these facts, but it advances four principal arguments, none of which remotely counters Patriot's strong showing on this prong of the statute.

First, the UMWA incorrectly argues that the Proposals are not fair and equitable because UMWA-represented employees and retirees shoulder a disproportionate percentage of the requested cash savings. (UMWA Objection at 37-41; Mandarino Decl. ¶¶ 8, 72.) The only support for this assertion are statistics that the UMWA has manipulated to support this very argument. For example, the UMWA argues that the "union workforce (40% of the total workforce) is bearing of the load." (UMWA Objection at 39.) To conclude that the UMWA must shoulder of the total concessions, one would have to shrink the denominator – the pool of total savings secured – beyond recognition. In fact, one would have to ignore the anticipated savings associated with nearly every one of the following initiatives:

- in cash savings between 2013 and 2016 from the reduction of planned capital expenditures;
- in cash savings between 2013 and 2016 from taking over operations from contractors;
- in cash savings between 2013 and 2016 from the rejection or renegotiation of unprofitable contracts;
- in cash savings between 2013 and 2016 from the sale of surplus assets;
- in cash savings between 2013 and 2016 from the reduction of overhead expenses;
- in cash savings between 2013 and 2016 from its reduction of payments on pre-petition unsecured debt;
- in cash savings between 2013 and 2016 from the reduction of management headcount;
- in cash savings between 2013 and 2016 from modifications to non-union medical benefits;

- in cash savings between 2014 and 2016 from the elimination of the 2014 non-union wage increase;
- in cash savings between 2013 and 2016 from the elimination of non-union retiree medical benefits; and
- in cash savings between 2013 and 2016 from the elimination of non-union compensation.

(Huffard Reply Decl. ¶¶ 22-25; see also Declaration of Bennett K. Hatfield, dated March 14, 2013 [ECF No. 3222] ("**Hatfield Decl.**") ¶¶ 88-92.) Only then can one reach the conclusion that the UMWA has reached. In reality, Patriot has asked the UMWA for no more than of the total savings it is seeking to achieve in order to reorganize.[17] (Huffard Reply Decl. ¶ 27.)

Similarly, the UMWA argues that Patriot has sought concessions from its union workforce that are seven times greater than the concessions that it sought from its non-union workforce. Like the this number is a product of flawed arithmetic. It fails to account for the fact that Patriot eliminated 78 management positions in 2012 and early 2013, that Patriot eliminated 640 non-union employee and contractor positions, and that Patriot identified additional cuts to respond to further deterioration in the markets after the development of the Five-Year Business Plan. (Opening Mem. at 35-36.) The argument also fails to acknowledge that UMWA-represented employees receive wages and benefits that are well above market, whereas Patriot's non-union employees receive market compensation, and it is well settled that adjusting compensation to market rates in this context is fair and equitable. See, e.g., Pinnacle

[17] Not only do the UMWA's numbers find no support in the facts, they are part of the testimony offered by a proposed expert whose opinion has been rejected by courts in the past on the grounds that he has inflated projections. See Greetham v. Sogima L-A Manager LLC, No. 2084-VCL, 2008 Del. Ch. LEXIS 160, at *62 (Del. Ch. Nov. 3, 2008) (rejecting Mr. Mandarino's calculation of damages for the plaintiff as "built on wildly speculative growth" of the portfolio that was the subject of the alleged contract); Am. Classic Voyages Co. v. J.P. Morgan Chase Bank (In re Am. Classic Voyages Co.), 367 B.R. 500, 514, 516 (Bankr. D. Del. 2007) (characterizing Mr. Mandarino's cash flow model as containing "random adjustments" and disregarding Mr. Mandarino's testimony on solvency, reasoning that "Mandarino's valuation of the assets on a liquidation basis does not provide a true picture of the Debtors' worth on the Transfer Date"). Mr. Mandarino is doing the same or worse here and his opinion cannot be relied upon.

Airlines, 483 B.R. at 415-16 (holding that it was not inequitable to demand a far larger pay cut from the pilots' union than from any other constituency because of the evidence that the other constituencies had below-market pay).

Additionally, the UMWA argues that "Patriot's non-union employees are eligible for far more generous incentive compensation payments than its union employees." (UMWA Objection at 39.) However, union and non-union employees have the same opportunity to earn compensation from mine-level incentive plans, which evaluate whether the mine has met safety targets, production targets, violations targets, and other such targets.[18] Going forward, both union and non-union miners alike will have the ability to meet and exceed their targets and to earn mine-level incentive compensation. (Lucha Reply Decl. ¶¶ 17-18.) For these reasons, the UMWA has not been asked to shoulder a disproportionate share of the sacrifice.[19]

[18] Elsewhere in its objection, the UMWA contends that unionized employees are not eligible for incentive compensation at all. (UMWA Objection at 16.) That is incorrect because both UMWA-represented employees and non-union employees are eligible for mine-level incentive compensation, except in limited circumstances like when the UMWA-represented employees at Federal declined to participate in the mine-level incentive plan. (Lucha Reply Decl. ¶ 17.)

[19] The UMWA quotes legislative history to support its argument that Section 1113 favors unions and that the statute should be construed in that light. (UMWA Objection at 2, 37.) But that is, at best, a selective reading of the legislative history. Legislators from both parties viewed Section 1113 as a neutral amendment that would accommodate the interests of businesses and unions. See H.R. Rep. No. 98-882 (1994), reprinted in 1984 U.S.C.C.A.N. 576, 577 (Conf. Rep.) (statement of Rep. Peter Rodino (D-NJ)) ("[I]t was only after much deliberation and much exchange that we finally came to what we believe to be a very balanced provision which will provide for fair and equitable treatment . . ."); id at 582 (statement of Sen. Strom Thurmond (R-SC)) ("This compromise is, in my opinion, the fairest and most equitable one that could have been reached under the circumstances."); id at 588 (statement of Sen. Robert Dole (R-KS)) ("The conferees – after a full week of debate – agreed upon a provision concerning the treatment of collective bargaining agreements that is a fair compromise between the decision in the Bildisco case and the various proposals that were supported by labor, the most recent of which was [the Packwood Amendment]. . . . [T]he labor amendment is a good compromise between the proposals and positions that were expounded by each side."); id. at 591 (statement of Sen. Orrin Hatch (R-UT)) ("I feel that the Conference version is a practical, workable mechanism. This provision will require negotiations to attempt to save both the labor contract and the business prior to court adjudication to reject the contract."). In fact, legislators rejected versions of the bill that were perceived to have an anti-debtor bias. See id. at 594 (statement of Sen. Orrin Hatch (R-UT)) (discussing the rejection of the Packwood Amendment). The legislative history also makes clear that that Section 1113 should be applied in light of Chapter 11's rehabilitative aims. Id. at 593-94 (statement of Sen. Orrin Hatch (R-UT)) ("Chapter 11's overriding purpose is to take whatever steps are expedient to preserve the failing business for the benefit of all if possible. . . . [T]his bill applies its principles in a manner that will protect the
(….continued)

Second, the UMWA errs when it argues that the Proposals are not fair and equitable because Patriot supposedly has failed to consider miners' health problems. (UMWA Objection at 41-44.) This repeated assertion is both unfortunate and incorrect. Patriot's Proposals include a healthcare plan for active employees that is comprehensive in scope and compares favorably with the average plan of U.S. employers. (Opening Mem. at 81-82.) Even assuming that miners "have a greater burden from illness" (UMWA Objection at 42), the proposed healthcare plan will cover those illnesses, a fact that the UMWA's own purported healthcare expert does not dispute.[20] (Declaration of Elliott Cobin, dated April 3, 2013 [ECF No. 3619] ("**Cobin Decl.**") ¶¶ 22-25; Deposition of Elliot Cobin. ("**Cobin Dep.**") at 139:5-141:17.)

As to health coverage for retirees, the UMWA continues to insist that the VEBA will be funded with no more than $15 million, a statement that it knows is false. (UMWA Objection at

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(continued….)
interest of all parties while permitting a distressed business to take whatever steps are necessary to reorganize itself and continue productive contributions to our economy.").

[20] In challenging Patriot's retiree healthcare proposals, the UMWA also asserts that "[w]hile Patriot glibly assumes the Affordable Care Act will rescue retired miners, it provides no real reason to sustain this belief." (UMWA Objection at 20.) Patriot's position is not glib; it is a reasonable construction of a new statute. As Patriot has explained to the UMWA, the Patient Protection and Affordable Care Act ("**PPACA**") will benefit retirees in multiple ways. First, the PPACA is expected to reduce retiree out-of-pocket expenditures on net. See, e.g., Allison K. Hoffman & Howell E. Jackson, Retiree Out-of-Pocket Healthcare Spending: A Study of Consumer Expectations and Policy Implications, 39 Am. J.L. & Med. 62, 82 (2013). Second, Medicare reform under the PPACA makes prescription drugs more affordable for seniors and grants them access to vital preventive care services. (Robertson Reply Decl. Ex. 78 (citing Fact Sheet: What the Health Care Law Means for People 65+, American Association of Retired Persons (Jan. 2013).) Even the UMWA's own healthcare expert – who challenged Patriot's construction of the PPACA in his declaration – concedes that the PPACA made changes to Medicare that will benefit retirees. (Cobin Dep. at 149:3-6.) Third, Patriot early retirees – retirees who are under age 65 and thus ineligible for Medicare – will have access to healthcare exchanges, which will open on January 1, 2014, and which will offer affordable healthcare plans containing safeguards to protect the interests of retired and elderly persons. (Robertson Reply Decl. Ex. 78; see also Alan Reuther, Workers and Their Health Care Plans: The Impact of New Health Insurance Exchanges and Medicaid Expansion on Employer-Sponsored Health Care Plans, Center for American Progress, at 38-39 (Sept. 2011).) Finally, Patriot early retirees will have access to cost-sharing subsidies and premium tax credits to ensure that individual plans on the exchanges remain within their financial grasp. (Robertson Reply Decl. Ex. 78.) Indeed, the UMWA has not presented evidence to the contrary, but instead misquotes its own expert's declaration to reach an off-base estimate of post-PPACA premiums. (Compare Cobin Decl. ¶ 11 (erroneously estimating the lowest out-of-pocket maximum for family coverage), with UMWA Objection at 20 (erroneously quoting Cobin's figure as the lowest estimated annual premium).

42-43.) Under the Pre-Application Proposal, the VEBA would receive additional funding in the form of an unsecured claim with substantial value, contributions from profit sharing, and recoveries from litigation relating to the spinoff; under the Post-Application Proposal, the VEBA would receive funding in the form of a 35 percent direct equity stake, contributions from profit sharing, royalties on every ton of coal sold, and recoveries from litigation. (Robertson Decl. Exs. 1-5; Robertson Reply Decl. Exs. 72-73.) Under no realistic set of facts would the UMWA receive nothing from these sources. In fact, using the UMWA's own estimates, the 35 percent stake in the company could alone be valued at approximately (Mandarino Dep. at 103:5-111:10; Huffard Reply Decl. ¶ 49.)

In short, Patriot is left with the clear impression that the UMWA intends to argue that the markets are healthy when such an argument serves its ends (Akunuri Decl. ¶¶ 24-25 (arguing that Patriot's coal pricing assumptions and revenue projections are too low); UMWA Objection at 50 (arguing that Patriot's financial problems are temporary)), while at the same time arguing that reorganized Patriot will have no value. (Cobin Decl. ¶¶ 12, 16 (arguing that no funding for the VEBA other than the initial contribution will materialize); UMWA Objection at 43 (arguing that the VEBA will provide 10 weeks of benefits).) These internally inconsistent positions permeate the UMWA's opposition papers.[21]

Third, the UMWA contends that the Proposals are inequitable because Patriot refused to accept a so-called "snapback." According to the UMWA, this will lead to the unfair result that, as Patriot becomes profitable in the future, non-union employees will benefit while UMWA employees are locked into lower benefits until 2018. (UMWA Objection at 46-47.) This is yet

[21] In support of its argument, the UMWA argues that the current healthcare benefits are not "generous." (UMWA Objection at 43.) Labels aside, Patriot's current plans for UMWA-represented employees and retirees include the following features: no co-insurance, free mail-order prescription drugs, $12 co-payments for visits to physicians, and a maximum out-of-pocket cost of $240 per family per year. (Opening Mem. at 19-21, 37.)

another misstatement of the facts. As an initial matter, Patriot's Proposals include a provision that provides, in no uncertain terms, that UMWA-represented employees will receive a wage increase in the event that a similarly situated non-union employee receives a wage increase to a level that is higher than that of the UMWA-represented employee. (Robertson Decl. Exs. 1-5; Robertson Reply Decl. Exs. 72-73.) Additionally, as Patriot has informed the UMWA time and again, the proposed snapbacks – there are several different kinds in the UMWA's counterproposals – are not feasible because Patriot needs certainty in its cost structure to attract new investors and exit financing. Without that certainty, prospective lenders or investors will not be interested in investing in a company whose cost structure may change dramatically in the middle of the term of the exit financing facility. (Huffard Reply Decl. ¶ 12.) Indeed, Mr. Mandarino, who complained about this issue in his declaration, conceded at his deposition that he was personally unfamiliar with snapback provisions and could not recall working on a labor deal that included one. (Mandarino Dep. at 292:6-293:23.)

Fourth, the UMWA challenges Patriot's analogy to the Gateway CBAs – where the UMWA has accepted many of the elements of Patriot's Proposals – and suggests that the circumstances at Gateway are entirely distinct from the issues before the Court. (UMWA Objection at 47-49.) In so doing, the UMWA misstates the facts relating to these contracts. The UMWA asserts that Patriot is improperly considering "outside labor contracts." Yet the Gateway CBAs are not "outside" labor contracts in any sense of the word; they are contracts, negotiated between Patriot and the UMWA, which are the subject of the instant Motion. (See, e.g., Robertson Decl. Exs. 2, 4 at Tab C (proposals to modify Gateway CBAs).) The UMWA also asserts that the Gateway CBAs cover "formerly non-union operations," and that "[t]he critical factor in the UMWA's agreement to [the Gateway CBAs] was that they provided work to

mines who had vested pensions or retiree care from other work." (UMWA Objection at 48.) However, these assertions are also incorrect. Two of the four mines covered by the Gateway CBAs – the Farley Eagle Mine and the Campbell's Creek No. 10 Mine – had been contractor-operated mines that were covered by "me-too" agreements. Similarly, contrary to the UMWA's assertion that the Gateway mines are essentially retirement communities for miners who already qualify for lifetime healthcare, Patriot's records reflect that only one-third of the individuals employed under the Gateway CBAs have vested benefits from prior work at Patriot. (Lucha Reply Decl. ¶ 15.) Next, the UMWA asserts that wages at the Gateway Eagle Mine were $3.50 per hour higher than under the NBCWA, suggesting that the UMWA demanded higher wages at Gateway in exchange for benefits concessions. (UMWA Objection at 49.) Again, the UMWA misstates the facts, because although there once was a $3.50 per hour variance, wages at the Gateway Eagle Mine are only $1.00 per hour higher than under the NBCWA. (Lucha Reply Decl. ¶ 15.) In short, the Gateway CBAs remain a proper basis of comparison and an illustration that a consensual resolution is possible if the UMWA works productively with Patriot.[22]

For these reasons, Patriot has carried its burden of proving that the Proposals are fair and equitable and the UMWA has not rebutted that proof.

F. The UMWA Has Failed to Produce Evidence that Its Rejections Were Not Without Good Cause

Patriot has established that the UMWA rejected Patriot's first four proposals and, as of the date of filing, the UMWA has not responded to Patriot's Post-Application Proposal. "[O]nce the debtor has shown that the [u]nion has refused to accept its proposal the [u]nion must produce

[22] In its opposition, the UMWA asserts that Patriot "imposed conditions" on it in connection with the Gateway CBAs. (UMWA Objection at 17.) Of course, the Gateway CBAs were freely negotiated contracts and Patriot had no ability to "impose" conditions if the UMWA were unwilling to enter into a contract with those conditions.

evidence that it was not without good cause." Am. Provision, 44 B.R. at 910. The UMWA has failed to do this.

The UMWA advances only two arguments in support of its contention that it rejected the proposals with good cause. First, the UMWA argues that the VEBA will be severely underfunded and therefore it had good cause to reject the Proposals. Yet again, however, the UMWA looks only to the initial $15 million contribution to support its argument. (UMWA Objection at 44-45.) As discussed above, the Proposals include multiple other funding mechanisms, which collectively – and according to the UMWA's own math – are expected to be worth hundreds of millions of dollars.

Second, the UMWA argues that permitting Patriot to modify its collective bargaining agreements and retiree healthcare obligations would condone Peabody's and Arch's actions, turning Patriot into a "mere way-station for Peabody and Arch to shed their retiree obligations." (UMWA Objection at 45-46.) Patriot has consistently taken the position that the acts of Peabody and Arch should be investigated and, for that reason, Patriot and the Creditors' Committee are actively investigating the conduct about which the UMWA complains. In fact, the UMWA's assertions that Patriot has (i) "acted in such a way as to create windfalls for its former parent," and (ii) "essentially dismissed the idea of pursuing its former parent for fraudulent conveyances" (UMWA Objection at 4-5), are – as admitted by the UMWA's witnesses under oath – demonstrably false. As the Court knows, Patriot has already sued Peabody with respect to the Peabody-Assumed Group and has made a motion pursuant to Rule 2004 to seek documents from Peabody with respect to the spinoff investigation.[23] In fact, the UMWA's own witness testified

[23] In its objection and supporting declarations, the UMWA sets forth its version of the facts relating to Peabody, Arch, and related issues. (UMWA Objection at 6-9; Traynor Decl. ¶¶ 5-18.) Patriot does not believe that (….continued)

that he is aware of the investigation, that he is aware of the Rule 2004 motion, and that he has no reason to believe that Patriot would not pursue fraudulent conveyance claims. (Traynor Dep. 119:19-120:24.) While serious causes of action may one day be brought against third parties, the UMWA's rationale for rejecting the Proposals – that it wants to send a message to Peabody and Arch by denying Patriot the relief it needs to survive – simply cannot constitute "good cause" to reject Patriot's Proposals.

G. The UMWA Has Failed to Rebut Patriot's Showing that the Balance of the Equities Favor Implementation

Patriot has satisfied the final element of Sections 1113 and 1114, namely that the "balance of the equities" favors rejection. 11 U.S.C. §§ 1113(c)(3), 1114(g)(3). In its opening memorandum, Patriot established that it will liquidate if the Proposals are not implemented, which will result in the loss of jobs, the elimination of benefits, and the evaporation of value for all of Patriot's creditors. (Opening Mem. at 85-86.) The UMWA has offered two responses to Patriot's arguments, neither of which rebut Patriot's showing.

First, the UMWA argues that the balance of the equities favors denying the Motion because Patriot's financial problems are temporary and Patriot will not liquidate if the Motion is denied. (UMWA Objection at 50.) However, for the reasons discussed above, the UMWA's proposed expert offers market analysis that is flawed at best. Moreover, even assuming that market conditions will improve in coming years, the UMWA's expert fails to show how Patriot can overcome its acute liquidity issues. Even the UMWA's president and lead negotiator has

(continued….)
this proceeding is the appropriate place to confirm or take issue with the UMWA's factual assertions and therefore does not do so herein.

testified that Patriot needs either "a cash infusion" or significant labor savings in order to survive, and that he was unaware of any prospects of a cash infusion. (Roberts Dep. at 39:9-21.)

Second, the UMWA argues that the balance of the equities counsel in favor of denying the Motion because "a strike that cannot be enjoined by the Court will become a reality should the Court reject the collective bargaining agreement and modify retiree benefits." (UMWA Objection at 49; see also UMWA Objection at 50 ("Balancing the equities favors denial of Patriot's motions when the interests of all constituents would benefit from avoiding a strike that will lead to Patriot's liquidation.").) The Court should not condone these threats, which effectively seek to deprive the Court of its ability to issue a ruling based on the evidence before it. These threats also ignore the certainty of liquidation if Patriot does not achieve the necessary cost reductions set forth in the Proposal. Indeed, while liquidation is inevitable in the absence of necessary cost reductions, a strike is not. Mesaba, 341 B.R. at 759. As the court in Horsehead Industries reasoned:

> [a] strike is an inherent risk in every § 1113 motion, and in the end, it makes little difference if the Debtors are forced out of business because of a union strike or the continuing obligation to pay union benefits to avoid one. The unions may have the legal right to strike, but that does not mean that they must exercise that right. The union's right to strike carries with it the burden of holding the fate of the rank and file in its hands. Little purpose would be served by a strike if a strike results in the termination of operations and the loss of jobs by the strikers.

In re Horsehead Indus., Inc., 300 B.R. 573, 587 (Bankr. S.D.N.Y. 2003). Patriot is hopeful that, notwithstanding the heated rhetoric and open threats that have characterized the UMWA's public statements during these proceedings, ultimately the parties will do what is best for the thousands of families who rely on Patriot to provide good jobs and meaningful benefits in the years to come.

For all these reasons, Patriot has established that the balance of equities support the Proposals.

POINT II.

THE COURT SHOULD CONSIDER PATRIOT'S PRE- AND POST-APPLICATION PROPOSALS, EACH OF WHICH SATISFIES THE STATUTORY REQUIREMENTS

Contrary to the argument advanced by the UMWA, the Court should consider Patriot's Pre-Application Proposal – which was the operative proposal at the time the Motion was filed – and Patriot's Post-Application Proposal – which is the most recent proposal. While both proposals satisfy the requirements of Sections 1113 and 1114, the Court need not confine its review to the Pre-Application Proposal.

It is well settled that, under Sections 1113 and 1114, a court may consider proposals made after a debtor files its application to reject collective bargaining agreements and/or modify retiree health benefits. In New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85 (2d Cir. 1992), for example, the Second Circuit considered whether a union had good cause to reject a post-application proposal that was made on the eve of the Section 1113 hearing. Id. at 88. In that case, the Second Circuit reversed the district court's order, which held that the proposal could not serve as a basis for relief, and affirmed the bankruptcy court's order authorizing rejection. Id. at 90-91. The Second Circuit's conclusion is consistent with the express language of Sections 1113(b)(2) and 1114(f)(2), which provides that negotiations must occur "during the period beginning on the date of the making [of the initial] proposal . . . and ending on the date of the hearing." 11 U.S.C. §§ 1113(b)(2), 1114(f)(2) (emphasis added); see also 7-1113 Collier on Bankruptcy P 1113.04 (2013) ("[T]he requirement that the [debtor] bargain with respect to its proposal [prior to the hearing] suggests that Congress was aware of the fact that the [debtor's] initial proposal might be changed pursuant

to the collective bargaining process."). The reasoning is also consistent with the intent of Sections 1113 and 1114, which place the burden on the parties to continue bargaining so as to increase the possibility of a consensual resolution. See Maxwell Newspapers, 981 F.2d at 90.

Other courts throughout the country have reached the same conclusion as the Second Circuit. See, e.g., In re Mesaba Aviation, Inc., 341 B.R. 693, 711 n.19 (Bankr. D. Minn. 2006) (noting that "[t]hrough the midpoint of the evidentiary hearing, the [d]ebtor was up to a seventh variant" of its section 1113 proposal, most of which were made "after this motion was filed," and which the court considered in its analysis), rev'd on other grounds sub. nom. Ass'n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc., 350 B.R. 435 (D. Minn. 2006);[24] see generally 7-1113 Collier on Bankruptcy P 1113.04 (2013) (explaining that courts typically consider post-application proposals and that courts "have been reluctant . . . to create hard line rules in circumstances where the exigencies of bankruptcy might place a premium on flexibility and responsiveness").

In urging the Court to ignore the Post-Application Proposal, the UMWA relies on one district court decision that held that post-application proposals can be relevant to the evaluation of good faith but cannot serve as grounds for the rejection of a collective bargaining agreement. (UMWA Objection at 56 (citing Teamsters Airline Div. v. Frontier Airlines, Inc., No. 09 Civ. 343 (PKC), 2009 U.S. Dist. LEXIS 61699, at *29 (S.D.N.Y. July 20, 2009)).) That case was wrongly decided, has not been cited for the instant proposition by a single court, and is not

[24] See also In re Nw. Airlines Corp., 346 B.R. 307, 325 & n.19 (Bankr. S.D.N.Y. 2006) (holding that it was appropriate to consider proposals made after the commencement of the 1113 hearing), rev'd on other grounds, 349 B.R. 338 (S.D.N.Y. 2006), aff'd, 483 F.3d 160 (2d Cir. 2007); In re Delta Air Lines, 342 B.R. 685, 690 (Bankr. S.D.N.Y. 2006) (observing that "at the instance of the Court, [negotiations] have continued subsequent to the conclusion of the trial," and that "all of Comair's proposals from November through the trial have been premised on obtaining" certain levels of cost reductions); In re Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986) (explaining that any proposal made prior to the commencement of the Section 1113 hearing could be considered), aff'd, 78 B.R. 671 (S.D.N.Y. 1987), aff'd on other grounds, 848 F.2d 345 (2d Cir. 1988).

binding on this Court. Moreover, its holding renders the statutory text meaningless, and therefore runs afoul of an elementary principle of statutory construction. See Marx v. Gen. Revenue Corp., __ U.S. __, 133 S. Ct. 1166, 1181-82 (2013) ("Under this most basic of interpretative canons, a statute should be constructed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotation marks, alterations, and citation omitted). The error in the Frontier court's reasoning is that Sections 1113(c)(1) and 1114(g)(1) provide that a court shall grant a motion for relief if the debtor has made a proposal that satisfies the statutory requirements "prior to the hearing." 11 U.S.C. §§ 1113(c)(1), 1114(g)(1) (emphasis added). By contrast, other subsections require the debtor to take specific actions "prior to filing an application," 11 U.S.C. §§ 1113(b)(1), 1114(f)(1) (emphasis added), and because a hearing on a motion under Section 1113 or 1114 *always* follows the application itself, any proposal that satisfies the pre-application requirement will necessarily satisfy the pre-hearing requirement. Thus, the construction adopted by the Frontier court renders the words "prior to the hearing" meaningless.[25]

In any event, the very case that the UMWA cites stands for the proposition that a debtor must continue to negotiate "until the start of the section 1113 hearing," not for the proposition that negotiations must be frozen at the time a motion is filed. Frontier, 2009 U.S. Dist. LEXIS 61699, at *14. Indeed, in the very passage cited by the UMWA, the Frontier court acknowledged that post-application proposals, like the one at issue here, "play an important part

[25] Indeed, any other conclusion would lead to absurd consequences. When Patriot delivered the Post-Application Proposal, it could have withdrawn and immediately re-filed the Motion and still kept the hearing date intact (because more than fourteen days remained before April 29). Had Patriot done so, there could be no debate that the Post- Application proposal "counts." Congress did not intend the statute to require a debtor to take such artificial steps.

Similarly, the UMWA itself supplied a counterproposal after the Motion was filed. (Robertson Reply Decl. ¶¶ 23-24.) Thus, the UMWA is apparently advocating for a position that would allow it to make a post-application proposal and present that to the Court, but would prohibit Patriot from doing the same.

in the statutory scheme" and "are relevant to the statute's good-faith negotiation requirement and to whether a union has good cause to reject the debtor's proposal." (UMWA Objection at 56 (quoting Frontier, 2009 U.S. Dist. LEXIS 61699, at *29).) Accordingly, instead of arguing that the Post-Application Proposal smacks of "bad faith," the UMWA must concede that such proposals are relevant to the inquiry under Sections 1113 and 1114.

For these reasons, the Court should consider Patriot's Pre-Application Proposal and Post-Application Proposal.

POINT III.

THE UMWA FUNDS HAVE FAILED TO REBUT PATRIOT'S SHOWING THAT THE PROPOSALS SATISFY SECTIONS 1113 AND 1114

Like the UMWA, the UMWA Funds oppose the Motion [ECF Nos. 3623, 3624].[26] However, the UMWA Funds' position that eliminating contributions to certain multi-employer benefit plans would result in diminished funding for those plans does not undermine Patriot's showing that the Proposals satisfy Sections 1113 and 1114.

A. Like the UMWA, the UMWA Funds Have Failed to Rebut Patriot's Showing that the Proposals Are Necessary

The UMWA Funds advance two arguments regarding necessity, each of which lacks merit.[27] First, the UMWA Funds assert that Patriot has failed to negotiate with them regarding ways to avoid eliminating contributions, which renders the Proposals unnecessary. (1974 Plan

[26] The 1974 Pension Plan and the 1993 Benefit Plan filed a joint objection. [ECF No. 3623]. The Retiree Bonus Plan filed a joinder to the joint objection. [ECF No. 3624].

[27] Notably, the UMWA Funds do not argue that Patriot's projected savings attributable to eliminating contributions are unreasonable, and they do not dispute that continuing to contribute to the 1974 Pension Plan could have a devastating financial impact on Patriot. (1974 Plan Objection ¶¶ 51-55.) Indeed, the UMWA Funds admit that if the expected contribution rates that they sent to contributing employers were implemented beginning in 2017 (Deposition of Dale Stover ("**Stover Dep.**") Ex. 3), it would create a "very . . . trying time" and would make it "very difficult" for coal companies to continue to operate. (Stover Dep. at 43:15-46:7, 47:22-48:12.)

Objection ¶¶ 53-54.[28]) This argument confuses the UMWA Funds' role in these cases. Although the Court granted the UMWA Funds' motion to intervene last month to allow them to participate in the hearing, Section 1113 requires only that Patriot negotiate in good faith with the "authorized representative" of employees covered by the collective bargaining agreement to be rejected, 11 U.S.C. § 1113 (b)(1)(A), which is indisputably the UMWA. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223-24 (1977) (describing the union as the "exclusive representative" of its members) (emphasis added). In fact, even the cases cited by the UMWA Funds are consistent with Patriot's construction of the statute. (1974 Plan Objection ¶¶ 54-55 (citing In re K&B Mounting, Inc., 50 B.R. 460, 465 (Bankr. N.D. Ind. 1985) ("[T]here must be evidence of good faith negotiations with the union before the debtor turns to the court."); In re Fiber Glass Indus., Inc., 49 B.R. 202, 206 (Bankr. N.D.N.Y. 1985) ("Section 1113(b)(1)(B) requires the debtors to provide the Union representative with 'such relevant information as is necessary to evaluate the proposal.'"); In re Pinnacle Airlines Corp., 483 B.R. 381, 405 (Bankr. S.D.N.Y. 2012) (requiring "that the debtor bargain in good faith with the union").) This argument also glosses over the fact that the UMWA Funds' own witness testified that it will be "very difficult" for any coal company to survive in light of anticipated increases in contribution rates to the 1974 Pension Plan. (Stover Dep. at 45:18-46:7 ("[W]ith my knowledge of the coal industry through my years it would be difficult for companies in the competitive market to operate with these high rates.").)

Second, the UMWA Funds assert that the Proposals are not necessary because eliminating contributions to the 1974 Pension Plan hinders Patriot's ability to effectively

[28] The UMWA Funds also suggest that failure to negotiate directly with them impacts the equity of the Proposals. (1974 Plan Objection ¶ 2.) This half-hearted attempt to shoehorn a requirement to engage in good faith negotiations with the UMWA Funds based on Section 1113's fairness requirement is similarly without merit.

reorganize by creating a withdrawal liability claim that would be owed jointly and severally by each of the Debtors and "would almost certainly require substantive consolidation . . . that may not be available." (1974 Plan Objection ¶ 51.) As a threshold matter, Patriot does not necessarily agree with the UMWA Funds that withdrawal would give rise to a claim of this magnitude and scope.[29] Moreover, the size of the UMWA Funds' unsecured claim has no bearing on whether the Proposals are economically necessary for Patriot to survive, which is the touchstone of the inquiry under Sections 1113 and 1114. In any event, Patriot has addressed this concern in both its Pre-Application and Post-Application Proposals.

The Fourth 1113 Proposal

In the Fourth 1113 Proposal, Patriot agreed to "negotiate a mutually agreeable post-emergence payment stream with the UMWA 1974 Pension Plan" to satisfy any withdrawal liability arising under ERISA from eliminating the obligation to contribute to the 1974 Pension Plan. If an agreement cannot be reached, Patriot will "pay the resulting withdrawal liability over time as provided for in section § 4219(c)(1)(A) of ERISA." (Robertson Reply Decl. Ex. 72 (Article XX, Section 2).)[30] Patriot believes that under either of these scenarios, the UMWA Funds will not be entitled to an unsecured claim and can pay the withdrawal liability in installments over time. The UMWA Funds argue, however, that Patriot's liability "cannot be

[29] Assuming arguendo that withdrawing from the 1974 Pension Fund gives rise to a claim, the UMWA Funds cite no case law indicating that the size of a general unsecured claim has any bearing on whether the proposal is necessary. In fact, "[i]n determining 'necessity,' the proposal must be viewed as a whole, and not by its specific elements," and the piecemeal approach is precisely what the Funds are doing here. (Opening Mem. at 67 (citing In re Horsehead Indus., Inc., 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003).) Moreover, assuming a claim were created, the Debtors believe the amount would be approximately $287 million, which further undermines any purported threat to reorganization. One thing is certain: the size of any unsecured claim associated with Patriot's withdrawal from the 1974 Pension Plan should not be litigated in the context of this proceeding.

[30] Contrary to the UMWA Funds' assertion that the Post-Application Proposal "has no bearing" on whether Patriot is entitled to relief (1974 Plan Objection ¶ 17), the Court should evaluate the Post-Application Proposal when deciding whether Patriot is entitled to the relief requested in the Motion. See supra Section II.

paid in installments" because Patriot has committed a "default" under the Plan documents.[31] (1974 Plan Objection ¶¶ 16-17.) The UMWA Funds concede that – outside of bankruptcy – an employer is entitled under ERISA to pay withdrawal liability in equal annual installments calculated under ERISA § 4219(c)(1)(A). (1974 Plan Objection ¶¶ 16-17.) ("[A]n employer shall pay the amount determined . . . over the period of years necessary to amortize the amount in level annual payments . . . ."); Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414, 415 (1995) ("The statute permits the employer to pay that [withdrawal liability] charge in lump sum or to 'amortize' it, making payments over time.").[32] The argument that Patriot cannot make withdrawal liability payments in annual installments because it is in bankruptcy is meritless for multiple reasons.

First, the UMWA Funds' assertion that Patriot meets the definition of "default" is based on a definition that was added to the Plan documents in 1983 (the "**Additional Definitions**") and apparently was never circulated to Patriot's predecessors, Patriot itself or any other employers associated with the Plan since 1983. Indeed, the UMWA Funds' Director of Finance testified that he is the person who would have sent these rules to employers beginning no later than 2003 and that he has not done so. (Stover Dep. at 81:21-82:2.) Moreover, even assuming Patriot received the Additional Definitions at some point, those definitions have never been incorporated

[31] ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5), provides that, "[i]n the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability." ERISA defines default as: (A) missing a payment or (B) "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5)(A), (B).

[32] See also Stover Dep. at 67:20-68:3 ("Q: And do you agree that by applying this formula for making the annual payments, that the Patriot Group would pay a year in annual payments? A: If this was what we would consider a normal case, but it is my understanding that this particular Debtor, by being in bankruptcy, is creating a different area of a withdrawal."); id. at 68:6-23 ("Q: But to take it outside the bankruptcy scenario . . . you can pay that [withdrawal liability] off in annual installments of a year? A: Yes. If this was completely a normal situation, and this was just not a bankruptcy situation . . . [t]hey would have had the option of paying monthly payments . . . .").

into the Plan documents; the Additional Definitions state that they supplement a definition contained in Article X Section H of the Plan, but that section simply does not exist.

Second, declaring default in this case would exceed the 1974 Pension Plan's authority under ERISA because the fact that Patriot filed for chapter 11 protection does not indicate a "substantial likelihood" that following emergence, reorganized Patriot "will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5)(B); see also 49 Fed. Reg. 22,642 (May 31,1984) (rules may include "additional definitions of default which indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability"). Indeed, this Court cannot approve a plan of reorganization under which there is a "substantial likelihood" that the reorganized debtor is unable to meet its financial obligations. See 11 U.S.C. § 1129(a)(11) (requiring bankruptcy court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization").

Third, the UMWA Funds' position concerning default would violate the Bankruptcy Code's ipso facto provisions. 11 U.S.C. §§ 365(e)(1), 541(c)(1).[33] Indeed, courts have repeatedly found that Sections 365(e) and 541(c) invalidate provisions that purport to alter a party's rights upon commencement of a chapter 11 case or based on a chapter 11 debtor's financial condition. See Lehman Bros. Special Fin., Inc. v. BNY Corporate Trustee Servs., Ltd.

[33] Section 365(e)(1) states that, "notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on (A) the insolvency or financial condition of the debtor at any time before the closing of the case [or] (B) the commencement of a case under this title." Section 541(c)(1) similarly prevents "any provision in an agreement" or "applicable nonbankruptcy law" from altering the Debtors' property interests based on "insolvency or financial condition of the debtor" or "the commencement of a case under this title." See Lehman Bros. Special Fin., Inc. v. BNY Corporate Trustee Servs., Ltd. (In re Lehman Bros. Holdings, Inc.), 422 B.R. 407, 420 (Bankr. S.D.N.Y. 2010) (holding unenforceable, under Section 541(c)(1), contractual provisions purporting to change priority in collateral upon filing for bankruptcy). The term applicable non-bankruptcy law in Section 541 includes ERISA. See Iannacone v. N. States Power Co. (In re Conlan), 974 F.2d 88, 89 (8th Cir. 1992).

(In re Lehman Bros. Holdings, Inc.), 422 B.R. 407, 412 (Bankr. S.D.N.Y. 2010) (holding provisions purporting to reverse the priority of swap termination payments upon commencement of bankruptcy were "unenforceable and violate[d] the ipso facto provisions of the Bankruptcy Code"); In re Texaco, Inc., 73 B.R. 960 (Bankr. S.D.N.Y. 1987) (invalidating provisions purporting to accelerate liability upon chapter 11 filing); In re Horton, 15 B.R. 403 (Bankr. E.D. Va. 1981) (invalidating clause purporting to permit a creditor to declare due the entire unpaid balance of a retail installment contract). In short, the ipso facto clause prohibition invalidates not only the Additional Definitions defining default as filing for bankruptcy, but also every definition of default that relates to the "financial condition of the debtor." 11 U.S.C. § 365(e)(1)(A); 11 U.S.C. § 541(c)(1)(B).

Fourth, even assuming that the 1974 Pension Plan could declare a default and demand a general unsecured claim, it has discretion to choose to accept post-emergence annual payments instead. See Chicago Truck Drivers v. El Paso CGP Co., 525 F.3d 591, 602 (7th Cir. 2008) (holding that acceleration of withdrawal liability upon default is permissive, not mandatory). Declining to exercise that discretion would represent a lose-lose proposition for the UMWA Funds and their beneficiaries, on the one hand, and Patriot and its estates, on the other hand.

Accordingly, the UMWA Funds' concern that Patriot's withdrawal will give rise to a large unsecured claim is unfounded. Under the Fourth Proposal, it will have no such effect.

The Fifth 1113 Proposal

Under the Fifth 1113 Proposal, Patriot proposes to take this issue entirely off the table, provided the UMWA and the UMWA Funds address Patriot's concerns regarding the possibility of sharply increased contribution obligations in the future. Given the strong concerns raised by the UMWA and the UMWA Funds regarding the impact of Patriot's withdrawal from the 1974

Pension Plan, Patriot would agree to not withdraw from the 1974 Pension Plan if: (1) the UMWA agrees not to amend the NBCWA between now and January 1, 2017 to provide for higher contribution rates than the rates currently reflected in today's CBA; and (2) the UMWA Funds agree to allow Patriot to withdraw from the 1974 Pension Plan on or after January 1, 2017 in the event that there is a material increase in Patriot's contribution rates compared to the currently scheduled rate for 2016. This compromise will address the UMWA and UMWA Funds' concerns by obligating Patriot to continue to contribute to the 1974 Pension Plan for now, while addressing Patriot's concerns that sharply increasing rates in the future will impose a debilitating obligation that will deter potential exit financiers from investing in Patriot now for fear that the company risks another insolvency proceeding down the road. If the UMWA and UMWA Funds refuse to accept the Fifth 1113 proposal, Patriot will revert to the Fourth 1113 Proposal which, as set forth above, addresses the concern the parties have raised about the unsecured claim associated with the 1974 Pension Plan.

Patriot has made every effort to tailor its Proposals to the concerns that the UMWA, UMWA Funds, and other stakeholders have expressed. Both the Fourth 1113 Proposal and the Fifth 1113 Proposal provide a balanced approach with respect to the UMWA Funds' potential unsecured claim and should have been endorsed by these parties, even if they found other portions of the Proposals to be objectionable.

B. Like the UMWA, the UMWA Funds Have Failed to Rebut Patriot's Showing that the Proposals Are Fair and Equitable

The UMWA Funds assert that the Proposals are inequitable because (i) they will cause the UMWA Funds to become more underfunded; (ii) they will decrease benefits paid to UMWA Fund beneficiaries; and (iii) they impose on the UMWA Funds an obligation to administer the VEBA. The Funds' arguments are without merit.

1. Eliminating Contributions to the UMWA Funds Will Have Minimal or No Impact on the UMWA Funds or Their Beneficiaries

(a) Eliminating Contributions to the 1974 Pension Plan Is Not Inequitable

The UMWA Funds' argument that eliminating contributions will harm the 1974 Pension Plan and its beneficiaries has three critical flaws. First, the UMWA Funds neglect to mention that, if Patriot were to withdraw from the 1974 Pension Plan, Patriot would not stop making contributions altogether. Rather, under the Fourth 1113 Proposal, it would make annual withdrawal payments that would approximate prior annual contributions. (Declaration of Dale Stover [ECF No. 3623-1] ("**Stover Decl.**") ¶ 17; see also Stover Dep. at 103:3-103:17 ("Q: [Do] the representations or statements in your declaration concerning the impact of Patriot ceasing contributions to the plan take into account the fact that there would be withdrawal liability paid to the plan as a result of the cessation of contributions? A: No.").) This is precisely the purpose of ERISA's withdrawal liability provisions – to provide multiemployer pension plans with continued annual contributions approximating those made by an employer prior to withdrawal. See ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc., 846 F.2d 879, 881 (2d Cir. 1988) ("The purpose of withdrawal liability 'is to relieve the funding burden on remaining employers . . . .'") (quoting H.R. Rep. No. 96-869, pt. 1, at 67 (1980), reprinted in 1980 U.S.C.C.A.N. 2918, 2935).)[34]

Second, the UMWA Funds take the wishy-washy position that eliminating contributions "may affect benefit levels of future retirees . . . if the loss of funding causes the 1974 Plan to

[34] This does not suggest withdrawal is unnecessary because, although annual withdrawal liability payments may be slightly more costly to the Debtors in the near term, it will provide them with significantly larger necessary savings from 2017 forward when contributions are expected to be from to per year. (Lucha Decl. ¶ 33 & Fig. 1.) Patriot seeks to eliminate the risk of these crushing contribution levels, which the UMWA Funds admitted would make it "very difficult" for coal companies to operate. (Stover Dep. at 43:15-46:7; 47:22-48:12.)

become reorganized or insolvent . . . ."[35] (Stover Decl. ¶ 19 (emphasis added).) The UMWA Funds, however, have not analyzed whether the loss of Patriot's contributions will cause the 1974 Pension Plan Funds to become insolvent (Stover Dep. at 39:9-13) and, therefore, do not argue that eliminating contributions will decrease benefits received by 1974 Pension Plan beneficiaries. Patriot's contributions in 2012 to the 1974 Pension Plan were less than one half of one percent of the Plan's total assets, and a mere three percent of benefits paid.[36] Thus, it strains credulity to assume without analysis that eliminating Patriot's contributions would cause the 1974 Pension Plan's insolvency, a necessary precondition to any reduction in payments to beneficiaries. (Stover Decl. ¶ 19.)

Third, implicit in the UMWA statements that eliminating contributions "may affect the benefit levels of future retirees" (Stover Decl. ¶ 19 (emphasis added)) is the reality that current beneficiaries of the 1974 Pension Plan will receive their guaranteed benefits at current levels at least until December 31, 2016 when the NBWCA of 2011 expires.

For all of these reasons, the Proposals are not unfair or inequitable to the UMWA Funds.

(b) Eliminating Contributions to the 1993 Pension Plan and the 2012 Bonus Trust Is Not Inequitable

The cost of failing to implement Patriot's Proposals would be far more devastating to the 1993 Pension Plan and the 2012 Bonus Trust and their beneficiaries than is any small reduction in benefits that may flow from eliminating contributions to these multiemployer plans.

[35] The UMWA Funds' references to the 1974 Plan's "Seriously Endangered" status is a red herring since, according the Funds' declarant, the 1974 Pension Plan was "Seriously Endangered" since 2011 as a result of the financial downturn, not as a result of any actions taken by Patriot. (Stover Dep. at 28:20-29:7; Stover Decl. ¶ 13.)

[36] (Stover Decl. ¶ 17 (listing Patriot's 2012 contributions as $20.9 million); Stover Dep. at 29:21-25 (estimating current assets at $4.2 billion); Stover Decl. Ex. 2 at 55 (listing assets of $4.2 billion as of June 30, 2012); Stover Decl. ¶ 13 (stating 1974 Pension Plan pays $650 million in benefits annually).) Moreover, potential harm resulting from the Plan's insolvency is mitigated by the Pension Benefit Guaranty Corporation's guarantee of those benefits. (Stover Decl. ¶ 19.)

The 1993 Plan covers a limited group of retirees whose last signatory employer is no longer in business and such retirees are not otherwise covered and receiving benefits under the Coal Act. (Stover Decl. ¶ 31.) Thus, any reductions in benefits paid by the 1993 Plan would not impact any of Patriot's employees. In stark contrast, however, if Patriot is "no longer in business" because it is forced to liquidate, the 1993 Benefit Plan asserts that it would be inundated with a 400 percent increase in the number of beneficiaries. (Stover Decl. ¶ 42.) Becoming responsible for thousands of new beneficiaries if Patriot were to liquidate would present a far greater risk to the 1993 Plan than eliminating Patriot's annual contribution of approximately $3.7 million. (Stover Decl. ¶ 38.) Finally, the impact of any reduced benefits is lessened compared to other potential cuts because benefits paid by the 1993 Plan are "secondary" to Medicare. (Stover Dep. at 106:16-21; 107:19-21.)

The Bonus Plan, established under the 2011 NBCWA, intends to make a bonus payment of approximately $500 on November 1 of 2014, 2015, and 2016 to participants in the 1974 Pension Plan, including Patriot's employees. (Declaration of Dale Stover in Support of Objection and Joinder of the 2012 Retiree Bonus Account Trust [ECF No. 3624-1] ("**Stover Retiree Bonus Plan Decl.**") ¶¶ 5-7.) The precise amount of these non-guaranteed bonus payments depends on the amounts of Funds collected from the nineteen contributing employers and the appreciation of the Bonus Plan's assets. (Id. ¶ 6.) These payments are made in addition to pension benefits received under the 1974 Pension Plan. (Id. ¶¶ 7-8) Although the amount of these bonus payments could decrease by approximately 15 percent for all Bonus Plan

participants (approximately from $500 to $425) (Stover Retiree Bonus Plan Decl. ¶ 14) the elimination of this bonus payment is necessary and equitable for the reasons discussed above.[37]

2. The Option to Administer the VEBA Does Not Render the Proposals Inequitable

The UMWA Funds argue repeatedly that the Proposals are unfair because they would be forced to administer the VEBA. That is untrue and reflects a misreading of the Proposals. Every single Proposal has made clear that either the UMWA Funds or the UMWA itself can administer the VEBA. If the UMWA Funds do not want to administer the VEBA, they need only say so (something they have not done to date). In short, Patriot's Proposals impose no obligation on the UMWA Funds at all. (Robertson Decl. Exs. 1-5; Robertson Reply Decl. Exs. 72-73.)

Accordingly, the UMWA Funds' final fairness argument is meritless because it is based on the false premise that it is required to administer the VEBA, when no such requirement exists.

POINT IV.

COMPETING COAL COMPANIES FAIL TO REBUT PATRIOT'S SHOWING THAT THE PROPOSALS SATISFY SECTIONS 1113 AND 1114

Seven of Patriot's competitors (the "**Competitors**") have filed four objections asserting that Patriot must tailor the Proposals to account for their interests [ECF Nos. 3326, 3585, 3586, 3617, 3618]. Like the UMWA and the UMWA Funds, the Competitors do not counter Patriot's clear showing that the Proposals satisfy Sections 1113 and 1114.

[37] The UMWA Funds' sole explanation for why the Proposals are unfair is that Patriot has sought to pay bonuses to certain members of management. (1974 Plan Objection ¶¶ 58-60.) For the reasons discussed in Section I-A, supra, however, necessary incentive and retention payments to management do not undermine the necessity or fairness of eliminating contributions to the UMWA Funds.

A. The Competitors Lack Grounds to Object to the Motion

Patriot understands that the Court has permitted third parties to file pleadings and to make opening and closing statements – but not present evidence or examine witnesses – at the hearing on the Motion. Yet six of the seven of the Competitors stand out as having no claim, or a claim that is small and apparently was purchased solely for the purpose of objecting to the Motion:

- The Ohio Valley Coal Company acquired a $4,000 claim on the day that it filed its objection. [ECF No. 3325, 3326 at 3 n.3].
- Its affiliate, the Ohio Valley Transloading Company, appears to have held no claim at the time it filed its objection. [ECF No. 3325, 3326 at 3 n.3].
- Four coal companies – Energy West, Cliffs Natural Resources, Oak Grove Resources, and Pinnacle Mining Company – had no claim at the time they filed their objections. [ECF No. 3586, 3618].
- Only one of the Competitors, Drummond, held a claim of a non-negligible size at the time it filed its objection. [ECF No. 3585].

These interests are so attenuated that these objections should be given little, if any weight.

B. The Competitors Fail to Rebut Patriot's Showing on the Merits

Even if they had valid grounds to object to the Proposals, the Competitors fail to rebut Patriot's showing that the Proposals are both necessary and equitable.[38] Instead, the Competitors rely on a distortion of the standards under Section 1113 and 1114 to argue that Patriot's reorganization must be tailored to meet their needs. The Competitors' claims are unavailing and should not be allowed to derail Patriot's emergence from bankruptcy.

[38] In addition to duplicating the arguments on necessity and equity set out in the Drummond Objection, the Energy West Objection, 11-13, asks this Court to assign administrative priority to any claim of the UMWA Funds. This is neither the time nor the place to determine the amount or priority of any claim. The allowance of a claim is subject to entirely separate proceedings under 11 U.S.C. §§ 502 or 503.

1. The Competitors Fail to Counter Patriot's Showing that the Proposals Are Necessary

The Competitors advance four basic arguments to support their claim that the Proposals are not necessary. These arguments are flawed, internally inconsistent, and insufficient to rebut Patriot's showing of necessity.

First, the Competitors argue that Patriot "may not now claim that ceasing contributions to and withdrawing from the [1974 Pension] Plan is necessary when, as the present situation plainly demonstrates, they are financially capable of making such contributions without harming their current business operations." (Drummond Objection at 7; Energy West Objection at 7.[39]) This assertion betrays an ignorance of the most basic facts of this bankruptcy. In fact, it is undisputed that Patriot will run out of cash at the beginning of 2014 and liquidate unless it obtains the cash savings outlined in the Proposals. Moreover, the Competitors disregard the fact that Patriot's contributions under the 1974 Pension Plan are scheduled to triple between now and 2021. (Opening Mem. at 41-43.)

Second, the Competitors argue that withdrawal is not necessary because the proposal to replace contributions to the 1974 Pension Plan with a 401(k) benefit is an "explicit[] recogni[tion] that providing a retirement benefit is necessary to retaining a workforce." (Drummond Objection at 8; Energy West Objection at 7-8.) Like their first argument, this position is incoherent. Patriot's proposal to make lower, fixed-rate contributions to a 401(k) or similar plan cannot possibly "disprove" Patriot's urgent need for relief from its substantial and growing liabilities to the 1974 Pension Plan; indeed, the various pension-related modifications

[39] Cliffs joins in Drummond and Energy West's "statements and arguments entirely." (Cliffs Objection, 4.)

yield net cash savings of per year, even taking into account the contributions to a 401(k) or similar plan. (Opening Mem. at 47-48.)

Third, the Competitors attack – with no basis in fact – Patriot's showing of necessity. They claim that contribution increases in 2016 are too far off to factor into the necessity inquiry; that rising coal prices or federal interest rates may make contribution increases unnecessary; and that Congress might step in to bail out the 1974 Pension Plan. These entirely speculative claims are completely unsupported and cannot constitute a basis to reject the exhaustive factual support Patriot has offered to substantiate the necessity of its proposals. Moreover, these contingencies are as likely to mitigate any harm to the Competitors as they are to make the Proposals less necessary.

Finally, Ohio Valley Coal alone makes the claim that the potential for claims against Peabody or Arch must be weighed in determining the Proposals' necessity.[40] (Ohio Valley Coal Objection at 7.) Patriot addressed this issue at length in its opening brief. (Opening Mem. at 72-75.) With no basis in law or fact, Ohio Valley Coal "submits that the potential litigation claims . . . may have value that exceeds the $150 million in cost savings sought by the Debtors. . . ." (Ohio Valley Coal Objection at 7.) This statement is no better than Ohio Valley Coal's offhand guess – as it must be – because no one at this point knows if, when, or how much Patriot will recover from Peabody or Arch. (See, e.g., Traynor Dep. at 115:22-118:3.) Moreover, it appears to ignore the fact that Patriot requires savings of $150 million per year. Apart from a single

[40] Ohio Valley Coal also argues that Patriot has an obligation to provide the UMWA with information regarding these potential claims. (Ohio Valley Coal Objection at 8.) Not only is the UMWA the proper party to make such an objection, but Ohio Valley Coal appears to have ignored the record in this case once again. In fact, Patriot has provided the UMWA with the information it requested regarding potential claims against Peabody and Arch, while reserving its rights with respect to the relevance of those materials. (See, e.g., Robertson Decl. ¶ 81.)

citation to a case on the requirements for plan confirmation, which is completely inapposite, Ohio Valley Coal offers nothing to contradict Patriot's argument but its own opinion.

2. The Competitors Fail to Counter Patriot's Showing that the Proposals Are Fair and Equitable

At bottom, the Competitors are motivated by a single concern: that Patriot's successful emergence from bankruptcy might someday cost them money. (Drummond Objection at 10-11; Energy West Objection at 10-11; Ohio Valley Coal Objection at 8-10.) This concern is entirely speculative.

Patriot is actively seeking a resolution concerning withdrawal from the 1974 Pension Plan and, as such, the Competitors' concerns are highly speculative. Indeed, the UMWA Funds' own witness has testified that contributions from other employers would not increase during the term of the current CBAs if Patriot ceased to contribute to the 1974 Pension Plan. (Stover Dep. at 39:19-40:4.) Additionally, even if Patriot withdraws from the 1974 Pension Plan and the UMWA Funds are unable to make a full recovery, it will be up to the 1974 Pension Plan trustees to decide whether to deal with any shortfall by increasing member contributions, instead of seeking other relief. In short, there is nothing pre-ordained about the result the Competitors fear, and no reason to delay the relief Patriot urgently needs for the sake of its competitors.

As a corollary to these concerns, Ohio Valley Coal argues that Patriot's Motion for Authority to Implement Compensation Plans (the "**Compensation Motion**") [ECF No. 2819] "calls into question the Debtors' ability to satisfy the fair and equitable requirement of [S]ection 1113. . . ." (Ohio Valley Coal Objection at 10-11.) This statement conflates two distinct proceedings and legal standards, seeks to relitigate an issue that has been fully litigated and is sub judice, and ignores the fact that Patriot's management has endured significant reductions in headcount, compensation, and benefits in recent months.

Finally, Cliffs argues that the "obvious negative response to the Motion demonstrates that the proposal submitted by Patriot is not considered fair and equitable to [sic] the affected parties," and points out that "no consent of the employees has been given." (Cliffs Objection at 4.) Motions under Sections 1113 and 1114 are not decided by vote; whether the Proposals are fair and equitable is a matter for the Court to decide. While a consensual resolution may require a vote of the UMWA, the union cannot reject the Proposals without legally sufficient good cause.

For these reasons, the Competitors fail to rebut Patriot's showing that it has satisfied Sections 1113 and 1114.[41]

POINT V.

THE PROPOSALS OFFER A CONCESSION TO THE UMWA THAT IS TYPICAL OF LARGE BANKRUPTCIES AND THE COURT NEED NOT CONSIDER SUBSTANTIVE CONSOLIDATION NOR WAIT UNTIL PLAN CONFIRMATION TO RULE ON PATRIOT'S MOTION

Several parties have objected to the Motion on grounds that the relief requested requires the Court to rule on the substantive consolidation or non-consolidation of the Debtors' estates.[42] [ECF Nos. 3605, 3606, 3608, 3616]. One of these parties – the Creditors' Committee – supports

[41] Ohio Valley Coal filed an objection on March 19, 2013 [ECF No. 3326] and on April 12, 2013, it inexplicably filed an additional objection [ECF No. 3617], styled as a "brief in support of [its] objection." In fact, Ohio Valley Coal's initial filing was a brief of equal length, which made similar arguments. Patriot has moved to strike this second bite at the apple, and this reply memorandum addresses only the first objection. Suffice it to say that the second objection adds almost nothing to the arguments advanced by the first objection and by the other Competitors. Rather, Ohio Valley Coal took the trouble of making yet another submission to suggest its own ideas for a settlement between Patriot and the UMWA Funds, and to make a demand for a portion of any proceeds received from litigation against Peabody or Arch. Ohio Valley Coal by now should recognize that under the Proposals, unsecured creditors will be able to share in certain litigation recoveries; Patriot will not otherwise address this self-serving demand.

[42] The parties who have objected, at least in part, on the basis of substantive consolidation or non-consolidation include U.S. Bank [ECF No. 3605]; Wilmington Trust [ECF. No. 3606]; the Sureties [ECF No. 3616]; and Aurelius and Knighthead [ECF No. 3608] (the "Noteholders' Objection").

the Motion and the remaining parties do not undermine Patriot's clear showing that the Proposals satisfy Sections 1113 and 1114.

A. Patriot's Proposals Do Not Require the Court to Address Substantive Consolidation, and Arguments to the Contrary Are Misplaced

Patriot has neither raised nor argued the issue of substantive consolidation. Nevertheless, the objections speculate that Patriot "may effectively be requesting" or "appear to rely" on a substantive consolidation plan. (U.S. Bank Objection ¶ 2; Wilmington Trust Objection ¶ 4.) There is no reason to engage in such speculation.

There are several reasons why the Post-Application Proposal does not require a ruling on substantive consolidation or non-consolidation, but foremost among them is that the 35 percent equity stake in the reorganized enterprise can be achieved based on the claims that the UMWA would have against the ten Obligor Companies alone. (Huffard Reply Decl. ¶ 47.) Furthermore, Patriot and its advisors are also analyzing information that the Court might deem relevant to a substantive consolidation analysis, and currently believe that there are facts that both support and argue against substantive consolidation. Patriot and its advisors believe there as it least some risk that, if this issue were to be fully litigated, the Court could impose substantive consolidation. For this additional reason, Patriot believes that at least some weight should be given to the possibility of substantive consolidation and that 35 percent remains an appropriate offer while factoring in that weight. (Huffard Reply Decl. ¶¶ 45-47.)

Nonetheless, consideration of substantive consolidation is wholly premature. In the vast majority of cases addressing substantive consolidation, the issue is not heard until the confirmation hearing. See, e.g., In re WorldCom, Inc., No. 02-13533 (AJG) (Bankr. S.D.N.Y. July 21, 2002) (substantive consolidation addressed at confirmation hearing despite objection and motion that it be considered prior to approval of disclosure statement); In re Apex Oil Co.,

118 B.R. 683, 693 (Bankr. E.D. Mo. 1990) (substantive consolidation proposed in chapter 11 plan and addressed at confirmation hearing). Patriot does not take a position on substantive consolidation at this time, except to note that it is appropriate when crafting the Proposals to consider the risk that the Court would substantively consolidate the Debtors. (Huffard Reply Decl. ¶ 58.)

Similarly, Patriot's prior proposals do not require a ruling on substantive consolidation either. Under the Pre-Application Proposal, the VEBA would receive additional funding in the form of an unsecured claim, contributions from profit-sharing, and recoveries from certain litigation. The creditor constituencies object that the Pre-Application Proposal does not specify the value of the unsecured claim or whether it would be attributable to all of the Debtor entities. As with the Post-Application Proposal, the analyses that underpin the Pre-Application Proposal do not assume substantive consolidation. (Huffard Decl. ¶ 69; Deposition of Paul P. Huffard ("**Huffard Dep.**") at 299:6-300:23.)

In short, the Court need not rule on an issue that is not before it and may never come before it.

B. Patriot's Proposals Offer the UMWA Concessions that Are Often Part of Settlements of Disputes Under Sections 1113 and 1114

There is no merit to the argument advanced by certain creditor constituencies that the Court must wait to rule on the Motion because the relief includes an equity stake under the Post-Application Proposal. Indeed, it is routine in chapter 11 cases for unions to receive an equity stake in the reorganized enterprise. A recent example is the American Airlines reorganization, in which the pilots' union received 13.5 percent of the equity of the reorganized debtor issued to holders of allowed prepetition general unsecured claims. In re AMR Corp., No. 11-15463 (SHL) (Bankr. S.D.N.Y. Dec. 19, 2012). Other examples include General Motors, which provided a

union VEBA that would be partially funded through a 17.5 percent equity stake in the reorganized company, In re Gen. Motors Corp., 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009), and the Chrysler reorganization, which approved a pre-bankruptcy union VEBA funded through a 55 percent equity stake in the reorganized debtor, In re Old Carco LLC, No. 09-50002 (AJG) (Bankr. S.D.N.Y. April 23, 2010).

As with Patriot's Post-Application Proposal, in all of these cases, the equity stake was in the entire reorganized enterprise. The fact that certain creditors may only have claims against the Non-Obligor Debtors affects how large or small their stake should be, but their stake remains as to the entire enterprise.

C. Specific Concerns Raised by Certain Creditors Are Misplaced

Notwithstanding the number of filings, no creditor has rebutted Patriot's showing that the Proposals satisfy Sections 1113 and 1114.

1. The Creditors' Committee

The Creditors' Committee is largely in agreement with Patriot. It not only supports rejection of the CBAs and the need to secure $150 million in annual savings, but also supports the Post-Application Proposal. (Creditors' Committee Statement ¶ 1.) In fact, the Creditors' Committee makes clear that it:

- "supports the rejection of the Debtors' collective bargaining agreements (the "CBAs") and retiree medical benefit plans because the savings outlined in the 1113/1114 Motion are necessary to the survival of the Debtors"; and

- "supports the basic structure of the latest proposal made on April 10, 2013 in connection with the motion. . . ."

(Creditors' Committee Statement ¶ 1.) The Creditors' Committee's primary objections stem from the size of the proposed equity stake, and implementation of the Proposal outside of the plan confirmation process. (Creditors' Committee Statement ¶¶ 2, 17-19.)

Without providing support to substantiate its assertion, the Creditors' Committee claims that, according to its own "recovery model," the proper share of distributable value "could be" 28 percent or possibly lower, rather than 35 percent, as set forth in the Post-Application Proposal. (Creditors' Committee Statement at ¶¶ 2, 15.) To its credit, the Creditors' Committee recognizes that its assertion is based on a number of assumptions. Patriot continues to work with the Creditors' Committee and its advisors to understand these assumptions; at present, however, Patriot believes that, with proper adjustments to the Creditors' Committee's assumptions, there is little difference between the 35 percent stake and the Committee's proposal. (Huffard Reply Decl. ¶ 47.) For that reason, among others, Patriot and its advisors continue to believe that the 35 percent equity stake is reasonable under any number of scenarios, including certain scenarios involving a non-consolidated plan of reorganization and other scenarios that place a limited weight on the risk of substantive consolidation. (Huffard Reply Decl. ¶ 47.)

The Creditors' Committee next argues that an "[a]n unliquidated claim for termination of retiree medical benefits, such as what the VEBA would hold, can be allowed only (i) through a proceeding under Section 502 . . . or (ii) under a chapter 11 plan." (Creditors' Committee Statement ¶ 18.) The Creditors' Committee offers no support for this argument.[43] To the contrary, Section 1114(j) of the Bankruptcy Code presumes that retirees are entitled to a claim in

[43] Moreover, the proposed order resolving the Debtors' Motion for an Order Authorizing the Modification and Termination of Certain Non-Vested Benefits for Non-Union Retiree Benefit Participants Pursuant to 11 U.S.C. §§ 105(a) and 363(b) provides for the affected retirees to receive a specified equity stake in the reorganized Debtors. Notably, that motion was not a proceeding under Section 502 of the Bankruptcy Code, nor was it heard in connection with plan confirmation, and the Creditors' Committee did not object to entry of that order.

respect of modified retiree benefits, and provides that such claim shall not be limited by Section 502(b)(7) of the Bankruptcy Code. See In re Farmland Indus., Inc., 294 B.R. 903, 918 (Bankr. W.D. Mo. 2003). Moreover, it is common for VEBAs to be funded through a claim pursuant to Sections 1113 and 1114. See e.g., In re Tower Automotive, Inc., 342 B.R. 158 (Bankr. S.D.N.Y. 2006) (approving Section 1114 settlement that established VEBA trusts principally funded by unsecured claims); In re Eastman Kodak Co., No. 12-10202 (ALG) (Bankr. S.D.N.Y. Nov. 11, 2012) (approving Section 1114 settlement involving VEBA funded with cash contribution and an administrative claim). Court approval of VEBAs funded through a fixed equity stake, as Patriot has requested in the Post-Application Proposal, is also common in the context of Sections 1113 and 1114. See e.g., In re AMR Corp., Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. 2012) (union received equity stake of reorganized debtor under Section 1113); In re Gen. Motors Corp., 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009) (union VEBA partially funded through equity stake in reorganized company under Section 1114). In short, there is no basis for the Creditors' Committee's objection, as the relief sought by Patriot is entirely permissible under the law and consistent with relevant precedents.

Finally, the Creditors' Committee argues that withdrawal from the 1974 Pension Plan requires Court approval under Section 363(b) of the Bankruptcy Code and that payment of attendant liability can be accomplished through the plan confirmation process only. (Creditors' Committee Statement ¶ 19.) Patriot is aware of no precedent or case law supporting this assertion, and the Creditors' Committee has cited none. It is true that Section 363(b) permits a debtor to use or sell property outside the ordinary course of business only after notice and a hearing. But the Creditors' Committee ignores the fact that the Court has scheduled a one-week trial to consider the Motion. It is hard to imagine that this trial does not satisfy the notice and

hearing requirements of Section 363(b). Moreover, courts generally consider motions under Section 363(b) under the business judgment standard, which is much lower than the standards set forth in Sections 1113 and 1114 and, should the Court grant the Motion, Patriot believes that such approval more than satisfies the requirements of Section 363(b).[44]

2. U.S. Bank National Association

In its objection, U.S. Bank contends that Patriot's proposals cannot be used as a vehicle for substantively consolidating the Debtors' estates and granting an equity stake in the reorganized Debtors to the UMWA. (U.S. Bank Objection ¶¶ 1, 5-8.)

As discussed above, Patriot's Proposals neither seek nor require such a ruling and therefore the objection does not rebut Patriot's proof.

3. Wilmington Trust Company

Wilmington Trust claims – without any basis in fact – that the 1114 Proposal cannot be implemented without substantive consolidation or "pooling" of the Debtors' assets. (Wilmington Trust Objection ¶¶17-19.) Indeed, this objection either deliberately misstates the terms of the Proposals or simply ignores them. (Compare Wilmington Trust Objection ¶¶ 4, 11 (stating that "all" Debtors will make profit-sharing payments and royalty contributions, and underscoring the relevant language) with Robertson Decl. Exs. 1-5 and Robertson Reply Decl. 72-73 (making clear that these payments are to be made by the Obligor Companies only).) While conceding that restructuring the UMWA's claims are necessary, Wilmington Trust argues that Patriot's Proposals prejudice the interests of certain creditors. (Wilmington Trust Objection ¶ 17.) For the reasons discussed above, this objection is misplaced and does not rebut Patriot's proof.

[44] To the extent the Court disagrees with Patriot's construction of Section 363(b), Patriot hereby requests relief pursuant to 11 U.S.C. § 363(b) in addition to under 11 U.S.C. §§ 1113, 1114.

To the extent Wilmington Trust is concerned about the "fair and equitable treatment" of all parties under Sections 1113 and 1114, Patriot has clearly satisfied this requirement, as detailed in Sections I-E and III-B above.

For these reasons, Wilmington Trust does not rebut Patriot's evidentiary showing.

4. Aurelius and Knighthead (the Noteholders)

The Noteholders' Objection largely tracks their ill-conceived Motion for the Appointment of a Chapter 11 Trustee [ECF No. 3423] (the "**Trustee Motion**"). As with the Trustee Motion, the Noteholders' main argument here is that the Proposals impermissibly shift union-related liabilities that only run against the Obligor Debtors to the Non-Obligor Debtors. As a result, they argue, this dilutes their claims against the Non-Obligor Debtors' assets.

The overarching flaw in the Noteholders' Objection is that it ignores reality. As described in detail in Patriot's response to the Trustee Motion, while each of the Debtors is legally distinct, in practice, Patriot is an integrated business. [ECF. No. 3675 ("**Trustee Objection**") at 18]. This means that the company as a whole benefits from efficiencies, economies of scale, and synergies between its interdependent subsidiaries. These benefits may be greatly reduced, if not altogether eliminated, if the Debtors were split according to which entities have obligations to the UMWA, a result the Noteholders blindly seek without thinking through the broader implications. Given that the Patriot enterprise is comprised of integrated components, the Noteholders' recurring assertion that they will receive "literally nothing" is simply wrong. (Noteholders' Objection ¶¶ 3, 13.) Without a doubt, the Non-Obligor Debtors will necessarily benefit from the successful outcome of the Motion through the survival of Patriot. The continued existence of the enterprise is in the best interest of all creditors, including the Noteholders.

In their objection, the Noteholders assert that "to the extent the Obligors are worth less than 35% of the reorganized entity, the Trust will be funded by assets of the Non-Obligors – Debtors that are not in any way obligated for the union-retiree healthcare." (Noteholders' Objection ¶ 10.) In a footnote, they further argue that "[e]ven if the Obligors were worth 35% of the reorganized entity, it could hardly be called 'fair and equitable' to give all of that value to the UMWA to satisfy what is only a portion of the Obligors' total liabilities." (Noteholders' Objection at n. 9.) As detailed above, according to comprehensive analyses conducted by Patriot's financial advisers, the UMWA is not receiving more value than it would if it was awarded claims against only the Obligor Debtors. Rather, the proposed equity stake is based on recovery from the Obligor Debtors in addition to an adjustment for the risk of future litigation. (Huffard Reply Decl. ¶¶ 44-47.)

The Noteholders also object to the proposed profit-sharing and royalty contributions because they would "siphon value" from the Non-Obligor Debtors to the Obligor Debtors. (Noteholders' Objection ¶ 11.) This is incorrect. The Obligor Debtors are the only Debtors with payment obligations. Additionally, company-wide EBITDA metrics have historically been a part of Patriot's annual incentive plan for many employees. (Trustee Objection ¶ 36.) The Noteholders cannot seriously argue that compensating employees based on the success of the wider enterprise is anything but common practice at virtually every large company spanning every major industry. Moreover, the Noteholders conveniently overlook an important detail – the obligation to make profit-sharing payments and royalty contributions fall only on the Obligor Debtors, not the Non-Obligor Debtors. (Trustee Objection ¶ 36.)

Finding no factual or legal support for their arguments, the Noteholders rely instead on a combination of rhetoric and high-level arguments based on the "bedrock principles of corporate

law." (Noteholders' Objection ¶ 14.) The Noteholders go so far as to argue that Sections 1113 and 1114 do not apply to the Non-Obligor Debtors and that Patriot's Proposal "is an affirmative impediment" to the Non-Obligor Debtors. (Noteholders' Objection ¶¶ 23.) These misguided assertions make clear that the Noteholders are willfully ignoring the fact that the Debtor entities have been administratively consolidated for purposes of the chapter 11 cases and that separating the Debtors according to their obligor status would entail separate emergences from chapter 11, a result that is not only impractical but also highly detrimental to the entire enterprise. (Noteholders' Objection ¶¶ 16-18.)

Finally, the Noteholders argue that Patriot has failed to meet the necessity and fair and equitable requirements of sections 1113 and 1114. For the reasons discussed above, Patriot has met its burden and the Noteholders' arguments with respect to these factors are without merit.

CONCLUSION

For all of these reasons, Patriot respectfully requests that the Court grant its Motion for an order: authorizing it to reject the collective bargaining agreements with the UMWA pursuant to Section 1113 of the Bankruptcy Code; authorizing it to terminate retiree benefits for certain of its current retirees pursuant to Section 1114 of the Bankruptcy Code; and implementing the terms of its Proposals.

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Respectfully submitted,

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