UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI

Case No. 12-51502-659

- -x

In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- -x

United States Bankruptcy Court

111 South 10th Street

4th Floor

St. Louis, Missouri

May 3, 2013

9:12 AM

B E F O R E:

HON. KATHY A. SURRATT-STATES

U.S. BANKRUPTCY JUDGE

Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. 1113, 1114 of the Bankruptcy Code Filed by Debtor (3214)

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P R O C E E D I N G S

THE CLERK: The United States Bankruptcy Court of the Eastern District of Missouri is now in session. The Honorable Kathy A. Surratt-States presiding.

THE COURT: Good morning. Please be seated.

IN UNISON: Good morning, Your Honor.

THE COURT: All right. Here we are at day five of the continued hearing on the debtors' 1113 and 1114 motion.

Can I get appearances in the courtroom first, please?

MR. KAMINETZKY: Good morning, Your Honor. Benjamin Kaminetzky of Davis Polk & Wardwell for the debtors. I'm here with my colleague Elliot Moskowitz, Jonathan Martin, and others. I also want to introduce the Court to our general counsel, Mr. Joe Bean, who's here in court, as well as someone you know, our president and CEO, Mr. Hatfield --

THE COURT: Yes.

MR. KAMINETZKY: -- is here, or he was here. And of course our local counsel, Lloyd Palans from Bryan Cave. Thank you.

THE COURT: All right. Good morning.

MR. PALANS: Good morning, Your Honor.

MR. O'NEILL: Good morning, Your Honor. Brad O'Neill from Kramer Levin on behalf of the official committee. With me today is Greg Willard of the Carmody MacDonald firm, co-counsel, and Stephen Blank of our firm as well.

THE COURT: All right. Good morning.

MR. WILLARD: Good morning.

MR. BLANK: Good morning.

MR. PERILLO: Good morning, Your Honor. Fred Perillo on behalf of the United Mine Workers of America. I'm with my partner today, Mr. Yingtao Ho, and the general counsel of the UMWA, Mr. Grant Crandall. Thank you.

THE COURT: Good morning.

MR. TURNER: Good morning, Your Honor. Marshall Turner on behalf of Citibank as the first out DIP agent. Also in court is lead counsel Joe Smolinsky from Weil, Gotshal & Manges.

MR. SMOLINSKY: Good morning, Your Honor.

MS. TOLEDO: Good morning, Your Honor. Laura Toledo with Lathrop & Gage on behalf of Bank of America as the second out DIP agent. With me in court today is Ana Alfonso from Willkie Farr & Gallagher. And Margot Schonholtz is on the phone.

THE COURT: Good morning.

MS. LONG: Good morning, Your Honor. Leonora Long on behalf of the United States Trustee.

THE COURT: Good morning.

MR. GOODCHILD: Good morning, Your Honor. John Goodchild, Morgan Lewis & Bockius, on behalf of the UMWA health and retirement funds. With me in the courtroom is my partner,

Becca Hillyer, whom I think you know, as well as my co-counsel, Jack Mooney.

THE COURT: Good morning.

MR. SCHNABEL: Good morning, Your Honor. Eric Lopez Schnabel of Dorsey & Whitney on behalf of U.S. Bank as trustee to the convertible senior notes.

THE COURT: Good morning.

MR. LEVINE: Good morning, Your Honor. Jon Levine of Andrews Kurth on behalf of Wilmington Trust, indenture trustee of the eight and a quarter senior notes.

THE COURT: Good morning.

MR. MARSICO: Good morning, Judge. Leonard Marsico, McGuirewoods, for Ohio Valley Coal, Ohio Valley Transloading. With me is Mr. Mike McKown, acting as general counsel for Ohio Valley Coal.

THE COURT: All right. Good morning.

MR. STRASSER: Good morning, Your Honor. Alan Strasser from the Robins, Russell firm on behalf of the senior noteholders.

THE COURT: Good morning.

MR. COUSINS: Good morning, Your Honor. Steven Cousins of Armstrong Teasdale, here on behalf of Peabody Energy Corporation. Thank you.

THE COURT: Good morning. All right. And then on the phone we have Ms. McGreal on behalf of the debtors?

MS. MCGREAL: Yes, good morning, Your Honor.

THE COURT: Good morning. Gregory Plotko on behalf of the creditors' committee?

MR. PLOTKO: Yes, good morning, Your Honor.

THE COURT: Good morning. Margot Schonholtz of Bank of America?

MS. SCHONHOLTZ: I'm here, Your Honor. Thank you.

THE COURT: Good morning. Blaine Early on behalf of Argonaut Insurance? Yes? Mr. Early?

MR. EARLY: Good morning, Your Honor. There was a breakup in the phone call, but I'm here.

THE COURT: All right. Good morning. And Theresa Anderson on behalf of the Pension Benefit Guaranty Corp.

MS. ANDERSON: Good morning, Your Honor.

THE COURT: Good morning. And Kristi Davidson on behalf of Caterpillar?

MS. DAVIDSON: Yes, good morning, Your Honor.

THE COURT: Good morning. All right, then, Mr. Kaminetzky?

MR. KAMINETZKY: Yes, Your Honor. Before we get started with the closings, that I understand we'll be hearing from the other parties before hearing from the debtor and the union, I actually have some good news for the Court.

THE COURT: All right.

MR. KAMINETZKY: There was, indeed, productive

discussions going outside the courtroom, unfortunately not with the party that we were hoping with. But during the course of this week there were some discussions in the hallway and elsewhere, and the unsecured creditors' committee has agreed to withdraw its objection to the debtors' 1113 and 1114 motion. And you'll be hearing from Brad O'Neill of the Kramer Levin firm in a few minutes.

I just want to make one point, just so that it's clear on the record. The Court has noted that the question of substantive consolidation is not before the Court and there will be no findings at this hearing regarding substantive consolidation or recharacterization of intercompany claims. As Mr. Huffard testified, we believe our proposal is fair and equitable to all creditors, even if one gives no weight to all two of those factors. And as Mr. Huffard further testified, to be sure, the debtors weighed all the relevant factors in determining that the thirty-five percent stake is fair and equitable.

And with that, I will turn the podium over to Mr. O'Neill of the creditors' committee who will confirm the agreement that was reached among the debtor and the committee.

THE COURT: All right. Mr. O'Neill?

MR. O'NEILL: Good morning, Your Honor. I think first, before I begin, I speak for everybody here in thanking Your Honor, chambers, and the Court's staff for a process that

has run very efficiently. I think the fact that we're here at 9 a.m. doing closing arguments is an achievement, and we appreciate the Court's time and the courthouse staff's effort, and in particular, I think, the security staff staying late, making sure we get this done in a timely fashion.

THE COURT: Thank you.

MR. O'NEILL: Your Honor, the committee actually filed a statement in support of the motion, and we supported the relief granted. We generally supported the form of the fifth proposal. We objected to the implementation of the fifth proposal on two grounds. The first is it shouldn't be done outside of a plan. We view Your Honor's rulings on the -- or Your Honor's indication that you're not considering substantive consolidation or intercompany claims in this hearing as addressed first. As to the second, we have now reached an agreement with the debtor as to -- in which we withdraw our objection to the implementation of the fifth proposal on the ground that it's not -- the fifth proposal is not fair and equitable to creditors. And there is an elaborate agreement which is negotiated. I'm going to read it, Your Honor. I apologize for reading it, and I know that can be a little tedious, but given the effort that went into it, I don't want to freelance and get something wrong.

So without further ado: "The committee, by majority vote of its unconflicted members, has determined to withdraw

its objection to the implementation of the fifth proposal, based on the following agreements and reservations. The debtors and the committee agree that: one, the committee's advisors received Blackstone's detailed recovery analysis in the last seventy-two hours; two, the committee's advisors have engaged in detailed discussion with the debtors' advisors over the last seventy-two hours to more closely reconcile their respective recovery models and the assumptions used to analyze various percentages of equity that are allocable to the UMWA in certain circumstances; three, among the assumptions affecting the allocation of equity to the UMWA are: the probable amount of the UMWA's claims, preliminary estimates of the value distributable to unsecured creditors, the allocation of that value among the various debtors, the amount of third-party trade and litigation claims against the various debtors, the likelihood that intercompany claims are allowed or disallowed, and the likelihood of substantive consolidation."

"The committee has determined that the fifth 1114 proposal allocates to the UMWA approximately thirty-nine percent of the equity value of the reorganized debtors, comprised of thirty-five percent of the equity, plus royalty and profit-sharing payments, which the committee values as equal to an additional four percent of the equity. The committee continues to believe that the fifth proposal's allocation of thirty-nine percent of the equity value to the

UMWA is high. However, after seventy-two hours of consultation and modeling by the committee and debtor advisory team, the committee, by a majority vote of its unconflicted members and the debtors have agreed that, based on the range of assumption shared by Houlihan and Blackstone, even if substantive consolidation is given a zero likelihood and the disallowance of intercompany claims is given a zero likelihood, the fifth proposal's allocation of equity to the UMWA is fair and equitable with respect to other creditors."

"Because the committee and the debtors have reached a mutual understanding on the basis of the fifth proposal's allocation of equity to the UMWA, the committee, by a majority vote of its unconflicted members, no longer requests proof of such basis or a second hearing on the implementation on the fifth proposal and withdraws that portion of its statement in support that objects to the implementation of that proposal without proof that it treats creditors fairly and equitably."

"The debtor and the committee agree that the range of assumptions shared by Houlihan and Blackstone is not an admission with respect to any assumption. Neither the debtors nor the committee shall be bound by any of the shared assumptions in any future litigation. The debtors and the committee agree that the foregoing determination is without prejudice to the rights of any party with respect to substantive consolidation or the allowance of intercompany

claims. The committee has made no determination as to whether substantive consolidation or the allowance of intercompany claims is appropriate or inappropriate."

Thank you, Your Honor.

THE COURT: Thank you. All right, then, Mr. Kaminetzky, I will then accept that agreement then by those two parties.

MR. KAMINETZKY: Thank you, Your Honor. And Mr. O'Neill said it just right.

THE COURT: That's because he wrote it down just right.

All right then, anything else, then, before we proceed with the closing arguments?

All right then, Mr. O'Neill, does the creditors' committee have anything else to offer -- or Mr. Willard?

MR. WILLARD: Good morning, Your Honor. Greg Willard for the committee. We have nothing further to offer by way of closing statement. We would echo Mr. O'Neill's comments about getting here on a Friday morning. And we think, in light of that announcement, it would be much more productive for Your Honor to hear from the other parties rather than us. We're pleased to have reached this resolution.

THE COURT: All right.

MR. WILLARD: Thank you.

THE COURT: Thank you. All right, then next would be

the U.S. Trustee, Mrs. Long?

MS. LONG: Again, good morning, Your Honor. Thank you. We have been observing and find this to be a very important aspect of this case. But at the same time, our client has taken no position. We feel the Court has heard from the appropriate parties and has taken the matter -- will take the matter under submission after hearing closing arguments, but we need nothing further, and thank you.

THE COURT: Thank you. All right. Ohio Valley, Mr. Marsico?

MR. MARSICO: Yes, Your Honor. I want to begin by also thanking the Court for its patience, attentiveness, and especially its good humor. And I want to thank the staff for its professionalism and many courtesies as well.

I do want to congratulate the Court for at least one good consequence of the limited participation it's allowed for the other parties to this proceeding. Judge, never before have so many lawyers said so little for so long. Good work.

I'll turn briefly to the motions that are pending before the Court. The first is the 1113 to reject the Patriot collective bargaining agreement. As Mr. Perillo has made clear, the Court cannot impose a new CBA on the union; it can only affirm or reject the existing CBA.

The second motion under 1114 is to modify the Patriot retiree benefits. I will not presume, Your Honor, and I do not

have the time to comment on all the legal issues and the evidence that's before the Court with respect to these motions. That's for counsel for the debtor and for the union to do. Mr. McKown and I represent the Ohio Valley Coal Company and the Ohio Valley Transloading Company. They've intervened and participated, to the limited extent allowed in these proceedings, to represent a group of parties who are keenly interested in these proceedings and who will be greatly affected by the grant of relief sought by the debtors. These other keenly interested and affected parties are the contributors to the 1974 pension trust and the 1993 benefit plan, as well as the beneficiaries of those plans, including both Patriot and non-Patriot retirees.

Now, I can understand Your Honor's reaction to this: I have enough people to worry about. But the interests of these other contributors to the plan, like Ohio Valley, and these other beneficiaries, are clearly aligned with the interests of other parties to these proceedings. Their plea is the same as the United Mine Workers' funds, and on this single issue, the same as the union.

Your Honor, do not let Patriot reduce its contributions to the plan one cent beyond what is necessary under 1114. Do not let Patriot reduce its contributions to the plan one cent beyond what is fair and equitable to all affected parties. And if there is to be a VEBA, ensure that it is

sufficiently funded to survive.

Now, as Your Honor knows, most of these propos -- the most recent proposals, the debtors have said that they'll contribute to the plans through 2016, and that they will not withdraw thereafter, unless the required contributions exceed their withdrawal liability over time. But this is a promise contingent upon implementation of the other elements of Patriot's proposal. And if it's not agreed to by the union, the Court cannot impose that proposal. Likewise, the full funding to any VEBA to replace the individual employer plans is essential to ensure that the other contributors to the '93 plan are not saddled with any failure of the VEBA. And Your Honor, you must remember that as a multi-employer plan, these plans are not immediately guaranteed by the PBGC, but rather by the other contributors to those plans.

If the Court denies the debtors' motions, there's no issue; Patriot will be obligated to continue contributing to the plans as it has done. But if the Court grants the debtors' motions, it must do so with an 1114 order that requires the debtors to continue contributing to the plans. If Patriot is allowed to unnecessarily withdraw from the plans, not only will the other contributors to the plan, who have to make up Patriot's contributions, be harmed, not only will the beneficiaries of these plans be dangerously affected, but Your Honor, an entire industry will be placed at risk.

If Patriot unnecessarily withdraws from the plans, and is unnecessary or unnecessarily reduces its contributions to them, there is the very real possibility of creating a domino effect in the coal industry. Any increased contributions required by an unnecessary Patriot withdrawal may force the next weakest coal company, that has to contribute to make up for Patriot's withdrawal liability, may be the next debtor in this court or some other court. And that contributor's withdrawal might force the next bankruptcy and the next until the industry crashes completely. Your analysis of what is fair and equitable to all parties must include this calculus. Nothing to unnecessarily jeopardize these plans must be allowed to happen in these proceedings.

Your Honor, I do not envy the Court for the task before it, but I do wish it continued strength and wisdom. Thank you.

THE COURT: Thank you. All right. I believe as on Monday Drummond, Energy West, and Cliffs Natural Resources do not have representation in the courtroom, so we'll just take their pleadings.

Next, did Bank of America have any comments? Ms. Alfonso?

MS. ALFONSO: Yes, thank you, Your Honor. Ana Alfonso, counsel for Bank of America, the second out DIP agent. We appreciate the opportunity to be heard briefly with respect

to the DIP financing, which has been discussed at length in the record of these proceedings and during this hearing.

Bank of America and the lenders and its syndicate negotiated and provided the second out DIP financing in good faith on fair and reasonable terms, and on an accelerated time line, as a lifeline to preserve the going concern value of these debtors for all parties-in-interest. The DIP financing was and is vital to a successful reorganization of the debtors which will benefit employees, creditors, customers and others. The final DIP order, approved without objection, which is part of the record in these cases, entered on August 3rd, 2012, contains findings to that effect. And that's, for the record, at docket number 275, paragraphs 4(b), (d), and (e). The DIP financing was provided to help the debtors avoid liquidation and to facilitate their successful reorganization. We are hopeful that there's a path forward to that end here. That's all, Your Honor. Thank you and thank you to your staff.

THE COURT: All right. Thank you.

All right, next, Citibank, Mr. Smolinsky?

MR. SMOLINSKY: Good morning, Your Honor. We have sat quietly in the courtroom, but we assure you that we are watching the proceedings intently. We'll also be watching intently whatever happens after Your Honor's ruling. But we have no formal comment on the specifics of the trial. Thank you.

THE COURT: Thank you. All right, then, U.S. Bank, Mr. Schnabel?

MR. SCHNABEL: Good morning, Your Honor. For the record, Eric Lopez Schnabel of Dorsey & Whitney on behalf of U.S. Bank as the indenture trustee to the three and a quarter convertible senior notes.

Your Honor, if you recall, at the outset of this hearing, our objection focused really just on two issues. One, that we were not taking a position with respect to 1113 and 1114. And two, the only position we were taking is an objection, to the extent the Court grants the motion, that that order should not have a preclusive effect with regards to substantive consolidation or nonconsolidation.

And I think Your Honor, during -- that the Court recognized that, and now we've heard from the debtor and committee and they recognize that as well, that there is not going to be a preclusive effect, that substantive consolidation or nonconsolidation is for another day.

I only want to add with respect to that, in our objection, that one of the issues we've heard now is in regards to intercompany claims, the allowance or disallowance of intercompany claims. That's obviously an issue in a nonconsolidated plan, and that there's not going to be any preclusive effect as regards to that issue, and that's also an issue that we have an interest in. We don't take a position on

that at this point, but we do reserve our rights with respect to that.

So I only rise to basically add that to our objection. It wasn't an issue before the trial. It's not an issue for today, but it's been expressly mentioned as not being decided, and our objection incorporates that concept as well.

And Your Honor, the last thing I do want to say is that on behalf of all counsel, we do appreciate the hard work that Your Honor and Your Honor's law clerk has engaged in. It's clearly evident that you're not only working hard but you're reading everything, and that's quite a task, so we do appreciate that greatly.

THE COURT: All right.

MR. SCHNABEL: Thank you.

THE COURT: Thank you. All right. Wilmington Trust, Mr. Levine?

MR. LEVINE: For the record, Jon Levine of Andrews Kurth on behalf of Wilmington Trust, indenture trustee to the eight and a quarter senior notes due 2018.

Good morning, Your Honor. Particularly given our extremely limited role in these 1113, 1114 proceedings, we have nothing to add at this time to our prior written and oral submissions, and we echo the sentiment of thank you to the court and staff. Thank you.

THE COURT: All right. Then

THE COURT: All right. Then Aurelius and Knighthead, Mr. Strasser?

MR. STRASSER: Good morning, Your Honor. Alan Strasser for the Robbins Russell firm on behalf of the senior noteholders. And let me join with other counsel in thanking the Court for not only its attention and its time, but its -- but the energy the Court has shown in following and keeping going a proceeding with a lot -- a lot of moving pieces. And I guess I would love to show that I'm one of those moving pieces, but I may not be moving in the same direction as everyone else who has spoken to you this morning, because in our view, the Court can't grant this motion because there is not record evidence that would show that the proposal is fair and equitable to other creditors.

I heard what counsel for the committee said this morning about their view of it, but I don't think that's enough, for the debtors and the committee to agree that this is fair; I think there's got to be record evidence so that the Court can reach that conclusion, and there isn't. There would have to be record evidence, I suggest, Your Honor, in a proceeding in which we were entitled to participate. And by participate, I mean something more than to listen to the evidence. Participate means we could challenge the witnesses, we could cross-examine the witnesses that the other parties

offered, we could offer our own evidence, we could offer our own witnesses, if we didn't agree with the conclusions that these witnesses had reached. And that's not something we had in this proceeding. It was set up that way, at the request of the debtors. The debtors said to the Court that we, as the senior noteholders, should be excluded; we shouldn't even be heard at all, an extreme proposition that the Court rejected. But even this limited participation, in which we get a brief opening statement and a brief closing argument, in my view, is not enough for us to be able to confront this evidence that goes to an essential element of the statute: is this fair to all the other creditors?

And what was striking to me, as I listened to the testimony -- there was a lot of testimony, and we can see binders here that it looks like a bunker up there on the witness stand -- but what was striking is not the quantity of evidence that was presented, but what was not presented. It was striking to me, as I listened to counsel for the committee this morning describe the terms of the stipulation, exactly the factors that he outlined that he said the financial advisors to the committee had been able to review outside the courtroom. And that is questions about the size of the claim, questions about the value of the company, questions about the value of each debtor, each of the ninety-nine debtors, questions about the size of the UMWA's claim at each of the debtors, and the

link between -- well, the size and the nature of intercompany claims, the link between all of those factors, that is how large a claim the UMWA had at each debtor, the link between that and the equity share that the company has offered.

It's just exactly those questions that the Court should have heard evidence on and that we should have been able to challenge, if we disagreed with it, or not to challenge if we agreed with it. But none of it appeared here on the record, nothing here to support a factual finding that this proposal is fair and equitable to all of the debtors.

We did hear testimony about the intercompany claims, that there was a blizzard of them. And I don't know how deep that is, Judge, but I think it's an important question of whether they should be counted at all. We didn't hear evidence on that. We didn't hear any evidence about whether the obligor debtors were worth enough to cover the UMWA claim, or how much value would be taken from the nonobligor debtors. What we did hear was that there was a very wide range of possibilities. We heard a discussion of this Blackstone model. It was clear from the testimony that the model has been created, and it was just as clear that the model wasn't offered here in court. It was clear from the testimony that that model attribute some value to the probabilities that there will be substantive consolidation, but it's our view that any probability of sub-con can't be included in the offer to the UMWA. It's a yes

or no, it's a binary fact, as we heard testimony yesterday. And to the extent that this thirty-five percent equity stake reflects some probabilistic estimate of the Court's ruling, it includes a factor that it should not include. It attributes -- it gives value to the UMWA that the Court can't give. And I would suggest that that testimony alone is enough to reject the motion here.

I think we also could tell from Mr. Huffard's testimony that there is -- I think what he said is there's some scenarios under which thirty-five percent is an accurate reflection of the size of the UMWA's claim, even without substantive consolidation. But I think that was a concession that there's some scenarios where it's not. And since we don't have any idea of how that particular factor translates into an equity share, we have a complete absence of evidence to support it on this record. And since -- I don't think it's enough for Mr. Huffard to say it could be right and it could be wrong and therefore the Court ought to approve it.

I guess the other thing that was striking to me is how broad the range of estimates of value of the UMWA claim were. Mr. Hatfield suggested, in response to questions from Mr. Perillo, that the range of values offered to the UMWA were somewhere between 56 and 450 million dollars. That range is wider than the range attributed to the value of the company as a whole; that's 400 million dollars' difference. And if I

understood the testimony, the suggestion was that Blackstone had identified a range of about 250 million dollars. It is curious to me that the range of the union's claim could be twice the range of the value of the company. And I think that gives the Court reason to doubt the accuracy of it.

Finally, I think we have an open question about the significance of what will happen with the '74 pension plan. It is hard to tell how that fit into the Blackstone model. There isn't record evidence on any of that. If the company withdraws from the plan, that would create a claim, then perhaps the company would annuitize that, but perhaps not. And that uncertainty also casts doubt on the accuracy of the thirty-five percent claim.

So where I come to on that, Judge, is if we can't tell from record evidence what the value of the other creditors' claims are and we can't really tell what the value of the union's claim is or what the value of the union's claim is at each of the debtors, and we can't tell how the value of the union's claim translate into a particular equity share, then it's impossible for the Court to determine whether it's fair to other creditors. And since the statute requires that, I think it requires denial of the motion.

Now, this was something, I think, that the debtors have brought onto the Court by existing that we be excluded from participation. And they've asked for that and I think now

they're stuck with that result. I think what the debtors have done is give the Court a difficult choice, and a choice between, really two unpalatable alternatives. And one of those is to grant the motion, without adequate record evidence on an element required by statute, and the second is deny the motion and, I think as the testimony has suggested, run the risk that the company liquidates with all the damage and the tragic harm that that would bring. And this is a kind of legal brinksmanship, I suggest, Your Honor, and it's not something that the Court should countenance.

The parties have expressed their interest to reach a consensual resolution. I suggest that the Court deny the motion, send them back to do that, and once they have done something, let them bring it before the Court with adequate disclosure, with our participation, and the Court can determine whether the UMWA is getting a share that's commensurate with its claim. If the Court doesn't have questions, Your Honor, that's all I have.

THE COURT: All right. I have no questions. Thank you, Mr. Strasser.

All right. Next on my list is Argonaut Insurance. Mr. Early is on the phone.

MR. EARLY: Yes, good morning, Your Honor. Thank you for the opportunity to appear today by telephone. I echo the comments of other counsel about the Court's staff, and beyond

that I have nothing else to add. Thank you.

THE COURT: All right. Thank you.

All right. Then that brings us to the funds. Mr. Goodchild?

MR. GOODCHILD: May it please the Court. Your Honor, I'd like to echo the thanks from counsel. You have the thanks of my firm, my co-counsel's firm and my client. Very much appreciated.

THE COURT: Thank you.

MR. GOODCHILD: Your Honor, the debtors had the burden to prove that the relief they're seeking is necessary to permit reorganization and that the relief they're seeking is fair and equitable to those affected. From the perspective of the funds, the debtors have failed to carry that burden.

I'd like to address fairness first, and I'd like to focus on the rejection of the collective bargaining agreement. Rejection of the collective bargaining agreements will mean, among other things, that the debtors will no longer be required to make contributions to the 1993 benefit plan and the 2012 account trust. The record shows that there will be significant and unfair harm resulting to the beneficiaries of those two trusts if that relief is granted.

The undisputed evidence is that the 1993 benefit plan provides health care coverage for 11,000 retired union coal miners, their spouses, and dependents who did not work for

Patriot and whose former employer is no longer in business. The evidence also shows that Patriot contributes sixteen percent of the total annual contributions to the 1993 benefit plan. Patriot's annual payments for that plan are about 3.7 million dollars. And if that money is lost, the health care coverage will be reduced; that is also undisputed. There is nothing fair or equitable about cutting these people's health benefits. To the contrary, granting the debtors' motion would subject the beneficiaries of the 1993 plan to a second injustice, because these people already lost the health care coverage provided by their former employer, and now they would face a second loss. Patriot, with the rest of the industry, has a responsibility to the industry's orphan retirees. The amount of its contribution is small relative to Patriot's issues, but large relative to the needs of the affected people.

Turning to the 2012 trust, the argument is similar. Your Honor heard Mr. Buckner testify that the benefit provided by the 2012 trust is a single annual payment of roughly 500 dollars. It's paid to retired miners and their surviving spouses. And the evidence is that the vast majority of these people never worked for Patriot. When these people retired, this payment was a part of their pension benefit. It's the so-called thirteenth monthly check. Until 2012, this thirteenth check was paid by the 1974 pension trust. But under the current collective bargaining agreement it's now paid by

this separate fund.

The evidence in the record establishes that the annual costs to Patriot to make contributions to the 2012 trust is about five and a half million dollars. In the context of this case, that is a modest amount. But the impact on the affected pensioners would be a direct reduction in income of one-thirteenth, or about eight percent, and we don't think that's fair or equitable.

I want to turn next to necessity, sticking with the collective bargaining agreement, and I want to talk about withdrawal liability. In contrast to the fairness issues related to the '93 plan and the 2012 trust, where the impact on the bankruptcy case is very small, but the impact on the affected beneficiaries is very large, the withdrawal issue related to the 1974 plan is of critical importance on the bankruptcy case.

The debtors say they don't want to trigger withdrawal liability, and on the point, all parties seem to be in agreement. It would be best for the debtors to continue to be a contributing employer in the pension plan. The annual costs of contributing to the pension plan is, undisputedly, at least five million dollars less than the very best case scenario regarding treatment of withdrawal liability. And just to make this absolutely clear, our position is that if withdrawal liability is triggered, the resulting claim will be nearly one

billion dollars, and is joint and several among the debtors. So our view is that the benefit to the debtors of avoiding withdrawal liability is far greater than the five million dollar figure.

The debtors agree. Your Honor heard Mr. Hatfield testify this week that the debtors have concluded that triggering withdrawal liability would result in an untenable situation, hurting everyone in the case, including the union, including the bondholders. The debtors reached that conclusion only a couple of weeks ago, and since April 10 have been trying to negotiate a solution to prevent withdrawal liability.

Your Honor, we support that goal. And as I informed the Court on Monday, the funds have been trying to facilitate negotiations to that effect. But the difficulty is what I alluded to on Monday. The debtors are asking this Court for authority to reject the collective bargaining agreements. And if they reject the collective bargaining agreements, withdrawal liability is triggered as a matter of law. It doesn't matter whether the debtors continue to make payments at that point. They will have withdrawn under the statute; that's Section 4209 of ERISA, codified at 29 U.S.C. 1383(a)(1).

The proposed order submitted with the debtors' motion seeks authority to reject the collective bargaining agreement. And Your Honor, we believe that that is only permanent relief available under Section 1113. And the case law is quite

uniform on the point. If it would be helpful for Your Honor, we can provide case citations to prove that point. We do not believe it is undisputed, however.

So put differently, the only litigated outcome available to the debtors under Section 1113 is that they get authority to reject the contract. But if they do that, they will trigger the massive withdrawal liability that we're all trying to avoid.

Withdrawal liability, specifically the effect on the bankruptcy that would result if withdrawal liability is triggered, is a factor that should be considered when assessing whether to authorize the rejection of a collective bargaining agreement under Section 1113. One of the cases that stands for that proposition is Valley Steel, decided in this district, reported at 142 B.R. 337.

Now, the debtors might argue that triggering withdrawal liability is necessary because of uncertainty about future contribution rates, such that if the debtors can't get assurances about what the future rates will be in 2017, then they should be permitted to withdraw from the pension plan now. But the evidence does not support that view, Your Honor. The pension contribution rate is essentially fixed through 2016 at a level the debtors can afford and are willing to pay. We have no idea what the contribution rate will be in 2017. That contract, the 2017 contract, it will be the product of

collective bargaining on many, many issues, pension contribution rates being just one. There's significant legislative overlay as well.

Mr. Stover's supplemental declaration establishes that the 1974 plan is likely to enter critical status under the Pension Protection Act of 2006, and that may change the way that legislation affects the rates. And indeed, the Pension Protection Act itself is sunsetting after 2014. It is unclear what action Congress will take, if any, with respect to future contribution obligations of employers.

Moreover, legislation currently pending before Congress, known as the Care Act, is intended to resolve the funding problem, specifically of the 1974 pension trust. And it is presently unknown what action Congress will take with respect to the Care Act and the funding proposals that go with it.

We also have no idea, and there is no evidence, regarding the debtors' ability to pay pension contributions after 2016. The business plan, the five-year business plan, it stops at 2016. Mr. Hatfield and Mr. Huffard both admitted they do not have cash flow forecasts beyond 2016 and none has been admitted. Any assertion that the debtors cannot exit financing without some assurance about future pension obligation is purely speculative, given that Mr. Huffard conceded that there have been no discussions with lenders regarding exit financing,

much less discussions about how pension contributions would affect it.

How can the debtors say that withdrawing from the pension plan now could be necessary, when they cannot show what the rate in 2017 will be, they cannot show what they can afford to pay that far in the future, and they cannot show that their concerns about 2017 and beyond will make any difference in the effort to emerge from bankruptcy?

Your Honor, in conclusion, for all these reasons, the funds urge the Court to deny the debtors' motion. The rejection of the current collective bargaining agreements would have a disastrous impact on the bankruptcy cases, because it will trigger a massive withdrawal liability for each and every one of the debtors, and would inequitably arm the retired miners' surviving spouses and dependents, who rely on modest payments from Patriot in order to obtain vitally important pension and health care coverage. Thank you very much.

THE COURT: Thank you. All right. Mr. Kaminetzky or Mr. Moskowitz? Mr. Kaminetzy?

MR. KAMINETZKY: Good morning, Your Honor. For the record, again, I am Benjamin Kaminetzky of Davis Polk for Patriot. To echo other sentiments expressed earlier today, first and foremost, on behalf of myself, Mr. Moskowitz, Mr. Huebner, Mr. Martin, the other Mr. Russano, as well as the company's -- and the people from the management team of the

company that have been with us in court, I want to thank the Court for accommodating us this week. In addition to Your Honor, we would especially like to thank Ms. Magnus, Mr. Howley, and the rest of your staff, the court's security officers, the AV personnel, and everyone in the courthouse that has made this week as comfortable as possible. They've also stayed late and extended to us every courtesy you could imagine.

We also want to thank the Patriot people, both employees and retirees, who have been active participants in and observers of these proceedings. While people may have different perspectives, Patriot is lucky to have such a passionate base of employees and retirees who desperately want to see this company succeed and continue to provide good jobs to its employees and meaningful health care to its retirees.

Now, although perhaps a bit unorthodox, I would also like to thank the UMWA professionals and their counsel at the Previant firm, Fred Perillo, Yingtao Ho, and Sara Geenen. Litigation is hard enough. When the litigation is about critically important and sensitive issues, such as jobs, wages and health care for very real people, litigation becomes even more difficult, as the stakes are enormously high. Nevertheless, it has been an absolute pleasure working with Mr. Perillo and his team for the last several months. The union and its members are privileged to have such a zealous advocate

on their side.

Now, Your Honor, this is a motion for relief under Section 1113 and 1114 of the Bankruptcy Code. Now, why would I make such an obvious statement? Well, if you listen to some of the rhetoric from my very able adversary, you could be led to believe that this is something else. Listening to the UMWA, what has occurred this week is not a hearing on a critical motion on a bankruptcy case. Rather, what has occurred this week in this courtroom in St. Louis was the epic showdown between management and organized labor; between Wall Street and Main Street; between the good folks of West Virginia, who have given their blood, sweat and tears to this company, or more likely Peabody, and the faceless bankers, whose only concern is the bottom line. Indeed, even when arguing about a technical evidentiary issue, the union could not avoid slinging caustic accusations about capitalism at us. While this bombastic view of the world may be a good way to whip a crowd up into a frenzy or make headlines, it has absolutely no basis in reality, and even a casual observer of these weeks' proceedings would know this to be true.

So just to be clear, we cherish our employees, both union and nonunion. We have deep respect for the UMWA and for the important work it does for its members and this country. One of the highlights of this case for me was when I had the privilege of visiting the UMWA's headquarters in Triangle,

Virginia, and when Cecil Roberts, president of the UMWA, gave me a brief tour of the proud pictorial history of the union. Our own CEO, Ben Hatfield, grew up in the coal fields of West Virginia, and his father and grandfather were coal miners and proud members of the UMWA. We neither resent nor begrudge any of the wages and benefits the union employees achieved through collective bargaining, nor do we resent or begrudge the outstanding retiree medical benefits that the union has obtained for its retirees.

In that case, why are we here seeking to modify or reject our collective bargaining agreements and retiree health care? We are here for one reason, and one reason only: we can't afford it. It is a mathematical certainty that if we continue to pay these employee and retiree obligations, we will run out of money and liquidate, period. And no one, and I mean no one has or can dispute that simple and unfortunate, yet stark, fact.

So now that we know why we're here and we can move away from the rhetoric, we can turn to the statute at issue. We thought it'd be most helpful for the Court if we organized the closing or summation according to the statutory requirements. I will also make repeated reference to the record, to assist the Court later on in formulating a decision.

We know that necessity is the touchstone of Section 1113 and 1114, and we will spend some time on that a bit later.

But before we do, I would like to address the other elements first. Now, we have a few simple slides for the Court that I hope will keep our presentation streamlined, fact and evidence based. So let's proceed to the first slide and the first element. Oh, let me first give this to counsel and to the Court.

THE COURT: Mr. Perillo, I'm going to assume you have no objection to their use of these slides in making their closing?

MR. PERILLO: I do not, Your Honor.

THE COURT: Thank you.

MR. KAMINETZKY: Your Honor, we can't get the slides pulled up on the screen quite yet. We're having a bit of a technical issue, so we'll have to --

THE COURT: All right.

MR. KAMINETZKY: -- flip along.

THE COURT: Okay.

MR. KAMINETZKY: There are worse things in life.

THE COURT: I have a copy; it's okay.

MR. KAMINETZKY: We're working on it. So let's go to the first element I would like to talk about this morning, complete and reliable information. Under Section 1113(b)(1)(A) and 1114(f)(1)(A), Patriot's proposals must be "based on the most complete and reliable information available". Under the case law, this means that the court must look to the

"comprehensiveness of the underlying factual support, its breadth, depth, and objective credibility". And I'm quoting the Mesaba case, 341 B.R. 693, Bankr. Court, Minnesota, 2006.

The record is clear that Patriot based its proposals and complete and reliable internal data, expert analyses, and an updated business plan. We have seen no argument to the contrary in the UMWA's briefing, nor have we heard a contrary suggestion in the questioning of Patriot's witnesses this week. For that matter, we have not seen a suggestion in any papers filed by any of the parties to the contrary, and no one has argued that there is other or there was other more complete and more reliable information that Patriot chose to ignore.

Indeed, you heard Mr. Hatfield testify this week that because coal markets continued to deteriorate further after the filing of the Chapter 11 petitions and the DIP plan, Patriot went back to the drawing board and revised its business plan to ensure that its proposals took into account the most reliable and up-to-date information available at the time. Or in the words of Mr. Hatfield, "The company was committed to the concept of measuring twice and cutting once."

And I truly doubt you'll hear very much about this element from the union today because, as we all heard a number of times by many witnesses over the last few days, if we were today to revise the coal projections in that business plan, the financial hole would be bigger and the labor asked could very

well be greater.

The next section of the Code -- of the statutes I want to talk about is the obligation to meet at reasonable times and negotiate in good faith. We're on, now, the next slide. Under Section 1113 and 1114 to 18, Patriot must establish that it has met with the UMWA "at reasonable times", and that it has "conferred in good faith" in an attempt to agree on modifications.

Under the case law, the requirement that a debtor meet at reasonable times "only goes to the fact of the meetings taking place, not to what actually transpires at that meeting". And that, again, is the Mesaba case, 341 B.R. 719. The companion good faith requirement means that the debtor must exhibit "conduct indicating an honest purpose to arrive at an agreement as a result of the bargaining process". Again, that's a quote from Mesaba at 720.

But there is a burden-shifting aspect to this inquiry. Once the debtor has shown that it has met with the union representatives, it is incumbent upon the union to produce evidence that the debtor did not confer in good faith. And that's the American Provision Case, 44 B.R. 907.

For starters, I will note that it is not even clear that the union takes issue with Patriot's compliance with this prong of the statute. They do not directly reference it in their objection. But just to be sure, let's recount the

relevant facts.

Fact: Patriot's negotiation team took part in twelve -- twelve negotiation sessions before the motion was filed, and four after the motion was filed. The CEO, Mr. Hatfield, personally participated in each of these meetings. The record reflects that Patriot accommodated the UMWA at every turn. Patriot met with the UMWA at times when convenient to the UMWA and at locations where convenient to the UMWA. To take one example, Mr. Hatfield testified that last week the Patriot negotiation team here in St. Louis cleared their schedules on short notice and flew out to Virginia for an extra day of negotiations. You could also see, for additional information about this, Robertson declaration, paragraphs 7, 102, 134, 191, and 193, and Robertson's reply declaration, paragraphs 4, 5, and 6.

Fact: Patriot participated in dozens of conference calls, hundreds of e-mail exchanges, in a continual effort to respond to information requests from the UMWA and its advisors. Robertson declaration 191, 193; Robertson's reply declaration, paragraphs 4, 5, and 6.

And if you could pull up the next slide.

Fact: Patriot made five proposals to the UMWA, each of which included modifications specifically designed to address the UMWA's concerns -- and this is important -- and each of which reduced the savings available to Patriot and

created more risk to the reorganization. I refer you to Joint Exhibits 2, 4, 5, 6, 74 and 75.

To cite just one example, Patriot adopted the union's proposal for a litigation trust essentially unchanged. This was -- this behavior of Patriot is the polar opposite of the one-sided take it or leave it approach that courts sometimes criticize debtors for employing.

And what has the UMWA done to meet its burden, to show that Patriot did not negotiate in good faith? To the extent they make any challenge, they make quite a feeble one at that. Here it is: In the union's view, Patriot acted in bad faith because it didn't give up. It acted in bad faith because it made another proposal and tried to reach a consensual deal after the motion was filed and as the clock to this hearing was ticking down.

What a bizarre argument. First, as a legal matter, it is proper to make post-motion proposals; it happens regularly. The case law supports it, as does the statute, 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". That's 1113(b)(2) and 1114(f)(2). And the Court ruled on Monday that it will consider all post-motion proposals made by parties for all purposes.

Second, it is undisputed that the UMWA's president made a public statement touting the post-motion proposal as a

step forward. He said that to the media, and that's Joint Exhibit 288. To his credit, he confirmed that belief at his deposition, which is also -- the excerpt is also part of the record. And for good reason. As Mr. Hatfield testified, the proposal was a direct response to UMWA's concerns.

Now, the Court heard Mr. Traynor try to argue that even though the post-motion proposal was a positive step forward, it was made in bad faith because the timing was tactical. This is quite a balancing act, and I commend his effort to do so. It was made in bad faith, according to Mr. Traynor, because it was made in the window between the time that the motion was filed and when the trial began. But of course, according to Mr. Traynor, the UMWA's counter-proposal, made last Saturday night at 10:35 p.m., thirty-six hours before this hearing commenced, was somehow not made in bad faith. This, of course, is illogical, but it is also utterly inconsistent with the statutes which contemplate a highly expedited dual track -- dual track process with a hearing in as little as fourteen days after the motion is filed, and with the parties required to negotiate until the date of the hearing.

Mr. Traynor and the UMWA are substituting the statute's requirement that the union and the debtor both litigate and negotiate simultaneously, in a very short period of time, with their completely made-up requirement that all witnesses be available to be deposed and redeposed and deposed

again after each and every development at the negotiating table, simultaneously and in real time. Completely impossible. Indeed, most 1113 proceedings do not even involve depositions at all; this one involved fifteen over a two-week period.

In truth, the record here is chockfull of evidence of Patriot's good faith. Patriot wants to get a deal done; we are desperate to do so. We still want to get a deal done. We are prepared and were prepared to take part in marathon sessions, as we were prepared to do last Wednesday and Thursday. We wanted to roll up our sleeves, narrow the remaining issues, think through additional ways to close the gap between the parties and negotiate around the clock until we get a deal done. Unfortunately, we didn't have a counter-party willing to make the same effort. Instead, they sent us home mid-afternoon with a wave of the hand and a "see you in court".

While I fully appreciate that sometimes a union cannot enter into a concessionary agreement without the assistance of a court order, any attempt to suggest that Patriot was less than 100 percent ready to negotiate in good faith and avoid this trial is completely unsupportable.

The next element of Section 1113 and 1114 requires that Patriot instantaneously provide the union with any conceivable piece of information that the union or its financial advisors could concoct, for tactical and litigation purposes. I'm joking. But listening to the union's witnesses,

that is what you would expect the statute to say or require. In real life, however, the statute requires the debtor to provide the union with "such relevant information as is necessary to evaluate the proposals 1113(b)(1)(A) and 1114(f)(1)(A)".

Now, under the relevant case law, this means that a debtor must provide the type of information that will "enable a union's representatives and members to subjectively attach some bedrock legitimacy to a debtor's proposal, to convince them that the process of formulating the proposal was not arbitrary." That's Mesaba 341 B.R. 715.

Again, let's start with the facts.

Fact: Patriot set up an extensive electronic data room a month before it even made its first proposal, and 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. And I refer the Court to Robertson declaration, paragraph 8 and Robertson's reply declaration, paragraph 5.

Fact: Patriot responded to nearly 200 information requests from the UMWA and its advisers prior to filing its motion. Again, Robertson declaration, paragraph 8. It responded to an additional fifty information requests after filing its motion, and prior to the commencement of the hearing. You can find these requests at Joint Exhibits 76, 78,

79, and 88. We never said no -- never said no to a single relevant request for information.

Fact: Not only did Patriot locate and supply pre-existing business records to the UMWA, it generated documents and schedules specifically in response to UMWA's request. And I refer the Court to Robertson declaration, paragraphs 14 and 192.

Fact: Patriot scheduled meetings, conference calls, and site visits to provide additional context to the information and answer questions. It also made its outside experts and professionals available to meet with the union and its advisers and answer any questions they had. And I refer to Robertson declaration, paragraphs 48, 50, 57, 67, 68, 129, 133 and 138. For example, we heard testimony about meetings among the union and its financial advisor at PwC, and Patriot and its financial advisors at Blackstone.

Now, Patriot has submitted detailed, written testimony on all of these facts, and I would respectfully refer the Court to the paragraph of the Robertson declaration I just cited, and frankly, to that entire declaration, which reflects an exhaustive, all-hands-on-deck effort to comply with the union's scores of requests. As that testimony details, Patriot responded quickly and comprehensively to the union and PwC's request for information, even ones that appeared to be wholly irrelevant.

Pull up the next slide.

Let's pause for a moment and take a look at the screen or the next several screens, which provides a calendar of the last several months, starting in October. I'm not going to walk through it, but I think it's worth taking a look after court. As you see, these months have been jam-packed with negotiation sessions, presentations to the union, and delivery of documents in response to the union's approximately 250 information requests. In light of Patriot's robust showing, the burden shifts to the UMWA to establish that it did not receive relevant information. And that's the In re American Provision Company, 44 B.R. 907, 909-910.

How does the UMWA respond to this showing? By my count, in four ways. First, as this Court is painfully aware, the UMWA argues that Patriot withheld a functional business plan model, and that this case is just like Mesaba. Well, the record is undisputed that Patriot has withheld absolutely nothing. As Mr. Mandarino finally admitted, the union's real complaint is not that we didn't give them something, it's that we didn't build them something new, we didn't create a brand new model to PwC's liking.

Well, you heard Mr. Huffard testify that his team built the business model from the ground up in the precise way that Blackstone builds models in almost every other engagement. And I refer the Court to Huffard's trial testimony from April

30th at page 36, 17 through 22. That model, which is a live Excel model that is fully functional and capable of running multiple scenarios, was provided to the union. And that's Huffard reply declaration, paragraphs 52 through 56, as well as his trial testimony at page 36 and 37.

The UMWA does not dispute that point. Instead, Mr. Mandarino's central complaint is that the business model contained certain cells that rely on data from the company's Hyperion accounting system. But this complaint has zero validity. In fact, Patriot bent over backwards to respond to the UMWA's concern.

First, as Mr. Mandarino acknowledged yesterday, Patriot offered to run scenarios for the UMWA. In fact, Patriot did run two different coal pricing sensitivities for the union in December. And I refer to Joint Exhibit 61, which is a letter from Mr. Hatfield to Mr. Roberts on that topic. Second, Patriot offered to provide the UMWA with full access to the Hyperion system, an offer the union declined. And that's in Robertson declaration, paragraph 133. That evidence is also undisputed.

The sworn testimony was crystal clear. As Mr. Mandarino eventually conceded, there is no secret model out there that was not shared with the UMWA. They have precisely what we have. The case law simply does not require a debtor to create new data systems or models that do not yet exist. It

needs only provide whatever data is available, and Patriot has done that. It's done more than that.

So why does the UMWA continue to advance this argument when it knows it to be false? Well, they approach the model issue the same way the unions approached the entire information provision prong, as a game of gotcha. They read the Eighth Circuit case, they read Mesaba, and they said, ah-hah, here's a way to win. But in Mesaba, the debtor refused to turn over its dynamic model for inconsistent and frequently shifting reasons. Some of the debtor's witnesses testified that the model was withheld because it generated errors if put in the wrong person's hands, while other witnesses testified that the model was proprietary. And I refer Your Honor to 341 B.R. 716. The point is the debtor withheld the model and refused to turn it over. They withheld their model.

Here, of course, we withheld nothing and gave them everything we had. There are no cases on record that require a debtor to build a new model for the union. In fact, Mesaba is the only case on this subject at all. We respectfully suggest that enough time has been wasted on the business model.

Second, the UMWA argues that Patriot withheld information relating to the value of the unsecured claim. But this argument reflects a profound misunderstanding of the information-sharing requirement. Patriot has provided the UMWA with this information. As set out in Mr. Robertson's

declaration, as well as in Mr. Huffard's declaration and live testimony, Patriot and its advisors spoke numerous times with the UMWA about the value of an unsecured claim, delivered a formal presentation on the value of an unsecured claim and Patriot's proposal to help monetize the claim in an expeditious manner, and they provided illustrious ranges of recovery based on certain assumptions. And I refer the Court to Robertson declaration at paragraphs 182, 183 and 184, and the Huffard declaration, paragraphs 67 and 69, as well as Mr. Huffard's trial testimony at page 57 and 58.

Patriot has also produced tens of thousands of pages of information to the UMWA so that the UMWA and its advisors could test Blackstone's analysis or do their own analysis. And you can see that at Robertson declaration, paragraph 8, and his reply declaration, paragraph 5.

But the UMWA does not want to be provided with information. It wants to be provided with an exact dollar amount when, by definition, no such certainty is possible at this point in the Chapter 11 proceedings. One thing is for sure, the union had enough information to conclude that the value of the claim would be substantial, potentially hundreds of millions of dollars. And I refer Your Honor to Mr. Mandarino's declaration at paragraph 44.

The third argument is that Patriot failed to provide information about the recent proposal, including information

about the proposed thirty-five percent equity stake. Yet, you heard Mr. Huffard and Mr. Hatfield testify that they spent two days last week in the union's headquarters answering the UMWA's questions about this very proposal. And I refer you to Mr. Hatfield's trial testimony at page 66 and 67.

You heard Mr. Hatfield testify that he specifically walked through PwC's information request, summarized the response, and that the UMWA president, Cecil Roberts, specifically acknowledged that the request has been addressed. And you heard Mr. Mandarino yesterday lavish praise -- lavish praise on Blackstone for the information it provided at that meeting.

Now, you also heard testimony of Mr. Traynor. He first said that the requested information was not provided. When pushed on cross, he finally conceded that information was in fact provided by the company and Blackstone on April 24 and 25, but that he was not satisfied with the response and he wanted more. Well, if all it takes to lose 1113 and 14 is for a lawyer on the other side to make an amorphous claim that it was dissatisfied and wants more information, then 1113 and 1114s would be unwinnable. And Mr. Mandarino, the union's financial advisor, did not testify -- did not testify that he needed any additional information. He testified, instead, that Blackstone provided the union with "a sophisticated and dynamic model regarding the equity stake".

And if the Court will refer to Joint Exhibit 293, you will see an accurate recounting of the status of Patriot's most recent provision of information. And of course, Mr. Roberts had enough information to announce to the world, and in his sworn testimony, that the proposal was a step in the right direction.

The fourth argument that Patriot (sic) tries to make with respect to information provision is that Patriot delayed or provided incomplete information to the UMWA. And I want to take a moment to explain why this argument, as mundane as it seemed, is so offensive to us. There are Patriot personnel in this very courtroom, as well as in St. Louis and in Charleston and in the operations throughout the company, who have been living what was literally a six-month long fire drill.

The UMWA has made hundreds of individual information requests. And as Mr. Hatfield and Mr. Robertson testified, after each request was made, there was a conference call, and the conference call would include the negotiation team and the business folks and the financial advisors and the lawyers. And together they would describe their request, develop a plan of action, and dispatch a team to address the request. And I refer to Mr. Robertson's trial testimony, page 220. And because of that process, spearheaded by the CEO Mr. Hatfield himself, dozens -- and I mean dozens of Patriot employees have been enlisted to get the UMWA the information that it has

requested. This has come at an enormous burden and expense to the estate.

When considering this issue, I suggest the Court begin by simply comparing the Robertson declaration to the Traynor declaration. The first thing that jumps off the page when perusing and comparing the two, is the voluminous written backup for Robertson, and the lack thereof for Traynor. Mr. Robertson backs up his statements about what was produced and when, with contemporaneous written reports that were shared with both sides. These are all part of the record.

In stark contrast, Mr. Traynor's statements are unsupported. As Your Honor heard, when I confronted Mr. Traynor with this contemporaneous evidence, that was inconsistent with Mr. Traynor's statements in his declaration, that it took months for Patriot to produce this sub, sub, subset of information, Mr. Traynor said his declaration testimony was based on other documents not in the record. When I asked counsel to produce such records, they were unable to find anything.

But let's get even more specific. Let's really drill down on this. We heard Mr. Traynor complain on Wednesday about the absence of information related to the Peabody-assumed group. This complaint is particularly perplexing because Patriot provided a list of all retirees in that group on October 24th, 2012, more than two weeks before Patriot even

made its original proposal. And I refer Your Honor to Joint Exhibit 293, as cited in the data room as item 1.1.5.14.

Then in response to a request from the UMWA for more detailed information about this group, Patriot provided full census data. When was this data provided? In December 2012, nearly five months ago. And I refer Your Honor to Joint Exhibit 38.

Then in a status report dated January 22nd, 2013, PwC stated that it was reviewing the list and would "let the debtors know if there are any remaining questions or follow-ups regarding this item". And that's Joint Exhibit 48. There was no further mention of the Peabody-assumed group until March 29th, 2013. And that's Joint Exhibit 85 at page 5. And just yesterday -- just yesterday, Mr. Mandarino admitted on cross that this information was provided.

We also heard Mr. Traynor complain about health care utilization data and a time lag in receiving confidentiality agreements from Caremark, a third party. I want to take a step back so we can look at this request. If you take a look at Joint Exhibit 51, you see the request, as well as the information concerning the status of the response. The request is four pages long, but just take a look at the first page, when the Court has time.

The first request was for mail order usage and cost. The request was made on January 15th at 5:22 p.m. The

information was posted on January 17th, with further detail provided the following week. The second request was for chain pharmacy usage and cost. Request made January 15th; information provided January 22nd. The third request made on January 15th; information provided January 22nd and supplemented the following week. The fourth request, again, January 15th, requested; January 22nd, responded to. The fifth request, January 15th; January 17th. Sixth request made on January 15th; provided on January 22nd and 23rd.

And you have to go more than halfway down the page before you see anything referencing a confidentiality agreement or information that was not provided until February. Turn the page, same thing, request after request satisfied in under forty-eight hours. Information secured from third-party administrators within five days. These are the facts, but of course, nary a mention of any of that in the union's submissions to the Court.

At bottom, as I noted earlier, perhaps ironically, the union's view of this prong is that Congress provided the union with a tool, more like a cudgel, in 1113 and 1114, where if the union can think of anything -- anything that the company did not provide instantaneously, the debtors lose. And the UMWA played this litigation game -- this litigation game like a pro.

Let's look at some of their requests, if you could pull up the next screen. Just some highlights. A list -- they

requested a list of all major equipment by asset serial number, manufacturer, model and year of manufacturer. And that you'll find Joint Exhibit 67. They wanted to know the serial numbers on our equipment.

Next one, confirmation of whether all leased machinery and equipment contains purchase buyout options at various times during the lease, or only at the end of the lease. Again, Joint Exhibit 78.

And my favorite, the last one, historical annual capital expenditure amounts on an overall company basis from 2006 through 2008, notwithstanding the fact, of course, that Patriot did not even exist prior to 2007.

I can go on, but I think the Court gets it. The statute requires that the debtors provide the union "with such relevant information as is necessary to evaluate the proposal". It does not require that we satiate the union's tactical information appetite.

Let's move on to fair and equitable. Under Section 1113 and 1114, Patriot must prove that the proposals treat all parties "fairly and equitably". That's 1113(b)(1)(A) and 1114(f)(1)(A). Under the relevant law, fair treatment must be tailored to the circumstances. It does not require across the board identical treatment, and it is simply not the case that dollar for dollar concessions need to be made by every constituency. And that's in the Mesaba case, 349 B.R. 749 and

In re Walway, 69 B.R. 974 (Bankr. E.D. Mich.).

Indeed, when one group, like the UMWA here, has significantly higher compensation than another that is similarly situated, seeking proportionally larger cuts from the former is to be expected. And I refer Your Honor to the Pinnacle case, 483 B.R. 381, just from last year. Even giving this leeway, Patriot has not asked the UMWA to carry an outsized burden. Again, here the facts carry the day.

Fact: Patriot has undertaken an exhaustive process to reduce nonlabor costs and stem its losses, including by reducing production and overhead, eliminating unprofitable contracts, making heavy cuts to its capital expenditure budget, and selling surplus assets. And that's at Hatfield declaration, paragraphs 84 through 89. And we have the summary slide, that Mr. Hatfield walked us through early in the week, on the screen.

Fact: Patriot has made a comprehensive effort to reduce nonunion labor costs, including by cutting employees and contractor positions, reducing wages, terminating the company's supplemental 401(k) plan, and modifying medical and prescription drug benefits. And I refer the Court to Hatfield declaration, paragraphs 89 and 92, and to the slide that Mr. Hatfield walked us through the other day, which is on the screen and in the pamphlet.

Fact: Patriot's nonunion cuts -- nonunion cuts will

yield cash savings of 170 million dollars in 2014 alone. And that's in Hatfield declaration, paragraph 104.

Fact: As coal markets continue to deteriorate since the creation of the October business plan, Patriot went back to its nonunion work force and implemented additional cuts on top of, and incremental to, the nonunion labor cuts already baked into the plan.

Fact: Patriot's 1113 proposal does nothing more than bring the union miners in line with the market. Thousands of people come to work every day, both at Patriot and at other companies, and receive wage and benefit packages lower -- lower than what is being offered to the union. While the union wants to ignore this fact, and contends that union members doing the exact same job as their nonunion colleagues, have a divine right to greater compensation, you also heard Mr. Hatfield's testimony that in his thirty-plus years in the coal business, he has never met a customer who is willing to pay even an extra penny for union coal instead of nonunion coal. That, Your Honor, is the cold reality.

Fact: The UMWA already agreed to many of these concessions in the gateway CBAs which were freely negotiated between Patriot and the UMWA. And you find that in Lucha declaration, paragraphs 9 and 10.

So the 1113 changes we are talking about here are neither unprecedented nor groundbreaking. These facts are

unrebutted.

So what fair and equitable argument can the UMWA advance, in light of the fact that all of the proposals that were made -- all the proposals still leave the union workers with pay and benefits superior to -- yes, superior to the nonunion work force who comes to work every day?

Well, first, the UMWA argues that the proposals are not fair and equitable because UMWA-represented employees and retirees shoulder a disproportionate percentage of the requested cash savings; in their mind, a whopping eighty-seven percent. The UMWA continues to press this argument, notwithstanding that the fact that there is no record to support this and it is absolutely contrary to the law.

Let's first turn to the law. As we talked briefly before, a constituency that has been receiving greater compensation for the same work as another, may be asked to accept larger cuts. And again, that's the Pinnacle case. In Pinnacle, the court found that it was fair to demand a far larger pay cut from the pilots union than from another constituency because of the disparity between the groups' pay. Likewise, the Delta court found relevant to its analysis that after the 1113/14 process, flight attendant union pay would still be higher than flight attendants at other airlines.

So under the law, even if the union's analysis was accurate, it gets them absolutely nowhere. Union work force

needs to give more because every aspect of their compensation is far above market. The represented employees must give more because, while every other employee and constituency in this reorganization has been sacrificing, the union employees and retirees have, consistent with federal law, continued to receive their compensation and benefits without disruption. And while other employees have seen their paycheck shrink and their benefits cut, the union employees have continued to receive multiple raises. And you recall that testimony from Mr. Hatfield on the stand. Now, but even putting aside the law, the union's assertion that it is making eighty-seven percent of the sacrifice has been completely debunked by Mr. Huffard, Mr. Hatfield, and indeed, even Mr. Mandarino.

And I think the Court recalls this slide that's on the board now; this is the eighty-seven percent or alleged eighty-seven percent slide. Mr. Huffard and Mr. Hatfield both testified that Patriot has identified hundreds of millions of dollars of cuts from all corners of the business, from slashing CAPEX to the elimination of high-cost contractors, from rejecting and renegotiating underwater contracts to selling surplus assets and eliminating payments on our unsecured pre-petition DIP, from reducing overhead to reducing management head count, from cutting medical benefits and long-term disability benefits for nonunion employees to wiping out 401(k) balances for salaried employees and cutting nonunion

compensation. Again, I refer to Huffard declaration, paragraph 39 to 41, and Hatfield declaration, paragraph 87 to 92.

Indeed, the Court just recently approved a settlement between the nonunion 1114 committee and the company, in which nonunion retirees made painful sacrifices and were forced to yield the retiree health care benefits. Simply stated, when it comes to shared sacrifice, no stone has been left unturned.

But Mr. Mandarino has chosen to ignore the vast majority of those overturned stones, and formulates a self-serving analysis that you can see on the screen. Yesterday, however, you heard Mr. Mandarino tell you precisely how he calculated that canard, that eighty-seven percent number. He looked at two line items in a single tab in Patriot's business plan, and divided one number by the other. That's it. But Mr. Mandarino admitted that his analysis includes none of Patriot's pre-petition cuts, none of Patriot's post-petition cuts that pre-dated the business plan, and none of Patriot's post-business plan cuts. Nor, if you look at the graph in Mr. Mandarino's declaration, from which his eighty-seven percent claim is derived -- and that's his declaration, paragraph 20 -- he excludes any sacrifice that was made in 2013, the year in which the bulk of nonunion reductions were made.

Mr. Mandarino's analysis has been gerrymandered beyond recognition until no factor that would diminish his point was included. This is naked cherry-picking, of course, and it

distorts the reality of the sacrifices made by all of Patriot's constituencies.

Second on this prong, the UMWA argues that Patriot has failed to consider miners' health problems. This claim is absolutely false. Patriot's proposed health care for active employees is both comprehensive and generous. It covers all major categories of health services, including 100 percent of the cost of preventive care services. Its out-of-pocket maximum is affordable and beats the national average. It covers routine and catastrophic treatments identically. The list goes on. Indeed, the testimony of Patriot's health care expert, Mr. Terry, is undisputed on each of these points. And I refer the Court to Terry declaration, paragraphs 14, 15, 17, 18, 21, and 26.

And of course, Patriot's nonunion employees, doing exactly the same job, share the same health profile as their union colleagues. Moreover, the VEBA has a larger stake in the reorganized enterprise, a stake worth hundreds of millions of dollars. Mr. Roberts recognized that Patriot's proposal to fund the VEBA with an equity stake was a step forward and for good reason. A thirty-five stake in the reorganized company will yield substantial value, regardless of what valuation one assigns on the company.

If the reorganized company has a net distributive value of 500 million, the equity stake is worth 175 million.

If a billion, it's worth 350 million. If 1.5 billion, it's worth 525 million. It's just simple math. And it's also hundreds of million dollars under any scenario. For that reason, the UMWA's refrain that the VEBA funding is illusory is itself baseless.

Mr. Cobin has analyzed only a caricature of the proposed VEBA, refusing to recognize any funding other than a fifteen million dollar initial investment. That's an absolutely absurd premise, and anything the UMWA has to say without recognizing all of the VEBA's sources of funding is, frankly, irrelevant, and, as Mr. Mandarino himself noted yesterday, unfair. In reality, the VEBA is well funded, precisely because Patriot understands the importance of health care.

Furthermore, Your Honor, the union's 1.79 billion valuation of Patriot's retiree health care liability is simply off the chart. Mr. Cobin's analysis ignores the undeniable positive impact that the Affordable Care Act will have on Patriot's retirees. The Act provides early retirees access to plans on health care exchanges that contain critical safeguards, such as a restriction on age discrimination and a prohibition on denying coverage for pre-existing conditions. Early retirees will be eligible for premium subsidies to purchase these plans. And Patriot's seniors will benefit from new and improved Medicare. All low-income Patriot miners will

benefit from new and improved Medicaid. And I refer Your Honor to Joint Exhibit 80. The Affordable Care Act's omission from his analysis calls into question every question of Mr. Cobin's work.

Now, even more suspect, however, is that he selected a model that, in his own words, would balloon the retiree health care liability estimate. Mr. Cobin testified that he's only seen this "Getzen model" used by two audit clients. It's not standard practice, it's not required by GAAP, and a couple of years ago, no one was using it. What's more, he took this model, an outlier to begin with, and manipulated the baseline assumptions to exaggerate the liability even more. He told you just yesterday that CPI and GDP are the primary drivers of the model and that if you wanted to put your thumb on the scale and push up liability, these are the inputs you tweak. So what did he do? Well, he tweaked them; he put his thumb on the scale. He tweaked the baseline inputs. The results: a Getzen model on steroids, projecting an excessive liability amounting to 1.79 billion dollars.

And let's not forget that Mr. Cobin admitted that Mercer has correctly calculated Patriot's FAS 106 liability. He also admitted that FAS 106 requires the use of "best estimates". So he conceded that Mercer used the best estimate. That's where the story should end, Your Honor. Mercer's independent valuation is highly credible and appropriate.

Next, the UMWA has contended that proposals are inequitable because Patriot refused to accept a so-called snapback. But even the UMWA recognizes that a snapback is infeasible, backing down from the position, and replacing it with a wage reopener in its latest counter-proposal because, as Mr. Mandarino told you yesterday, Patriot may not be able to bear the costs associated with a snapback.

The UMWA, nevertheless, continues to try to develop a record that Patriot's nonunion personnel will benefit in the future if coal markets rebound, while union employees would be locked into lower wages and benefits. Again, this is untrue. The 1113 proposal has provided for months that UMWA-represented employees will receive a wage increase, in the event that a similarly situated nonunion employee receives a wage increase. And should fortunes improve, union retirees will receive benefits not shared by the nonunion counterparts. The equity stake in the VEBA will grow in value, while profit-sharing and royalty contributions will also increase.

More important, however, a cessation of savings, a snapback is impossible under the circumstances. As Mr. Huffard testified, in his professional experience, lenders need some certainty about a company's cost structure before extending exit financing. I turn your attention to Huffard declaration 49, and to Mr. Huffard's trial testimony.

Why do they need certainty? It's pretty intuitive.

Patriot is in bankruptcy. Its financial performance remains dismal. The markets remain weak. And if Patriot's efforts to reduce costs will be reversed in just thirty months, prospective lenders will feel no security about their ability to recoup their loans. And as Mr. Huffard testified, the risk here is even greater than for a typical Chapter 11 debtor seeking exit financing. Why? Because Patriot will have negative free cash flow through 2014, whereas the vast majority of Chapter 11 debtors are cash flow positive at the time they emerge from bankruptcy.

Patriot is projected to have some positive free cash flow in 2015 and 2016, but only two years of positive cash flow is little comfort to lenders. And Patriot's 2015 and 2016 financial performance is by no means guaranteed. As we heard, the revenue projections in the five-year business plan are based on coal pricing forecasts that Mr. Schwartz told you are overly optimistic. And those already rosy revenue projections don't even take into account profit sharing, royalty contributions or pension-related payments featured in Patriot's most recent proposals.

All told, Your Honor, the proposals are fair and equitable. While the requested sacrifices are real and painful, and we recognize that, they are the type of sacrifices that every other constituency to this bankruptcy, both labor and nonlabor, has to bear if the company is going to survive

and emerge.

The next prong of 1113 and 1114 says that the Court should grant the application for relief upon a finding that the union has refused to accept the proposal without good cause. Under the test applied in the American Provisions case that Mr. Perillo cited to you on Monday, "Once the debtor has shown that the union had refused to accept its proposal, the union must produce evidence that it was not without good cause." And that's 44 B.R. 909. In other words, the burden shifts to the union.

And what argument has the union advanced in an effort to satisfy its burden? There are two -- two arguments, and each falls woefully short. First, the UMWA argues that the VEBA will be severely underfunded, and therefore it had good cause to reject the proposals. But yet again, for the purposes of this argument, the union pretends -- literally pretends that the VEBA will only be funded with fifteen million dollars. As we have heard again and again, the equity stake in the current proposal and the unsecured claim in the earlier proposal, will be worth over 350 million dollars, according to the union's own financial advisors. Mr. Mandarino acknowledged that yesterday. Where does the union come up with the legal proposition that just because an indisputably large sum of money has some degree of uncertainty as to the specific amount, it should be altogether ignored and be given zero value? And let's not

forget the royalty payments in the proposal, pursuant to which the VEBA could receive tens of millions of dollars a year in perpetuity.

After the VEBA argument, the UMWA argues that permitting Patriot to modify its collective bargaining agreements and retiree health obligations would condone Peabody's and Arch's conduct. This is a difficult one for me, so let's pause here to discuss Peabody and Arch. You heard Mr. Hatfield testify that Patriot has been conducting an investigation for months, reviewing documents, interviewing witnesses, trying to evaluate all possible claims against Peabody and Arch.

Patriot filed a successful motion to gain access to additional documents for the relevant time period from Peabody. Patriot also filed a declaratory judgment action and filed an expedited dispositive motion. A mere six weeks elapsed between the filing of the action and an oral argument on the motion for summary judgment that occurred on Monday. As Your Honor has witnessed firsthand, the company has and will continue to pursue Peabody and Arch, and if appropriate, will commence legal action and zealously prosecute these actions.

So then taking a step back, what, in essence, the UMWA is asking the Court to do is punish Patriot for the actions of other coal companies. The union is asking Your Honor to deny 1113 and 1114 relief and propel the debtors into liquidation to

avoid condoning Peabody and Arch's inexcusable conduct. So we punish Peabody by crippling and then liquidating one of its competitors. I know I'm a bit sleep deprived, but that sounds a lot more like rewarding Peabody than punishing it.

Let's go to the major prong of 1113 and 1114, and that's necessity. Under Section 1113 and 1114, Patriot has to prove that the proposed modifications are necessary to permit the reorganization of the debtor. So what is necessity? We could sit here and debate. Is it the Second Circuit standard in Carey, which has been adopted by most courts, and which looks to whether proposals are necessary for the long-term competitiveness of the debtor? Or do we follow the Third Circuit's minority view in Wheeling, which looks only to whether the proposals will help the company stave off liquidation. Lucky enough, we can spare you the philosophical discussion, because the facts show that Patriot satisfied either and any standard.

Again, let's look at the cold, hard facts. Turn to the next slide; that should look familiar. Patriot needs significant savings in the short term to stave off liquidation. Patriot continues to burn through cash, and is projected to have no cash, literally zero dollars, by early 2014. That's Huffard declaration, paragraphs 73, 74, 75, 76, 77, and Mr. Hatfield's declaration at paragraph 59. There is no dispute about this.

Fact: Absent savings, Patriot will breach the EBITDA and liquidity covenants in its DIP agreements by the year end. Such defaults could accelerate Patriot's repayment obligations, forcing Patriot to liquidate even before it runs out of cash. And that's in Huffard declaration, 73 through 77, and Hatfield declaration at paragraph 59.

Fact: Mr. Mandarino testified that the union is in agreement with Patriot regarding the magnitude of savings that are required over the next two years.

Fact: Patriot needs significant savings to survive in the medium term. It will be extremely difficult, more like impossible, for Patriot to secure exit financing without first overhauling its labor costs. And that's Huffard declaration, paragraphs 78, 79 and 80. Mr. Mandarino agrees with this as well.

Fact: Patriot needs significant savings to survive in the long term. Patriot cannot compete with its well-capitalized competitors, such as Peabody and CONSOL, who have far leaner core structures. Absent relief, Patriot will simply not survive in this competitive industry. And I point Your Honor to Huffard declaration, paragraphs 53 to 57, the Hatfield declaration, paragraphs 98 and 100, and the Schwartz declarations, paragraphs 51 to 61 and paragraphs 69 to 70.

Fact: I really like this slide. The imperiled Social Security system is funded by 2.8 workers for every one

beneficiary. Patriot, on the other hand, is turned on its head; one worker supports at least five retirees and dependents. Everyone talks about how sick the Social Security system is. If that's sick, this is sick. These numbers reflect unsustainable status quo.

Those are the unrebutted facts. It is the rare case, Your Honor, where the union actually, perhaps without meaning to do so, stipulates to necessity. And that is precisely what happened here. Mr. Traynor testified that Patriot's legacy liabilities are unsustainable and that Patriot was doomed to fail from the very beginning. Mr. Roberts, likewise, asserted that he believed that Patriot was never financial viable. And that's Roberts's deposition at pages 34 through 39. And add to these legacy retiree obligations, the below market projects Patriot also inherited from Peabody. Indeed, according to the union -- according to the union, Patriot could have made the requisite necessity filing or showing five years ago.

Undeterred, the union has thus set forth a number of make late arguments about necessity, so let me just knock them out one by one. First, the UMWA continues to assert that Patriot is seeking greater concessions than it needs, and continues to point to Patriot's EBITDA figures. Pure and simple, EBITDA is the wrong metric. Again, when Mr. Mandarino says that Patriot will have 1.2 billion in profits over the next four years, what he's really looking at is EBITDA. And

when one evaluates Patriot's free cash flow over the next four years, as opposed to EBITDA, that figure plummets all the way from 1.2 billion to 81 million.

Why the difference? Because Patriot has to spend large amounts of cash on items that are not reflected in EBITDA. It spends millions upon millions on capital expenditures to keep mines safe and its equipment running. It spends millions upon millions on environmental obligations, millions upon millions on Coal Act benefits that are required by statute, and millions upon millions of other regulatory obligations. Now, Mr. Mandarino wants to ignore all that spending, and that may well be the right way to look at companies in other industries, but those costs simply don't go away for Patriot because the union wants them to. You cannot pay bills with EBITDA; you pay bills with cash.

Second, the UMWA argues that savings are not necessary because Patriot has sought relief for five years, through 2018, but failed to make projections beyond 2016. Oddly enough, this argument ignores the fact that the UMWA made a counter-proposal last Saturday night that contemplates savings through 2013, which the company appreciated, even though it came with a wage reopener. This argument should simply fall off the table.

But counter-proposal aside, Mr. Huffard testified that savings are necessary through 2018 to secure exit financing. And exit financing is crucial for every debtor, but is

particularly important here because Patriot projects negative free cash flow through 2014. In other words, Patriot projects that it will emerge from bankruptcy while still cash flow negative, something that Mr. Huffard testified is highly unusual. Even Mr. Mandarino testified that Patriot's concerns regarding the union's earlier snapback provision, which would have terminated savings in 2016, was not unreasonable.

Third, the UMWA argues that Patriot's proposals are not necessary because Patriot's business plan is based on "unreasonably conservative coal price projections" -- or at least Mr. Akunuri argued this. Mr. Akunuri, however, testified that he's not an expert in coal price projections and that he has never prepared a coal forecast, and that he is not even permitted to provide coal price forecasts. Yet he's the person who asserts that Patriot does not need the savings it has requested because coal prices are better than projected and revenues will therefore be better than projected.

I think a lot of people here would like to live in Mr. Akunuri's world. It sounds a lot better than the world we live in today, but it is not the reality. In reality, coal prices have deteriorated since Patriot prepared its five-year business plan. Both Mr. Hatfield and Mr. Schwartz testified to this in no uncertain terms. And Mr. Hatfield has worked in the coal industry for more than thirty years. Mr. Schwartz is a preeminent or perhaps the preeminent coal expert, provided an

extraordinary detailed and well-founded expert opinion on this matter. By contrast, Mr. Akunuri made significant errors in his report. To the extent there is any battle between the expert, there is no real contact.

Fourth, the UMWA argues that Patriot's proposals are not necessary because the UMWA has identified, and Patriot could implement 189 million dollars in additional cash savings over the next four years. I say 189 million because that's become a shorthand for this point, but Mr. Mandarino himself has now downsized this to 155 million.

Numbers aside, the analysis is completely wrong. Mr. Mandarino asserted in his declaration that Patriot could secure millions in savings from the elimination of "management bonuses", but both Mr. Huffard and Mr. Hatfield testified that half of that total represents noncash stock option expenses which will yield absolutely no cash burn. Both testified that the other half is performance-based incentive compensation which Patriot believes is needed to stem the flow of departures of key personnel and which is available to low-level and mid-level management. And I refer Your Honor to Huffard reply declaration 28 to 31, as well as Mr. Hatfield's testimony at trial. And even Mr. Mandarino conceded that these funds might be needed to retain employees; he just didn't know either way.

And just so the record is clear, each and every one of Patriot's competitors have this type of incentive program,

although perhaps a lot richer than what we're offering. And that is directly from Mr. Hatfield's testimony. So if we're going to continue in operations and retain people to run the operations, there's no choice but to pay them almost as much, at least, as they could make if they walked across the street.

Mr. Mandarino also asserts that Patriot could, without explanation or any specificity, further reduce capital expenditures, even though Patriot has already reduced CAPEX by approximately 620 million dollars between 2013 and 2016. And that's Hatfield declaration at paragraph 88.

Mr. Mandarino also persists with his argument concerning salaried to hourly staffing ratios, even though significant errors in his analysis were exposed at his deposition. Suffice it to say that Mr. Mandarino makes claims and Mr. Lucha provides the actual statistics. And the statistics show absolutely no disparity. Indeed, Mr. Lucha provided unrebutted testimony that the ratios of Patriot's nonunion and union operations reflect negligible differences once one stops counting secretaries and IT personnel and HR personnel as "mine supervisors". You can find that in Lucha's reply declaration at paragraph 24 and Joint Exhibits 116 and 117. And the cushion -- there is no cushion. As Mr. Huffard explained, these are real dollars that had been or will be devoted to real uses. And I refer you to Huffard's reply declaration, paragraphs 37 to 42.

Fifth, the UMWA contends that Patriot's proposals are not necessary because Patriot set its obligations to other parties in the bankruptcy in stone before coming to the union. They call it building the proposal from the bottom up. Well, let's discuss this for a second. What did Patriot do? It's business personnel and financial advisors scoured for all available cuts. And only after all potential avenues for cuts were examined, did Patriot turn to the UMWA.

This complaint is somewhat curious. Would the union have preferred Patriot ask them for cuts first before looking to any other constituency? I would think not. Ironically, it's usually the UMWA or the union's position that the fair and equitable prong of 1113 requires that the debtors first explore cuts elsewhere before coming to the union.

Sixth, there is no credible testimony supporting the union's contention that Patriot created its own liquidity crisis by entering into DIP agreements with liquidity and EBITDA covenants. I don't even thing they're going to push this one. You heard Mr. Huffard testify that Patriot would have liquidated last summer, absent DIP financing. And you heard Mr. Huffard testify that those covenants were hotly contested, that Patriot reduced the thresholds of the covenants, that Patriot could not have secured financing that excluded these sorts of financial covenants.

And this testimony didn't only come from our financial

advisor, it also came from the union's. Mr. Mandarino acknowledged that the bankruptcy court approved the DIP financing, he had no reason to second guess the court's judgment, and that Patriot could not secure replacement financing today.

Indeed, the bankruptcy court's words are dispositive, and frankly, law of the case. And I'm quoting from ECF number 275 at page 11. This is from the court: "The debtors are unable to obtain financing on more favorable terms from sources other than the DIP lenders pursuant to the DIP document."

Seventh, the union challenges certain work rule modification which it labels as noneconomic modifications that should not have found their way into the proposals. But as Mr. Lucha, Mr. Hatfield, and Mr. Robertson consistently testified, these changes have economic benefits. The most striking example is the attendance modification. As Mr. Lucha clearly testified, having people show up for work more often can significantly reduce costs and improve efficiency. And I point the Court to Lucha's reply declaration, paragraphs 7 through 10, and Mr. Lucha's trial testimony on day 2 at pages 377 to 378.

Eighth, the UMWA asserts that Patriot's union mines are safer than its nonunion mines. Fortunately, we have data and they have anecdotes. Mr. Lucha testified that Patriot's nonunion mines were safer than its union mines in 2011 and

2012, and that testimony is entirely unrebutted. And that's in Lucha's reply declaration, paragraphs 11 through 15.

Mr. Buckner also asserts that Patriot's union mines are more productive than its nonunion mines. Again, the truth is the opposite of this assertion. As Mr. Schwartz and Mr. Hatfield both testified, and Mr. Buckner actually agreed, productivity is driven by geology, not by miners.

More importantly, these arguments are red herrings. The relative safety or the relative productivity of mines simply have nothing to do with what Patriot could afford and what cost savings it needs and how it could achieve those savings.

Finally, let's discuss the UMWA's Saturday night counter-proposal. As we have said, there were improvements, but the asks remain far too large. Even if we want to assume that every number on the summary of savings were correct, which will require a significant suspension of disbelief in light of our prior flaws, the savings are almost entirely offset by other onerous provisions in the counter-proposal, such as enriched royalty payments and required cash contributions, wrongly dubbed profit sharing. That profit sharing proposal, which is not even reflected in the summary of savings, required Patriot to give more to the UMWA, more than thirty-five million dollars in some years, than the UMWA gives to Patriot in savings.

In sum, Your Honor, the union's position that this enterprise was "doomed for failure" and "a house of cards" -- and those are quotes from the UMWA -- way back in 2007, requires the conclusion that in 2013, with liquidity evaporating and markets continuing to plummet, necessity is very apparent; it is screaming. The union's assorted efforts to dance around these facts are simply invalid.

Let's go to one of the final factors, the balance of equities. Turning to the next element, under Section 1113 and 1114, Patriot has to show that "the balance of equities favors rejection". That's 1113(c)(3) and 1114(g)(3). Through its declaration and through the testimony of Mr. Huffard and Mr. Hatfield, 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.

The UMWA's main response to this is what? It's a threat. It's a threat that we've heard since September, when then counsel for the union told Judge Chapman that they will refuse to negotiate if the case was not transferred to West Virginia. It is a threat that we heard in mid-March when Mr. Perillo told the Court that the UMWA may strike if the Court grants the incentive compensation motion. It is a threat that we again heard on Monday, and a threat that he repeated through questionings of witnesses throughout the week. The threat: if

you grant the motion, we will strike and we will shut this company down.

I'm not sure what Mr. Perillo is trying to prove, quite frankly. Indeed, we stipulate that if the UMWA were to strike, the company could ultimately liquidate. And perhaps in one of the most bizarre moments of this trial, under direct questioning from Mr. Ho, in a moment that -- kind of, again, bizarre, Mr. Buckner said that he was actually unsure, if the motion was granted, whether the union would strike, and Mr. Ho then objected to his own witness' testimony.

But rather than arguing, I think it would be best to use the time on this issue for me to simply read from the court's decision in Mesaba. There the union argued that if 1113 relief were proposed, the union would strike. The court responded to the union's threat as follows, and again, I'm just reading from the Mesaba decision because I think it's exactly pertinent.

And I quote: "It is almost embarrassing to see it presented in a forum that is to receive principal discord structured by dictates of reason. In contrast, this seems to be a matter of posturing only and posturing in the height. One message to be gleaned from it is jarringly out of place in legal proceedings. If you don't watch out, I'm really going to hurt myself and you too. An image comes to mind of standing under a high bridge and hearing a voice coming from above: if

you don't give me what I want I'm going to grab you and take us both over the edge." Again, I'm still quoting from an opinion. "In point of fact, the power to conduct a strike rests solely with the unions. This is where the impetus for one must lie and to the attribution of any consequences. To raise this threat as an ostensible and compelling reason to deny the motion is truly ignoring the plank in the eye for the splinter in the finger, if the thought is that above all else it is necessary for the debtors to continue operation. The debtor has made its case that its operations will not be able to continue on the current cost structure, including labor costs. This is the situation that all of the constituencies must deal with. Under the facts established, the motive force for the process should be the anticipation of a mounting bleed-out under the current cost structure or a catastrophic hemorrhage. But threatening to cause a catastrophe, in the wake of one outcome to the 1113 process, and then saying that the making of the threat could conclusively deter that outcome, elevates a bullying tactic to mask over the underlying problem. There is an aura of self-righteousness, of self-possession here that borders on solipsism. And ultimately, would the threatened outcome really be in the best interests of the regular working people who make up the union's locals?" And that was a quote from 341 B.R. 747 to 748. I couldn't have said it better myself.

I suspect a number of people in this courtroom found the union's approach here quite jarring, especially when as the union keeps on reminding us, this is about real jobs and real benefits, and that's what on the line here, and the union never fails to remind us of that.

So there they are, Your Honor. There are the elements of 1113 and 1114. One word on the burden of proof. What's the burden of proof here? The burden of proof is the preponderance of the evidence, and that's clear from the case law. And the question the Court then has to ask is have we met the burden of preponderance of evidence.

And to be clear, preponderance of evidence is not clear and convincing standard. We do not have to be perfect. I think we were pretty close. Our numbers don't have to be absolutely right. We need only be more right than wrong. The scales, at the end of the day, may only need to tip slightly more in our favor. Of course, it's our belief that the record in this case, the evidence, the testimony has met this burden and exceeded it by miles.

Which proposal counts, Your Honor? For the integrity of the record, I note one additional point, before I move on to the -- what I call the cats and dogs, the other objections. I note one additional point. Your Honor will recall that there was a debate at the outset of the hearing as to which proposal counts. And Your Honor, quite appropriately, and consistent

with the statute, ruled that the Court should consider all proposals for all purposes, including Patriot's most recent proposal made before the commencement of the hearing as well as the union's even more recent counter-proposal. I would simply note that if the Court is inclined to grant Patriot's motion, the issue raised by the union would be mooted for purposes of any appeal if the Court found that not only was our most recent proposal satisfactory under the statute, our pre-motion proposal was as well.

And certainly, all the evidence that we have discussed bears this out. I simply note this for the completeness of the record. And needless to say, the debtors believe that both the pre-application proposal and the post-application proposal satisfy each and every element of this statute. But of course, let me be clear, if our motion is granted, we would only implement our final proposal, the proposal that even President Roberts conceded was a step forward.

Let's briefly turn to the funds. Like the union, the UMWA funds have done absolutely nothing to undermining Patriot's showing that each of its proposals satisfy the requirements of 1113 and 1114. As Your Honor heard during our opening statement and today, the UMWA funds consist of seven pension and benefit plans that are funded by contributions from numerous coal industry employees. Three of these funds have objected to or joined in the objection to Patriot's motion.

That's the '74 pension plan, the '93 benefit plan, and the 2012 bonus trust.

Patriot contributes to each of these plans pursuant to the terms of the 2011 NBCWA with the union. Now, the '74 pension plan is the largest of the three, and the most significant part of Patriot's request for relief. The debtors currently contribute approximately twenty million dollars per year to this plan. That amount is expected to go up to over thirty-five million dollars per year in 2017 and to over sixty million dollars per year by 2021. Again, thirty-five million starting 2017, sixty million per year 2021. And that's out of the Lucha declaration, paragraphs 33 to 34.

Joint Exhibit 262 shows the funding improvement plan that the 1974 pension settlers develop and adopted, and which the 1974 plan sent to all contributing employers to inform them of expected future contribution rates. As you'll see from that exhibit current rates of $5.50 per UMWA pay represented hour are scheduled to more than double -- double to $12.50 in 2017, and are scheduled to increase by nearly 500 percent to twenty-five dollars per hour in 2022. This is how we arrived at the thirty-five to sixty million dollar per year number I noted a moment ago.

Now, there's no dispute, nor can there be a dispute, that contributions at this magnitude threaten to put Patriot out of business. In fact, the funds' own witness, Dale Stover,

stated at his deposition that based on his experience in the coal industry those contributions rates would make it "Very difficult for coal companies to continue to operate." And that deposition testimony has been designated.

Patriot has presented the Court with unrebutted expert testimony from Mr. Huffard about this topic. Mr. Huffard, in his declaration at paragraph 57 and in this courtroom, testified that Patriot cannot and will not obtain necessary exit financing and cannot reorganize unless it can eliminate the risks that contribution rates will increase dramatically beginning in 2017. By contrast, Mr. Mandarino says not a single word about the pension and benefit plan when he testified.

Now, the funds have asserted with zero evidence that withdrawing from the 1974 plan is unnecessary because the contribution rates schedule that the funds sent to Patriot may -- may not go into effect. Bear in mind that these rates are not Patriot's predictions for future rates, they aren't speculation by Patriot as the union suggests, these are the rate schedules created and adopted by the BCOA and the UMW and sent by the funds to all employers as the best estimate of what the future rates will be. This is reflected in Joint Exhibit 262 and Mr. Stover's deposition, pages 43 to 45, and page 57.

Your Honor, this gets very technical, but I think it's easier if you just take a step back. Let's think about the

funds' position. Can you imagine what it would like from a practical perspective. The debtors undoubtedly need exit financing, there's no denying that. The company sits across the table from a potential investor who will take a look and see that Patriot's contribution rate is scheduled to more than double in 2017 and increase by 500 percent in 2022. As the investor is running to the exit the funds' position is that we can lure them back by uttering these magic words "Don't worry Mr. Goodchild said that those rates might not happen."

Patriot asked the funds to just put it in writing, give Patriot and its potential investors and lenders an assurance that the company will be not forced back into bankruptcy, Chapter 22, by skyrocketing contribution rates in 2017. The funds have refused and have left Patriot in the untenable position of convincing investors that these predicted rates set forth in the funding plan won't happen because Mr. Goodchild said so.

The funds argue to this Court that this risk of dramatically increased rates may not happen. Again, may not happen. They present two principal reasons why.

First, they suggest the funds assets may well perform well enough that contribution rates do not need to increase.

And, two, they say that the UMWA and the BCOA, the parties that collectively bargained to determine what contribution level will be, may decide -- again, may decide not

to implement rates as high as needed to eliminate the 1974 plan funding shortfall.

The suggestion that the funds' assets could perform so well that increases -- that rate increases may not be required, or that the need to contribute could disappear altogether is particularly disingenuous in light of the supplemental declaration filed by the funds just two days ago, and that's ECF Number 3919. The stipulation suggests the exact opposite. The 1974 plan assets are predicted to depreciate so much that in the third quarter of 2014 it will be certified as being in critical status, that means sixty-five percent funded.

Again, if the funds believe the assets will appreciate put it in writing, give us something to show an investor, but they continue to refuse. Instead, they ask Patriot and potential investors, to believe the 1974 plan will not require "increased contributions" despite its declining financial health.

Now, with respect to the funds' argument that the BCOA and the UMW may -- again, may, not implement the rates they say are required to help eliminate the plans under funding we agree it's possible, anything's possible. But the only voting member of the BCOA is one of Patriot's competitors, CONSOL. In other words, the fund suggests that Patriot should let its competitor, CONSOL, decide whether it wants to implement rates that would put Patriot out of business. Rates with CONSOL

could likely weather it because it's larger and more financially sound. Patriot is simply unwilling to roll the dice in 2017 and lets its competitor decide whether it wants to push the company back into bankruptcy.

To be clear, if the funds are right and significantly higher contribution rates will not go into effect, as the funds have repeatedly suggested, and suggested to this Court, then they lose nothing under Patriot's fifth 1113 proposal, literally nothing. Under the fifth proposal Patriot will continue to contribute to the 1974 plan at the current rates called for under the 2011 BCW -- NBCWA and would only withdraw if contribution rates increase to a level where it is more costly to continue contributing than it is to withdraw, and pay the annual withdrawal liability provided under ERISA.

In any event, as you heard on the first day of trial Mr. Goodchild has no authority to make assurances or negotiate, and that's why we are where we are. If we ever get to those assurances we would not withdraw. And even if we don't get those assurances we will withdraw but pay withdrawal liabilities installment payments under ERISA and not generate an unsecured claim, pursuant to ERISA 4219(c)(1), and we will not generate an unsecured claim. And I refer the Court to the cases cited on page 44 of our reply brief, especially footnote 32, which is the testimony of Mr. Stover.

Let's turn briefly to the 1993 benefit plan, and the

2012 bonus trust, which are multiemployer plans to which the debtors contribute approximately eight million dollars annually pursuant to the 2011 NBCWA. As stated by Mr. Stover at his deposition and by Mr. Goodchild in his opening statement, in contrast to a defined benefit plan, like the 1974 plan, these are defined contribution plans, there's nothing special or unique about these plans. Unfortunately, the debtors simply cannot afford to participate in them.

So, Your Honor, we have the funds who argue that Patriot's withdrawal is not necessary because contributions may not go up. Putting it in writing and we will be done.

Now, let's turn very briefly to the objections of Patriot's competitors; Ohio Valley Coal, Energy West, and Cliffs Natural Resources. This is really a bee in my bonnet. It's too late in the game to rehash the reasons these entities lack standing or to dwell on the fact that two of them aren't even creditors in this bankruptcy case. What is notable is that despite these infirmities Your Honor graciously afforded these competitors an opportunity to be heard. The fact that only one of them actually showed up in court I think speaks volume and speaks volume about the weight that the Court should afford their objection.

But let's touch very briefly on their substantive claim. In a few places Patriot's competitors try to stand in the union's shoes, like when they complain about information

sharing. But, of course, their arguments are misplaced, they're out of the room, they're completely out of touch with negotiations and the proposals. Make no mistake what's going on here. At bottom these objections come down to the competitors' fear that Patriot's successful emergence from bankruptcy might someday cost them money. We are aware of not a single case that says that the effect of a competitor is at all relevant. Chapter 11 is about making the company in bankruptcy more competitive. If everything a bankruptcy court did to make a bankruptcy company more competitive is subject to the objection, or not the objection, the veto power of its competitors, there would be no bankruptcy and reorganization. And, of course, Mr. Marsico is wrong that the Court cannot authorize implementation of a proposal. Beyond this, we'll just simply rest on the arguments advanced in our papers.

Last but not least, let's turn hopefully for the final time to substantive consolidation and the creditors who stood up in the courtroom on Monday and earlier today; Aurelius, Knighthead, Wilmington Trust. They are varying degree of angry but they all think Patriot is somehow playing Robin Hood; stealing from their pockets to give to the union. I will get to the substantive consolidation issues pressed by these creditors momentarily, but first let's take a step back.

As we said earlier, a strong indication that Patriot's proposals are fair and equitable is that after months of

hearing from the union that our proposals are too stingy these creditors are screaming from the other side that we're being too generous to the union. These proposals are not too rich, they are reasonable proposals based on in-depth analysis and consideration of multiple variables; including Patriot's enterprise value, analysis of intercompany claims, analysis of unsecured creditor pool, environmental liabilities, and the list goes on.

As Mr. Huffard stated in his declaration and testified earlier this week, the UMWA's equity state could range from twelve percent to fifty-seven percent depending on any number of assumptions.

To be clear, part of these creditors' negative reaction relates to the fact that they continue to misread or simply ignore the actual terms of the proposals. I don't know how much clearer we can all be on this. Profit sharing contributions will not come from nonobligor debtors. Royalty contributions will not come from nonobligor debtors. And Patriot's proposals do not require substantive consolidation. The uncontested evidence is that thirty-five percent is an appropriate equity state in the reorganized Patriot even where no weight is given to the possibility of sub-con.

Mr. Huffard testified to this fact at pages 65 and 66 of the April 30th transcript, noting that there are range of potential outcomes depending on what assumptions are used, and

thirty-five percent falls well within the range even where substantive consolidation is completely off the table.

Now, Mr. Strasser of Aurelius got up here and ignored this detailed evidence. He called -- made these bold assertions that there's no record evidence of this regard, as if this didn't happen in this courtroom. But he then modified that and said well, the actual problem isn't that there wasn't evidence, but that I didn't get the chance to participate. So it's the position -- it Mr. Strasser's position and Aurelius' position that unless and until a hedge fund -- a hedge fund has a right to cross-examine witnesses at an 1113 and 1114 trial Your Honor can't order any relief. I'd like to find a single case where a hedge fund participated in an 1113 and 1114 trial.

In Aurelius' view if a vulture fund may do better in a liquidation then the Court can't grant relief in 1113 and 1114. Find me a case. By contrast, as Mr. Huffard testified, the union's proposal for a fifty-seven equity stake requires all assumptions to be made in its favor, and that a hundred percent weight be given to sub-con, an impossibility. And, of course, Your Honor has rightly decided not to make any findings regarding the substantive consolidation issue for the purposes of this proceeding.

Finally, the decision of the UCC announced this morning with significant analysis to withdraw its objection and support the thirty-five percent proposal provides further

confirmation that the sub-con issue is finally, or it should finally be off the table for this hearing.

Let me conclude with a final word. I want to come back to the end of Mr. Hatfield's testimony and some remarks that my colleague, Mr. Moskowitz, made at the end of his opening. There are rarely, rarely any winners in a bankruptcy. But if this company fails to get its costs in line there will be one primary loser; the UMWA's employees and retirees.

If Patriot liquidates there are a lot of people in this room that will be just fine. The DIP lenders will be just fine. The hedge funds, they'll be just fine. Our competitors, well, they'll be better off. And after having the privilege of working with this management team over the last several months I can assure you that this management team will have no problem finding something else to do. The pain of a liquidation will fall disproportionately onto our employees, who, as we heard from Mr. Roberts and Mr. Buckner, have little prospect of finding a job in this downturned industry. And our retirees who will be dramatically stripped of real healthcare.

What would happen if we liquidate, we would be the next Hostess. I want Your Honor just to take a look at the -- this is a Wall Street Journal article from just last week, and I think the first sentence of this article says it all.

"The company that bought the Twinkie, Ho-Ho, and Ding Dong brands out of bankruptcy is gearing up to reopen plants

and hire workers, but it won't be using union labor."

Is that what we want to happen here? But if the company can turn itself around and shed its unsustainable costs a winner will emerge, and that winner is the UMWA's membership; both employees and retirees. They'll be able to keep their job and keep high quality healthcare, and will be significant stakeholders, perhaps the most significant stakeholder in a fiercely competitive company with a bright future. Thank you.

THE COURT: Thank you. Mr. Perillo, can I take a five-minute recess before you get started, please?

MR. PERILLO: Yes, Your Honor.

THE COURT: All right. We'll recess for five minutes.

(Recess from 11:28 a.m. until 11:52 a.m.)

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

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

Mr. Perillo, you may proceed.

MR. PERILLO: Thank you, Your Honor. Fred Perillo for the United Mineworkers of America.

I want to thank the Court for your seemingly inexhaustible patience with these proceedings, and, also, because you have conducted the trial in a fashion that exhibits your fairness and impartiality to all constituencies, including, of course, to ours. And for this I thank you.

The debtor bears the burden of proof on all of the elements pertaining to 1113 and 1114. When Mr. Kaminetzky

mentioned to you that the burden shifts to the union, of course he meant the burden of production and not the burden of persuasion, which at all times rests with the debtor on all issues. And as to the balancing of the equities rests upon the debtor not by a preponderance but by clear and convincing proof.

There are by long tradition, arising in the Bildisco case, six equities to balance. I'd like to begin my exam -- my argument, rather, in the reverse of my opening statement, starting with the balancing of the equities first, and proceeding back up through the tests -- to the necessity test.

The first two equities that the Court is to consider are the likelihood and consequences of liquidation, if rejection is not permitted and the likelihood and consequences of a strike if the bargaining agreement is voided. And I would point that virtually all cases that mention the balancing of the equities require the Court to balance the equity of the likelihood and consequences of a strike if the bargaining agreement is voided.

At times parties have suggested here, Your Honor, that the union was threatening the Court with a strike, of course, we do not view you as being aligned with the debtor, such that our threat to strike Patriot, would be a threat to the Court. As I said, we view you as an impartial party. Our threat, let's be clear, is directed toward the debtor.

The debtor cites the Mesaba case, and also in their brief, the Horsaid (ph.) case. And these are cases which actually refuse to weigh this particular equity, they condemn rather than balance it. And that is because in the view of those particular judges strikes are never justified and they make that quite clear. The Horsaid cases reads like a 1920s diatribe against the right of employees to engage in self-organization and mutual aid and protection in the form of a work stoppage.

I also want to be clear that when these cases say they hope that the union leaders will somehow make a decision that doesn't hurt their members, they are, again, engaging a classic 1920s caricature, unions are democratic organizations, we elect our leaders, they are us.

So while characterized as a threat it is absolutely clear that the right to engage in a strike is not some lugubrious tactic it is a federally protected right. There is a specific statute of the National Labor Relations Act, 29 U.S.C. Section 163, that specifically protects this right by federal law. And were there any doubt that the courts in Mesaba and Horsaid were wrong, dead wrong, about the meaning of a strike.

MR. PERILLO: Let me quote to you the Supreme Court of the United States in the famous Buffalo Forge case at 428 U.S. 397,409. This case is one of those 1967 advised the federal

courts that what is their policy regarding strikes? And here it is.

"There is no general federal anti-strike policy."

But more importantly, Your Honor, we're not looking at this false dichotomy that if rejection is not granted, Patriot will melt and everything will be destroyed. But if rejection is granted maybe the new workers will reject the advice of their leaders and go to work and break the union, what Patriot hopes for.

As Mr. Mandarino explained to you yesterday, and I thought quite intelligently, Patriot has many paths to failure. It has one path to success and that path is a consensual deal. That deal is going to take place and it's going to take place with or without rejection.

The question is should that deal take place in the context of a Patriot on fire from a work stoppage where the parties are engaged in combat at the same time they are engaged in negotiations? And a substantial risk exists that Patriot will be destroyed before the parties are able to reach that agreement.

Or should the Court were deny the motion, not reject the contract, and advise the parties to proceed with -- with their negotiations as they are already doing and in a way that will reach a consensual deal without there being undue stress on the debtor.

As I said, the debtor has the burden by clear and convincing proof as to every one of these equities. Can you say that the debtor has clearly and convincingly proven to me that rejection leads to a better outcome than denying the motion?

I would point out one other thing. As Mr. Mandarino again very cogently stated, the certainty that the debtor seeks cannot come through an imposed solution. The airline industry case cited by Mr. Kaminetzy, the Mesaba case in his closing argument is a case where the union was legally prohibited from striking. And so a court imposed solution was literally a court imposed solution.

But here as Mr. Goodchild correctly pointed out, rejection is like a light switch. It's either off or on and if you grant rejection, the contract will disappear and the union will be free to choose a time to strike at its own discretion without any further notice. The certainty that the debtors crave will not come on this road.

The next two equities to balance are the likelihood -- excuse me -- the likely reduction in the value of claims if the bargaining agreement remains in force and the possibility and likely effect of any employee claims for breach of contract if rejection is approved.

Now, we know that there is no evidence at all on the

first point, the likely reduction in the value of claims if rejection is denied, and that's because there's no liquidation analysis as Mr. Hatfield admitted, and the debtor has never prepared a steady state or run rate model showing what its cost structure looks like with no 1113 concessions. And so, there's nothing for you to compare. There's nothing to see what creditors are at risk to lose in the event the agreement is affirmed.

There's also no evidence of what creditors might expect for their claims. The closest that the debtor comes to making this point is that its failure to value the company and to predict any outcomes will nevertheless leave the equity being worth "hundreds of millions of dollars" which could mean almost anything. And Mr. Hatfield admitted from the stand two days ago, I believe, that the unions' share of that equity stake could be as little as maybe fifty-some million dollars.

On the other hand, if rejection is granted, large claims are a certainty. Although Mr. Kaminetzy argued to you that you ought to adopt Mercer's calculation for the size of the retiree health care liability, I point out that you don't know what that is. You have only the final number taken from the 10K which is roughly one billion dollars and excludes all of the currently active employees who might retire. No witness from Mercer testified. No witness from Mercer gave a declaration. You do not have the calculation before you. All

you have is the a priori conclusion, it's a billion.

Mr. Cobin, on the one hand, gave cogent and well-informed testimony about why this claim is actually much larger and includes not only the current retirees, but the potential retirees. And the attacks on Mr. Cobin's analysis, I think are unfounded. I believe he was a very credible witness and without belaboring the point, simply say that the debtor's one billion dollars analysis which omits the current retirees shows that there is 400 million dollars concession by the union tucked into this proposal. That's the 400 million dollars that pertains to current active employees who might retire that is not valued in either the 1113 savings or in the 1114 savings. It's an extra 400 million dollars from the workers that doesn't show up anywhere.

But in addition to this very large retiree liability claim, there's also the withdrawal liability claim.

Now I want to address Mr. Kaminetzky's point that the debtor could easily avoid this withdrawal liability claim simply by continuing to make payments. And there's a problem with that. It's called the Taft-Hartley Act. Taft-Hartley Act is found at 29 U.S.C. Sec 186(c) and it's an act that was passed in 1947 over concerns about union corruption by employers who would pay off union representatives. And at that time Congress prohibited the payment of any money or anything of value of any kind from an employer to a union unless it fits

within one of the exceptions in subpart C.

One of those exceptions, of course, is to allow an employer to make contributions to a jointly trusteed fund such as the 1974 bond. But that exception is on the express stipulation that there be a contract setting forth the basis of the payments.

What does the debtor's motion ask you to do? Do we eliminate that contract? It will be illegal to make those payments, not just illegal, a felony punishable by five years or 50,000 dollars. I don't know what official in Patriot is going to write that check. I don't know what trustee is going to take it.

There is going to be, if you pause rejection, a 960 million dollars claim on top of the $1.8 billion retiree liability. There is going to be a flood of union claims. We own this debtor already.

Can you say, Your Honor, that the debtor has clearly and convincingly proven to you that rejection is better than this scenario that I have just laid out?

The next factor, Your Honor, is the cost spreading abilities of the various parties taking into account the number of employees covered by the collective bargaining agreement and how various employee wages and benefits compare to those of others in the industry.

Now we got a very enlightening lesson on the cost

spreading ability of parties in a colloquy between Mr. Moskowitz and Mr. Mandarino yesterday where Mr. Moskowitz used the analogy of rejection of at least for machinery and the rejection of a contract covering union miners.

Of course, the entrepreneur who owns the piece of machinery has many cost rating abilities just as do most creditors in this case who are not employees. We can idle the machine. It doesn't have to feed the machine while it's idle. You can rent it out to somebody else. He can start his own business and try to make a profit with the machine. He can sell the machine. He can scrap the machine. He can even make a deal with the debtor on a concessionary basis over the machine, but he has lots and lots of cost spreading abilities.

The workers do not. The retirees do not. Cost spreading abilities for retirees means cutting your pills in half. Cost spreading abilities for retirees means making a choice today over medicine or food. And if you are a diabetic it means making a very difficult choice indeed.

Cost spreading abilities for workers means that they either give up their seniority and go out and face the vicissitudes of the modern day unemployment situation, or accept massive wage cuts, or do what workers have always done when they have been faced with oppression and that is to band together for mutual aid and protection.

This particular equity focuses on the quality of the

sacrifice rather than the equality of sacrifice. I will get to the equality of sacrifice in a moment. But without their retiree health care, our retirees face a grim future. And employees will face a greatly reduced standard of living.

The labor of a human being, Your Honor, is not a commodity. Many parties have risen in the course of this proceeding to tell you that the market sets the wages according to the non-union standard and that the union standard is over the market.

I want to address that point briefly because I do not recall seeing a labor market economist rise to testify to that in this case, nor, in fact, anyone qualified to give that opinion. In fact, it was just announced as another a priori statement. The non-union is the market. The labor union contract is over the market. And that's an article of faith and it's an article of anti-union faith spoken by Mr. Hatfield who frankly confessed to his credit that he prefers a non-union company.

But these are not facts. This is etiology. I will in a moment address what the Congress of the United States says the market is. But before I do that, I just want to say that with respect to the cost spreading abilities factor, there is not actual showing that unionized miners are overpaid.

The evidence rather shows that they are paid more because they produce more. There is no showing that they paid

more than the industry standard. And there's no recognition in the statement that unionized miners have sacrificed lower wages and pensions for decades to achieve a guaranty of lifetime health care.

And I would say, Your Honor, when Mr. Hatfield put up the chart which showed that there is 78 employees in the corporate overhead that were -- that were lost and 640 employees I believe it was were non-union that laid off and said, you know, there's millions of dollars of savings right there that the debtor has incurred nowhere. Nowhere in any of this proceeding is there a chart that shows you the 350 or so union employees who also lost their jobs.

I think, Your Honor, it was probably a surprise to you to learn that at the time of this bankruptcy, the debtor's workforce was not 57 percent unionized, but roughly 50/50 with equal numbers of union and non-union miners. I don't think you knew that fact before.

And it's a very interesting thing, because when the company had a choice about whom to lay off, did they lay off the overpaid, unproductive, unsafe union workers? No. By a margin of two to one, they laid off the non-union workers and actions speak louder than words. There is a reason why we are today growing at Patriot rather than diminishing.

Now you could say that perhaps this was a cynical ploy by management, that they laid off a disproportionate number of

the super-efficient non-union employees as a way to hurt themselves so they would be able to exaggerate the amount the of union concession that they need. I highly doubt that. I think they kept the union workers because just as we have claimed throughout and just as the numbers show, we are more productive than they.

I was somewhat shocked that Mr. Hatfield could not tell you what portion of profit of this business comes from his unionized workforce rather than his non-unionized workforce. But Mr. Mandarino, again, was very helpful in this regard.

We know that we are as of today because of the layoffs, 57 percent of the miners; we know that we are approximately 60 percent of the tonnage. And Mr. Mandarino you yesterday, we're about two-thirds of the profit at this company. And yet, when you compare how much we produce to the percentage of labor cost attributable to us, another startling fact appears. Unionized operations have about 27 percent labor cost. Non-union operations, 34 percent labor cost. We run leaner. We make more.

Patriot keeps us because it can't live without us. So as to the cost spreading abilities and I'm not sure that Patriot brought forth any evidence about the cost spreading abilities of the parties. But then you say they have clearly and convincingly proven to you that our workers have better cost spreading abilities than the other trade creditors, note

holders, bankers, etcetera, who are the other constituencies in this bankruptcy. I think not.

The next factor is the good and bad faith of the parties in dealing with the debtor's financial dilemma. Despite charges of foot dragging that have been lodged against the union, the union has made counterproposals that are quite serious and provide real relief to the debtor. They provide a real path out and most of all, they provide the debtor the certainties that they say they need.

Again, Perry Mandarino's testimony of yesterday showed that our VEBA proposal is going to save the company the same 75 million dollars that it thinks its VEBA proposal is going to save it. And that we have offered up 26 million dollars of 1113 concessions and that we provide the debtor in 2014 and the following years the same 150 million dollars that it wants by identifying other savings that it can achieve.

Mr. Mandarino was criticized for inventing out of old cloth this notion that Patriot has a top heavy management. But when you go to Mr. Lucia's Exhibit, which is I believe, tab 116, and look to see at the Panther and Black Stallion mines, what is the actual ratio of hourly supervisory or salaried workers? It's exactly the ratio Mr. Mandarino said it was. And as he testified, two-thirds of the savings comes straight from those mines.

And the same exhibit shows contrary to the statements

made by management in this proceeding that small unionized mines, the ones that supposed to have the worst ratios, actually have the best ratios.

And the huge Panther mine which is supposed to have a great ratio, has one of the worst ratios. Those savings are real and they are there. The debtor does not take them because it wants to keep the size of the union concession package larger than it has to be for the debtor to survive.

Throughout this period the parties were negotiating. You remember Mr. Hatfield put the -- the progressive bars graph up on his -- on the screen showing the five proposals, how they got progressively more generous from left to right.

I asked him at each step, what concessions did the debtor take off the table? The answer was none. The first bar was worth 150 million. The second bar was worth 150 million. The third bar was 150,000 million and all the way down to the end. The debtor hasn't given up on a dollar.

The debtors insist on putting the risk on retirees that the debtors themselves will not assume. That is to say, they tell the retirees that they have to monetize a claim, take the risk of the stock price, take the risk of delay and the debtors are not willing themselves to face that same music.

And if there's any doubt about this, I refer the Court to Mr. Huffard's testimony. When he was testifying about and criticizing Mr. Mandarino for challenging the thirty million

dollars in cash bonuses, this was what Mr. Huffard said to the Court. "Cash and stock are not fungible." In other words, executives, some of whom are paid hundreds of thousands of dollars have to have real cash money. But the debtor says that's not true of the retirees.

Mr. Huffard's, if you recall, said you know you can't buy things with stock certificates. But apparently the retirees live in a special bubble where they can go down to CVS and tear off a corner of their stock certificate from Patriot and get their prescription drugs.

The other thing Mr. Huffard said is, will Patriot's stock price rise? They don't know. Patriot's telling us don't worry. You've got a huge equity stake. It's got to be worth millions, hundreds of millions. We can't ask our executives who pay -- are paid hundreds of thousands of dollars to take that same risk. But your retirees can take that risk.

And here's the third thing that Mr. Huffard said about why managers who are already paid hundreds of thousands of dollars have got to receive cash. He said how long will they have to wait? It could be, in his words, a decent period of time before they would be able to get their stock turned into cash.

But for retirees, Patriot tells them to believe exactly the opposite. In no time at all we'll take that equity stake and turn it into enough money to fund that VEBA, you

know, it'll happen by next January.

For the executives it's cash money on the barrel head, please. I submit to you that this not good faith in the treatment of the retirees. I submit to you that the retirees being the most offerable should get the most generous treatment. Not the reverse, that the executives should get the most generous treatment and that the retirees should take the most risk.

At bottom, Your Honor, the decision that people who are already paid hundreds of thousands of dollars, get bonuses paid for by concessions wrung from people who get tens of thousands of dollars is a value choice by the debtor. It's not a matter of necessity. It's not a matter of survival. It's a matter of who do you think is worth more?

And finally with respect to the good faith element, the debtors have met our every suggestion with a wall of negativity. We offered them more production flexibility to get more coal out of the ground; they didn't like that. We offered the hourly salary ratio savings; they don't like that.

There are specific items such as supervisors doing bargain unit work that the debtor won't even put a dollar value on. We offered it to them with a dollar value and they refused it. When we took it off the table, they became angry and said now put it back. We want it. We just want it free. It doesn't actually for an actual concession that you've made.

I don't understand how that could even be possible. How could the fact that a supervisor is doing someone else's work not result in a savings of dollars because that other person is now no longer spending the time to do that work? But that's what the debtor wants you to believe.

And I would just point out one further anomaly, Your Honor. The debtor has been steadfast from the very first proposal in saying that the standard is nonunion wages and benefits and the union employees have to go down to that level because they're paid more and we can't take anything out of those nonunion brace until we scrunch down those union wages.

Now that same philosophy doesn't apply to the executive making hundreds of thousands of dollars. He's not going down to the level of the next lowest paid employee before that employee takes any concessions. So there's a very curious middle zone. Up on the top they're golden and immune. Over the nonunion part they're golden and immune. But us union people sandwiched in the middle, well, as Mr. Hayfield said, "We's where the money is." And in the words of, you know, the immortal bank robber of Willy Sutton, "That's where the company's go to get the money."

Now how does this compare to the actual intent of Congress and the legislative history of Section 1113? You know, I'd cite the words of Senator Packwood who was one of the sponsors of 1113. This is found right in the legislative

history.

"This language guarantees that the focus for cost cutting must not be directed exclusively at unionized workers. Rather, the burden of sacrifices in the reorganization process will be spread among all selected parties. This consideration is desirable since experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will agree to shoulder their fair share and in some instances without the necessity for formal rejection."

And that of course is the impasse that we have reached. But Senator Packwood didn't stop there. He went on and gave an example of what is the proper way for a court to balance this particular equity.

He said, and I'm quoting again, "This language should not be difficult to apply. In fact, at least one bankruptcy court has already applied this kind of analysis in Rhode Island." And he cites here Blue Ribbon Transportation Company at 111 -- excuse me -- at 113 RLRRM3505. It's a 1983 case in the district of Rhode Island.

"The court refused to permit rejection unless the debtor showed that it has reduced top heavy management salaries. Where have we heard that before? And reduced health, welfare and pension contributions for management personnel proportionately with the contributions for unionized employees. As I see it, this approach is eminently fair and

will not be impossible to implement."

That is what the sponsor of 1113 said the court should do. That contrast radically with what Patriot here is trying to do. And so I ask you again, can you say that the debtor has clearly and convincingly proven this factor?

I'll move on now to the factor of good cause for rejection of the employer's proposals. Good cause obviously means more than just the necessity and fairness factors, otherwise it would be redundant.

Here the UMW Way acknowledged our fair share by making counter proposals that provide the debtor a full picture of recovery not just our sacrifices but comprehensively where the debtor can get the cash it needs to survive. And we presented that in the form of a term sheet. We never got a coherent response to that and we never got an alternative proposed term sheet from the debtor.

What we have gotten is a steadfast no; that the only way to get out of bankruptcy is on Mr. Hatfield's bar graphs which don't budge even a dollar. We always got the denial that there was any other possibility, insistence on the full amount sought even in the case of the pension, where in fact the relief is more costly than staying in the plan.

These were tactical choices made by the debtor. They rebuffed every initiative and gambling on getting full relief because they view that there's really no downside for them. If

you grant the rejection, they get more than they need. And if you deny the rejection, they're counting on the idea that you will not apply the rule in Fulton Bellows applying res judicata to 1113 proceedings and prohibiting multiple 1113 motions. Fulton Bellows is a 301BR723 and contains I think a fairly cogent analysis of why the debtor shouldn't be allowed to whittle away at the union in the fashion that -- that Patriot is doing here.

I think it also recalls the Countryman test in the legislative history of 1113. And I'm going to go back to the legislative history this time in the remarks of Representative Morrison.

Representative Morrison was also a sponsor of 1113 said that the good cause phrase in subsection C 2 "ensures that a continuing process of good faith negotiation will take place before court involvement and so by embodying the standards set out in the rejection of collective bargaining agreements by Chapter 11 debtors, in 57 American Bankruptcy Law Journal 299 at pages 300 and 319.

This article is the Vern Countryman article that talks about relative risk in 1113 proceedings and it's very enlightening and it's also very enlightening that it was cited in the legislative history, because Professor Countryman points out that if labor guesses low on 1113 concessions, it has a lot to lose. If we don't give enough for the company to survive,

we are the ones who are hurt most by the company failing.

But conversely, the debtor has very little to lose by asking for too much. After all, if the debtor asks for too much and it gets rejection, it gets a windfall. And it if asks for too much and the court denies rejection, it just comes back asks for a little bit less later and keeps whittling away until it gets down to what's truly necessary.

And so this approach argues for a very strong presumption against rejection of labor contracts on the grounds that rejection seriously undercuts fundamental aspects of labor policy which should be permitted only in extraordinary cases. And that was cited by court in the Wheeling Pittsburgh decision which I'll address further shortly.

Next, Your Honor, we go to the factor of good faith and relevant information. I've already discussed good faith and so I'm going to concentrate on relevant information. The standard in the statute, Your Honor, requires that the debtor provide sufficient information to evaluate the proposal. Throughout the hearing we heard the debtor say, well, we gave everything we have on this particular subject or that particular subject.

But of course that's not the same thing as saying that everything you have is sufficient to evaluate the proposal. Those are two different statements. If the debtor makes proposals that are amorphous, difficult to quantify, things

like supervisors doing bargaining unit work or in the case of the 1114 motion, how to value the equity stake for the retiree claim. If those things are difficult to quantify then the debtor needs to change its proposal. It doesn't get to say, we really don't need to supply you information needed to evaluate that because we can't figure out what it is.

And this is pretty clear right in the statute itself. Both 1113 and 1114 contain this phrase, "subsequent to filing a petition and prior to filing an application, the trustee shall make a proposal to the authorized representative" etcetera. And then, sub B, "provide the representative with such relevant information as is necessary to evaluate the proposal.

The debtor doesn't get to do the third thing that Patriot did here and say, well, you know, nobody could actually figure this out and so I just have to tell you. You just take the risk.

The other thing that is interesting about the phrase I just read to you is it tells you when the information has to be provided. Now I understand and I respect and I am not asking for reconsideration of the Court's ruling that proposals made after the filing of the motion could be considered.

But the statute is clear when the information to evaluate those proposals must be provided. Let me read it again.

"Subsequent to filing a petition and prior to filing

an application seeking rejection or seeking modification of benefits as the case may be, the debtor shall provide the information."

It's mandatory. It's not advisory and that means that on March 13th, that was the last day, the last day that the debtor legally could provide information to consider for any proposal including the proposals made on April 10th and April 23rd.

So did we have in hand -- did we have in hand on May -- on March 13th the information about the governance rights? Di d we have the information about the royalty proposal? Did we have the information to value the equity stake?

We didn't because those proposals hadn't been made yet. But the debtor can only rely on information provided up to and ending on the instant that it filed the motion to reject.

Now, the debtor obviously has taken a high risk strategy here, Your Honor. They argued for and won the right to make a proposal post application. But unless you erase an entire subsection out of 1113 and 1114, the debtor was so sharp that it cut itself, because it can't retroactively provide us the information we need to evaluate those proposals. And there's not a word, not a single word of evidence in this record that we had that information on March 13th. So the show is over. It's not going to take long to decide the 1114

motion. It won't take 90 days. It won't take 30 days, won't take 90 minutes. We don't have the information and the record is completely undisputed on that question.

And so what should a court do? Let's go back to the legislative history. Representative Morrison says, "The trustee has an affirmative obligation to provide all relevant financial and other information necessary to evaluate the proposal and if that obligation is not met, the application should be denied."

The debtor thought that information was its strong point. It turns out it's its Achilles heel.

Now, there's another interesting thing about the information provision in this case. At the very last minute we entered some exhibits, 291, 292, and 293 showing that the parties are very much in dispute about who provided what to whom and whether or not it was done on a timely basis.

And interestingly in the very last one, Exhibit 293, Mr. Mizzoti from Alex Partners sent us a diligence report saying, "We provided you all of the information that you wanted about governance rights and we did it on April 25. April 25 is post application so it's untimely under the statute and once again shows why the union prevails on this issue.

But what's also interesting is it directly contradicts the testimony of Mr. Huffard. Mr. Huffard said on the witness stand that we had never asked about governance rights and

that's the reason why they didn't give us any information. And then he testified from the witness stand that it would be the usual governance --rights whatever that means -- anyway.

So which of the debtor witnesses is actuality telling the truth here? Mr. Huffard, who said we never asked, or Mr. Mizzoti who says we asked and got an answer?

It seems like the gambler in Vegas who tries to cover all corners of the roulette wheel. The debtor is putting markers down that we never asked, that it provided the information that, you know, it's making a play here that belies its ingenuity.

I point out one final thing, Your Honor, on the question of information. We still can't figure out what the equity stake is worth and neither can a lot of other parties in this proceeding. And because that is the heart and soul of the 1114 motion, even if the debtor wasn't obviously untimely under the statute in providing information, we would have the right to refuse this proposal and we would expect that the court would deny the motion because of the lack of relevant information.

I want to go next to the fairness and equity component. I've already pointed out how union employees are more productive and produce a greater percentage EBITDA than the nonunion employees at this company.

There's no matter how its viewed, unionized labor is

making a disproportionate contribution to the sacrifices in this case.

If we look at the fact that we are 57 percent of the miners and are making 87 percent of the occupational -- or excuse me -- operational sacrifices; it's clearly disproportionate. If you look at the whole dollar sacrifice of union to nonunion, it's clearly disproportionate; 62 million dollars is assuming that the nonunion concessions actually have been imposed versus 286 million dollars for the active workers -- 600 million dollars for the active workers including the retirees.

If we look at union people versus managers; they are still getting their bonuses and those bonuses are going to be large enough to wipe out the two and a half percent nominal wage cut that they are taking.

We are not getting any upside in this. And I'll come back to that lack of snap back in a moment. The seven million dollars in the bonus motion is just a fraction of it. When we look into the plan we can see that there is sixty-two million dollars in stock and cash going to the managers and half of that in cash.

Now the debtor says that this is fair because we started out so much better off than the nonunion employees that we should actually be pushed down to the nonunion level before they start to make the same kinds of sacrifices we make. Is

that the law?

In Purse Terminal Warehouse, this 113BR6639, the court made this observation. "Van Lines" that's the name of the employer, "does not provide a pension plan for nonunion employees and health insurance for -- health insurance contributions for nonunion employees are less than for union employees. But the burdens of failure and liquidation fall on all employees alike. The union employees should not have to bear the entire burden to preserver everyone's jobs."

So it does not matter that the nonunion employees started out lower. They've got to put their shoulder to the wheel just as we do. Furthermore in the same case, the court discussed whether sacrifices made by those parties who give up their unsecured claims should be weighed equally with the sacrifices of unionized workers.

You recall Mr. Mandarino said that was an unfair comparison. Is he right about that? He was indeed. The court noted in the paragraph immediately following the one I just read to you, while the -- this is the officer and shareholder of the -- of the corporation would not be paid any dividend on his unsecured claim. This sacrifice is a one-time event.

This court finds that the debtors are attempting to have the bargaining unit employees bear the burden of the reorganization without a showing that such a placement of the burden is equitable.

Mr. Mandarino who was lampooned by the debtor in the course of his examination yesterday turns out to have been right about a whole lot of things.

With respect to the equality of sacrifice, what we are talking about now, retirees are winding up losing their benefits entirely. They are getting what the debtors expert, Mr. Terry, called access, access to a plan on the assumption that their benefits would be cut.

It's very clear from Mr. Terry's analysis that the debtor is giving a lump of coal in the Santa Claus sense to the VEBA trustees. They're getting an insufficient cash stake, a speculative amount of equity, and the obligation to fund seventy-five million dollars a year of benefits.

And Mr. Terry very frankly admitted that that couldn't be done. That what would have to happen is the trustees would have to make decisions about eligibility, coverage, and cost sharing. Now those are fine sounding phrases, but the reality is and he admitted when I pushed him on cross, that eligibility means throwing people off the plan, making decisions about coverage means covering less conditions and less treatments, and that cost sharing means that they will pay premiums and higher co-pays that they cannot afford on their 582 dollars a month pensions. That is not fair. That is not equipment and that is not permitted under Section 1114. I'll point out to you that in the Wheeling Pittsburgh decision, this is at

791 F 2d 1074. The court also discussed the need for snap back as a matter of fairness and equity. The court noted that under Wheeling Pittsburg proposals labor costs would remain frozen. The court then recited the company's argument that such a proposal would provide cost stability for the company and wage stability for union employees.

In other words, we think Pittsburgh was making the identical certainty argument that the debtor makes here in order to attract investors, it's got to slam down union wages and freeze them for a long period of time. We think Pittsburgh chose five years, the same number of years chosen Patriot.

This is what the Court of Appeals said in response to this argument. I'm quoting now. "This is not persuasive. The workers did not ask for or need wage stability at a rate they considered substandard. Therefore such stability cannot be considered to be a benefit to them to compensate for the absence of any share in a better than anticipated recovery."

And a little later on, "The proposal's failure to provide workers a share in a possible recovery is particularly significant in this case since the proposal asked workers to take substantial reductions over a five-year period based on extremely pessimistic forecasts."

The bank creditors argue that the proposal contains a snap back in the union's claim as a prepetition creditor for the reduction in wages during the 13-month period left on the

old contract could be repaid at a higher level. But an unsecured claim is not the equivalent in kind to a snap back which is based on the principle that all of the concessions sought may not turn out to be necessary.

In the circumstances of this case, the bankruptcy court's failure to recognize the need for some parity in this regard flaws the court's conclusion that the proposal was fair and equitable.

The same could very well be said of the proposals here. Patriot has steadfastly insisted on the idea that it's going to get permanent concessions or a short run liquidity crisis. And we have tried multiple times because unlike the debtor, the union has moved a lot in its proposals in this case.

We started out demanding equitable snap back and when the debtor resisted that, we said, okay, snap back three years from now at a date certain. And when the debtor said no to that, we've now said, okay. How about a just a reopener so we can reopen the contract and talk about it in three years?

And the debtor says no, that's still not good enough. It's five years, five years of concessions at a permanent level and that's it. That's the show is over.

That's not good faith bargaining and that's not fair and equitable and the case law doesn't support it.

Lastly, Your Honor, I'm going to turn to the necessity

prong of the test. Before we got there, I'm going to talk a little bit about how we got here today.

Patriot was created as Mr. Kaminetzky acknowledged by a spin off that put too much liability on a company that had too few assets. But Patriot continues to say to the court, you should not consider those past facts because Patriot is where it is today and this is a forward looking process only.

But I asked the court to consider these things. Patriot was losing in a year after it was created, 2008. It knew then that it what Mr. Hatfield called underwater contracts that were causing it serious economic damages. And those economic damages we now see were huge, 572 million dollars is below cost and below market contract. In 2011 alone it was 180 million dollars. Almost all of that flows through to EBITDA.

Patriot would be in a very different position today if it had shed those contracts earlier.

So why wasn't a fraudulent conveyance action brought then in 2011 because they surely knew they were losing massive amounts of money because of that? or in 2010 or in 2009 or in 2008, the year after its birth when it was losing money?

We were told in the course of this case, it's because they weren't suffering damages. But that doesn't square with having 572 million dollars of underwater contracts. It can't be both things.

So there was unreasonable delay in pursuing Peabody.

And that delay created a crisis which is now being visited like an avalanche on a completely innocent group of union workers.

I went through with Mr. Hatfield just which of Patriot's economic problems we cause. Were we responsible for the underwater contracts? Are we responsible for the selenium liabilities? Did we do those other things that caused management to have excessive expenses? No. We worked in exchange for money according to a contract that Patriot negotiated with us and that Patriot voluntarily signed, a contract that was the product of negotiations between parties with equal bargaining power.

I think, Your Honor, on the necessity prong of this test, we need to ask the question necessary for what?

Once again the legislative history answers that question for you. The late Senator Kennedy in his statement on the floor in support of 1113 said, "this provision is a most important one worthy of this body's support for it ensures that a company's workers will not have to bear an undue burden to keep the company solvent."

To keep the company solvent, the union would have to make the necessary concessions, nothing more.

So 1113 is not a license for investment bankers to make five-year projections where only three years actually have any dollars assigned to the projection and in the fourth and fifth years, 2017 and 2018 in this case, nothing is known about

the projections. And say, well, the union just has to make the concessions for that whole period because we need to have pretty impressive cash flow in those out years.

That's not what the legislative history says. We give the minimum amount to get the company out. It's the company's responsibility to find capital and get financing, not ours. The legislative history makes clear that the court doesn't have the discretion to treat 1113 like the old pre-bill disco 365 on the business judgment standard. This is a much more limited test.

Patriot is not entitled to emerge as the strongest competitor in the field. It's already the sixth largest in revenue. It's already the tenth largest in tonnage. And that hole that it has of 150 million dollars is probably exaggerated.

I understand that the debtor's paired back Mr. Akunuri's project. There might be an extra 100 million dollars of revenue in those out years.

But even after their criticisms of his methods, they're still thirty million dollars in 2015 and another four million dollars in 2016. And I don't think any reason has been given why in the face of those anticipated increases we ought to continue to make the same dollar value of concession year after year even as Patriot begins to climb up a very sharp v-curve toward profitability.

I think, Your Honor, I would commend to the Court the decision in Fiberglass Industries, a decision that is found at 49 BR 202, a decision from the Northern District of New York where the bankruptcy said that a debtor could not establish necessity under section 1113 from the bottom up. It has to calculate its need first and then determine how it will meet that need.

And the debtor here used exactly the opposite method. It cut and cut and cut wherever it could find, you know, a few dollars here and a few dollars there and then said, whoops, we have 150 million dollar hole and everything that's left is your responsibility, UMWA.

What the debtor should have done is run a steady state model to figure out what the total need was and then apportion that model fairly and equitably out amongst the different constituencies. That's just not the way it was done. It was done higgledy piggledy and we wind up bearing by any measure just a colossally disproportionate share of the sacrifice that's to be made.

Mr. Huffard's testimony, he pointed out that he's looking for 163 million dollars of union concessions and about 17 million dollars in nonunion concessions in these early years.

163 million dollars divided by the -- by our -- well, excuse me. Of that 163 million dollars about half is 1113

concessions. And when you divide that by the 1,657 UMWA miners, you get about 45,000 dollars per employee. When you divide the seventeen million dollars of nonunion concessions by the rest of the company; it's about seven thousand dollar per employee.

And that does not count -- does not count the loss being taken by the retirees.

I would note, Your Honor, that if the plan here by the debtor is designed to attract investment and to satisfy the desires of the lenders for the EBITDA and liquidity covenants that it was not the UMWA that said those covenants were set unfairly. It was Mr. Huffard. And if you go to paragraph 79 of his declaration, his original declaration, he says, "The lenders relented on their request only when Patriot agreed to an EBITDA covenant that would be impossible to achieve without the contemplated labor and retiree health care cost relief.

So from the very start, the company established the bar at height that it knew it couldn't achieve unless it cemented in place concessions that it had negotiated not with the UMWA, but with its lenders.

This is a naked attempt to sneak the old business judgment standard in through the back door.

Once upon a time all a debtor had to do is say that it's my business judgment that the contract is burdensome and I need X relief and that gets me rejection. But that's not the

standard anymore. And what he debtor did here is create a scenario where the necessity would established by covenants it negotiated many months before it even made a proposal to the UMWA.

Now I don't know whether Judge Chapman was told by Mr. Huffard that by the way she was approving a liquidity and an EBITDA covenant that was designed to force her to grant relief months later in a motion that hadn't been filed yet under proposals that she had never even seen. And I don't know if she would have granted that motion if she had known that. But you know it. And the motion is now before you and it is clearly contrary to the statute.

I would turn next, Your Honor, to a question that I have been dying to address throughout this proceeding. And that is why, is it, that union wages are called above market by the debtor? I've already that there was not labor economist who testified on that issue. There wasn't -- I've also said to that there isn't a shred of fact anywhere in the record that supports the idea that nonunion wages set the market, that that's purely a matter of etiology.

But it's time now to examine what is the policy of the United States on that question. And so I'll read to you what the policy of the United States is: "The inequality of bargaining power between employees who do not possess full freedom of association and actual liberty of contract, and

employers who are organized in the corporate and other forms of association substantially burdens and affects the free flow of Congress, tends to aggravate the current business depressions by depressing wage rates and the purchasing power of wage earners, and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

What judge said that? The answer is no judge. Those are the words of the Congress of the United States in their findings of fact in Section 1 of the National Labor Relations Act found in 29 U.S.C., Section 151.

The point contrary to the mantra that we've heard repeated all week long, that non-union wages set the market. We understand Congress knows that those are below market rates because they're the product of unequal bargaining power and they are the opposite of competitive wage rates and they are the opposite of sustainable wage rates in the business cycle.

Congress, in the next section, it says, "It is declared to be the policy of the United States", and that ought to cause our ears to perk-up, because after all, where is the bankruptcy power of the United States? It's in the Congress. And where is the labor power of the United States? That's in the Congress. It’s not for any judge to declare that policy. So let's listen to what Congress says is the policy: "It's declared to be the policy of the United States to eliminate the

causes of substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and the procedure of collection bargaining and by protecting the exercise by workers, a full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment." So what sets the market? Collective bargaining sets the market. And who says that? The Congress of the United States says that.

Now if Mr. Huffard disagrees, I understand it's a free country and he can have all kinds of wrong ideas, and he can't go to jail for that, but he can't change what the policy of the United States is. And Mr. Hatfield can believe that it's better to be in a non-union company where he doesn't have to bargain collectively; he can bargain one-by-one with the employees, and he's entitled to that belief, too, but you, Your Honor, are not, because you do not belong to the republic of Hatfield or to the republic of Huffard. You're a judge of the United States of America and your charge has been given to you by the Congress.

When Congress passed 1113 in 1984, Representative Glickman rose to explain why collective bargaining agreements are not treated under Section 365, but are treated under a new section. Here is what he said, "This package responds to what

I consider to have been a misinterpretation of congressional intent by the Supreme Court in its Bildisco Decision, with regard to the status of collective bargaining agreement and bankruptcies. The Bildisco Decision reversed longstanding policy in favor of preferential treatment of labor contracts in recognition of their origins in negotiations, directly hearken back to the findings of fact of Congress in the National Labor Relations Act.

The market is set by collective bargaining, not by individual bargaining. So the notion that we are paid over-market is completely false. The standard is not the non-union wage; the standard is the union wage. And we are quite willing to take concessions, and we have proposed large concessions to the debtor. And we will shoulder our fair share of the burden, but we will not shoulder it all. And when the day comes, if the day comes, that the debtor no longer has a collective bargaining agreement with us, we will do what we have always done. We will band together and get a new collective bargaining agreement by our collective strength, and I hope that we achieve that without Patriot being destroyed in the process. Man does not live by bread alone, and we will maintain our rights and we will fight, as we have always done, for more than a hundred years.

Your Honor, I would say, in conclusion, that it is clear Patriot is seeking too much and is doing so in

contravention, not just to better labor policy, but also quite clearly to federal bankruptcy policy, and I believe that the Court should deny this motion, and I will also tell the Court I cannot believe that denying the motion will result in Patriot collapsing, as we have been told.

Parties will go back to the bargaining table and we have time to reach a deal; the company is not going to breach its liquidity covenant for many months more, until the end of this year. It's not going to run out of cash until early next year. I believe, Your Honor, that the debtor simply has failed to meet the standards that are enacted in Sections 1113 and 1114. But I pledge to you, the UMWA will work to try and achieve a consensual resolution. But if that consensual resolution is brought at a time when we no longer have the protection of our agreement, I will simply remind the court of our longstanding slogan: no contract, no work. This is our policy and it fits well within the policies of the United States of America.

I want to thank the Court. I've gone on for an hour, I believe. Once again, I thank you for your patience; I thank you for your impartiality; I thank you and your staff for the incredible hard work and the diligence that you have all displayed, and I hope at the end of this process, I will one day return to this well, with a deal in hand with the debtor and a successful plan of reorganization. Thank you.

THE COURT: Thank you.

MR. KAMINETZKY: Your Honor, If you can give me, like, ten minutes to organize, I think I could save a lot of time than if I come up right away, but if, unless you're starving, maybe we could do it and not break for lunch and then, well, could go home.

THE COURT: That'll be fine. All right, will be a recess for ten minutes.

MR. KAMINETZKY: Thank you.

THE COURT: Thank you.

(Recess from 1:03 p.m. until 1:31 p.m.)

THE CLERK: We're back on the record.

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

All right, Mr. Kaminetzky, you may proceed.

MR. KAMINETZKY: Yes. Thank you for those few minutes, Your Honor. I'm going to be brief because I think, quite frankly, we've all had our fill.

But let me just try to clarify some points, and I beg your indulgence at the outset. Because this is a on-the-fly, rebuttal argument, I'm going to jump around and not give a beautifully organized presentation now.

I wanted to clear something up, before I do anything else, about what exactly the relief would be if Your Honor grants our motion, because many people have stood up here today and said that an order of the Court equals immediate rejection

of the contract, and that's just not correct. If you look at the proposed order that we submitted to this Court, which is based on proposed orders, or orders in other 1113/14 cases, we were very careful. What it says is: "The obligor companies are authorized to reject their collective bargaining agreements. The obligor companies are authorized to implement the terms of the proposals. The obligor companies are authorized to terminate retiree benefits. Now the obligor companies are authorized to implement the terms of the 1114 proposal." So nothing's automatic. The suggestion that the whole world comes crashing down and everything stops when and if, you, the judge approves our motion, is just simply incorrect.

The company knows exactly well the value of a consensual deal with all constituencies, and if we believe a consensual deal, even once we have a court order, is close at hand, we will definitely not do anything stupid and blow up the world just because ha-ha, we won, now you lose. That's never the way a company acts and that's certainly not the way we would act. And we continue and will continue, while we're waiting for a decision, and in fact after we receive a decision, to try desperately to reach a consensual deal with the union and all parties. And I think Your Honor has seen that in the way the debtors have conducted themselves throughout these proceedings, both with the respect to this

matter and other matters.

I want to move on to -- first, as Mr. Perillo did; he started with the balance of the equities, and I wanted to just touch on a few points there. First, in terms of what the standard is, under the In re Family Snacks, 257 BR 884, that element as well, balance of equities is preponderance of the evidence. And Mr. Perillo started off, as quite frankly he always does, with his strike threats, and the problem is Mr. Perillo's argument, with respect to a strike, in a lot of ways peruse too much. If, in fact, all it takes is a threat of a strike to balance the equities in favor of denying the debtors' motion, then the balance of equities factor in 1113/1114 is simply a poison pill. If the union lawyer can get up and wave the strike flag, the Court must rule against the debtors, there's no case that says that. In fact, I took some time and read what the cases actually say, and the cases actually said, "That the union threats of a strike cannot and should not be determinative." I will shoot myself if you make me do it, is not the way a court should rule.

And what's interesting is, other than Mr. Perillo's strike flag waving, the actual evidence in this case is quite different. When Mr. Ho asked Mr. Buckner, "What will happen if the court rules in our favor, in terms of 1113," Mr. Buckner in a moment of candor said, "I don't know why. The union's going to have a very, very, very tough decision, and the union's

going to think about it and talk to its membership and decide what to do. It could very well that the union would act rationally and not blow everything up just because and to prove a point." So if you want to look at the evidence in this case, rather than what Mr. Perillo has threatened the court, again and again, I would suggest you start there.

Mr. Perillo then said, "There's no evidence of what happens in this case or to this company if relief is not granted." That's just false, and I want to just point the court to the Huffard declaration starting on page 21, table 6, which is joint exhibit 132. There's an analysis right there, in black and white, of what happens to this company if there are no labor savings.

Mr. Perillo then went on to talk about the 1113 claim in this case, should the court grant our motion. I turn the court's attention to the Northwest Airlines case. There is no claim for 1113 relief, and that's 366 BR 270.

And for the very first time, the union makes a new argument about -- and a new assertion about withdrawal liability, and we had a whole dialog, or a whole lecture, about the Taft-Hartley Act; not a word, not a sentence, not a suggestion of any of this in any of their briefs in this case; no evidence, nothing. In fact, believe it or not, even the funds have not made this argument that Mr. Perillo decides to come in here for the very first time today.

Mr. Perillo then talks about the quote, "Quite serious counter proposals we've received over time from the union." As we've heard, and we've seen the record, that many of these counter proposals takes more, or passed for more, from the company than it actually gives. Some of them -- another feature is the union demands veto rights over the company's ability to pay anyone, even one dollar more. And as Mr. Mandarino even admits, that many of the -- that the union's previous proposals quote, "May not have been feasible."

Mr. Perillo then talked about productivity, union versus non-union. All I could do is, once again, point the court to Mr. Lucia's analysis on this issue. It really speaks for itself, and it's found in the reply declaration, paragraphs 19 to 25, and the attachments to that declaration, 11A and 11B. I don't have to say more; Mr. Lucia says everything you need to know.

Now, I found this also interesting that, once again, the union would like you to ignore and criticizes our thirty-five percent equity estate offer; you know, the one that Cecil Roberts called a step-forward, because he can't walk into Wal-Mart and pay for something with equity. And the union is -- by that, a suggestion that the union has no use for anything but hard-cold cash. But this is completely hallowed. How do we know that? It's because the union already agreed to this currency. We're just haggling about dollars; about amounts.

We said thirty-five percent; they want fifty-seven percent. If this equity-stuff was worthless to the union, why would they counter-proposal with more equity stuff? If it's useless, it's useless. So to suggest that thirty-five percent is meaningless is wrong, because they know it's very meaningful; they just want more.

Mr. Perillo said that -- he suggested that our proposal reflects the fact that management and non-union employees are immune from cuts, and that we're only going after organized labor. Where has he been this week? How many times do we have to show? How much testimony do we need on the extensive cuts that our management and our non-union employees have suffered?

Now, throughout Mr. Perillo's presentation, he talked a lot about legislative history, and may I say, he's been cherry-picking the legislative history, and I point Your Honor to our reply brief on page 30, footnote 19, and that footnote also speaks for itself. Mr. Perillo also cites from legislative history of bills that were rejected. But, I always know I'm doing well in a argument when the other side has legislative history and we have cases. And one thing about 1113 and 1114, is there're a lot of cases in this area, and for Mr. Perillo to think that a cherry-picked legislative history somehow trumps case-law, I think is just wrong.

Mr. Perillo also talked about a term sheet that the

union provided. Well, it was that term sheet that Mr. Mandarino said may not have been feasible, and the UCC said it was not feasible, and this is all described in our brief.

Mr. Perillo then said outrageous thing that, "We haven't given anything up at the table." Each month of delay of 1113 costs this company six to seven million dollars, each month. Each month of delay on 1114 costs this company six to seven million dollars per month, and as you recall from the bar graphs that Mr. Hatfield present -- or the bar chart with the -- you know, the implementation date has been moving-and-moving-and-moving in response to the union's request. We haven't given anything up. How about those royalty contributions that could be worth tens of millions of dollars? What about our agreement to stay into the plan which costs us sixteen million dollars per year, when our initial proposal was to get out, and if installments -- and if installments kick-in, that would be twenty-five million per month. That's sixteen to twenty-five million dollars, just on the pension issue, and we haven't given anything up. That's per year; sorry, not per month; the sixteen to twenty-five.

Now, we then move to relevant information and, again, I want to be judicious with my plight here, but Mr. Perillo tried in the guise of a discussion of the relevant information, to reargue the point of which proposal should count. In Mr. Perillo's view, we had to give the union information about a

proposal before that proposal even existed. That's what he got in here and said. He said that, "We lose, because on March 14th, we didn't give the union a proposal -- information about our April 10th proposal." Now, how you could do that, I'm not sure. Clearly, all he's trying to do is boot-strap this cute little argument into a re-argument of something that the judge already ruled. But, it's even better than that. Because if you look at the actual statute, now looking through 1113 (b) (1) (A), which is what Mr. Perillo read to the court, he actually left out four very important words. Let me read to you; the statute actually says. It says, "Make a proposal to the authorized representatives of the employees covered by such agreement." Then, this is what he said, "Based on the most complete and reliable information." He stopped there. You know what the next words are: available at the time of such proposal. I'm not sure how the information was available at the time of such -- again, information about a proposal made on April 10th was not available on March 14th.

And once again, I point Your Honor to our brief, reply brief pages 38 to 41, where this issue of which proposal counts is described in great detail. And, obviously, if Congress and the statute requires us to continue to negotiate after the filing of a motion, up to the time of the hearing, then you have to also, one would think, provide information during the negotiations. His kind-of dual track: well, you can only

provide information until here, but you should continue to provide proposals until there, just simply makes no sense.

Mr. Perillo tried to point to a purported conflict in testimony on whether and what was provided during the meetings of April 24th and 25th to the union, and he said, "Well how are we going to be able to decide who's telling the truth on the debtors' witnesses." I didn't quite see the conflict, but let me suggest this. Let's listen to Mr. Mandarino, who said on the stand under oath, that he received the information on April 25th. So you could ignore anything, any of the company witnesses that Mr. Perillo pointed out, said, and just listen to Mr. Mandarino. That's just fine with us.

And it was interesting that Mr. Perillo was still talking about snap-backs, even though that -- even though they conceded that the snap-backs didn't work, and they've removed the request for snap-backs in their proposal. They do have a re-opener that those snap-backs are completely off-the-table. I'm not sure why Mr. Perillo still talked about it, and Mr. Mandarino agreed with our criticism of snap-backs, that our criticisms of snap-backs were, in fact, reasonable.

Now, Mr. Perillo's necessity argument, again, I didn't quite follow. Now it's part of the union playbook in these hearings to try to read a blame-factor into 1113. And often, these 1113 hearings are plagued with saying, "The motion shouldn't be granted because these bad guys, these managers,

got us to where we are today, so they don't deserve the relief." And judges, in decisions again and again, say, "1113 has nothing to do with blame; it's not about how we got here; it's what are we going to now." And necessity means do you need the relief. It's not why do you need relief. Every bankruptcy has a sad story of how you get here, but what's fascinating about this case is that -- and what's fascinating about the part that Mr. Perillo even mentioned this, if it was -- in this case, the union's not evening blaming management. This isn't the typical case where the judge has to say, "Stop talking about blame. I know you think these people are bad." Here, I don't think the union has a problem with our management. They're blaming our competitor, our former parent, and we could agree, we do agree. We could disagree, but it doesn't matter. Again, this goes back to the fact of, "Well, Your Honor, Peabody is really bad, so let's punish them and kill Patriot." I just don't connect the dots on that one.

Then Mr. Perillo said necessity. Necessity for what? What does necessity mean? And what does he do? He turns quickly to the legislative history of the late Senator Kennedy. Well, there are cases and cases and cases that talk in detail about what necessity means. And, instead, Mr. Perillo reads one little cherry-picked line in legislative history, and I point the court to of course you know the seminal case is in Carey (ph.) Transportation.

But again, here, it's pretty easy, because our necessity is showing we've made with respect to short-term, medium-term, and long-term. In the short-term, we will die; we will run out of cash; before that, we'll breach our liquidity covenant and the banks could call the show over and liquidate us. That's not years from now; that's in the next few months. So, it's necessary for us to get the savings requested in this motion to survive in the short-term. It's also necessary in the medium-term. As you've heard Mr. Huffard, "We will not recede exit financing without these savings." So, short-term, we die; medium-term, if we don't get these savings, we don't leave Your Honor's protection, here, in the bankruptcy court; we never emerge. Long-term, we can be competitive with the costs that we have under the current collective bargaining agreement.

Mr. Perillo suggested that competitiveness has absolutely nothing to do with 1113 relief. That's just wrong; that's not what the cases say. We cite cases in our brief, staring with Carey, that becoming a competitive, being able to survive in the competitive industry that you're in, is an important factor, or the important factor, of restructuring an 1113 and 1114.

So, it's suggested that, kind of, we don't have to give if all they want is to be competitive. How you survive without being competitive is the question I ask, but is just

wrong, that competitiveness is not a part of 1113 and 1114. Mr. Perillo then came back to the DIP covenants, those DIP covenants. Let me tell you this. There was an evidentiary hearing on the DIP covenants. Every party and interest had notice of that evidentiary hearing. Judge Cabinet (ph.) held that evidentiary hearing and made the findings that she did in the order that she issued.

Mr. Perillo then made the startling comment that there's no evidence that the union miners make more than non-union. I mean, we all know that, but if he wants evidence, it's there, and I point you to the Schwartz declarations starting on page 32, going on for pages-and-pages with charts. It's completely un-rebutted.

And Mr. Perillo then concluded with his theory of, I guess, markets in general, that collective bargaining sets the markets. That it's not the market that sets the market; it's not what your customer's willing to pay that sets the market, collective bargaining sets the markets. Boy, what a different world we would live in if that was the case. Tell that to a customer; tell that to Mr. Hatfield, who when he enters into a competitive bidding situation with companies with a healthy balance sheet and with a tiny union workforce, bids on a project or bids on a sale, and we, our bid, to cover our costs, has to be ten percent, five percent, twenty percent higher, tell Mr. Hatfield that it's the collective bargaining

agreement, or collective bargaining that sets the market. Tell that to the customers. Sorry, Mr. Customer, but we have to charge more because you don't set the market and your competitor doesn't set the market, but we said that our union sets the market. It's just not the world we live in. Maybe we should, but it's not the world we live.

And let me just conclude with a few one or two final thoughts. Thought number one: I want everyone in this courtroom to know the company remains committed today as it was six months ago, three months ago, two months ago, and last week, to a consensual deal with this union. We'll meet them anytime and in any place. We will drop everything; roll-up our sleeves; sit in a room; lock the door and not leave until we have a consensual deal. Sometimes a union just can't do that without the assistance of the court, but we can and we will. As long as we -- if we stick out our hand, if they grab our hand, we can come, get through this together in a consensual basis and we're going to do that today. We'll bring to that today, tomorrow, and even up to and including the time when this judge, when this Court, issues an opinion.

And since Mr. -- I don't want Mr. Perillo to out-pithy me with quotes; I want to end by quoting Walter Ruther, President of the United Auto Workers Union, for many years, who said the following: "The greatest job security an employee can have is a financially strong company." We agree. Thank you,

Your Honor.

THE COURT: All right. Thank you. All right, then I would like to thank all of the attorneys who have appeared for the presentations today and throughout the week. And I certainly appreciate counsel being very well prepared. That certainly makes things move-along at an appropriate pace and easier on everyone.

I certainly have a lot to consider and I will issue a written order in accordance with the mere time constraints that are laid-out in the bankruptcy code. I also wish everyone safe travels back to their homes. Please be careful out there. I think it is continuing to rain here today, and if there's nothing else -- anything else on behalf of the debtors?

MR. KAMINETZKY: Mr. Mark (ph.) wants to reargue the --

IN UNISON: Laughter.

MR. KAMINETZKY: I think that's all we have, Your Honor. Again, thank you, to everyone.

THE COURT: All right. Thank you. Mr. Perillo, Mr. Ho, anything else on behalf of the union?

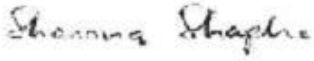
MR. PERILLO: No, Your Honor, and thank you.

THE COURT: All right. Thank you. There will be a recess until Monday morning at 10:00 a.m.

(Whereupon these proceedings were concluded at 1:53 PM)

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.



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SHARONA SHAPIRO

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Date: May 6, 2013

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UNITED STATES BANKRUPTCY COURT
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Fourth Floor
St. Louis, MO 63102

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12−51502 −A659

CHAPTER 11

Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction

To: All Persons of Record at Hearing

A transcript of the proceeding held on May 3, 2013 was filed on May 8, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: May 15, 2013. Personal data identifiers include: **social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice:May 29, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no Statement of Transcript Redactions is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: June 10, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: August 6, 2013, unless extended by court order. However, during this 90−day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244−4801.

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 5/8/13

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Rev. 12/10