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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
Case No. 12-51502-659

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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. SURRETT-STATES
U.S. BANKRUPTCY JUDGE

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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.

1 THE COURT: All right. Good morning.

2 MR. WILLARD: Good morning.

3 MR. BLANK: Good morning.

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

8 THE COURT: Good morning.

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

13 MR. SMOLINSKY: Good morning, Your Honor.

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

19 THE COURT: Good morning.

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

22 THE COURT: Good morning.

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

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

3 THE COURT: Good morning.

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

7 THE COURT: Good morning.

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

11 THE COURT: Good morning.

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

16 THE COURT: All right. Good morning.

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

20 THE COURT: Good morning.

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

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

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

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

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

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

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

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

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

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

14 MS. ANDERSON: Good morning, Your Honor.

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

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

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

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

24 THE COURT: All right.

25 MR. KAMINETZKY: There was, indeed, productive

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

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

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

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

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

1 has run very efficiently. I think the fact that we're here at
2 9 a.m. doing closing arguments is an achievement, and we
3 appreciate the Court's time and the courthouse staff's effort,
4 and in particular, I think, the security staff staying late,
5 making sure we get this done in a timely fashion.

6 THE COURT: Thank you.

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

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

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

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

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

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

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

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

4 Thank you, Your Honor.

5 THE COURT: Thank you. All right, then, Mr.

6 Kaminetzky, I will then accept that agreement then by those two
7 parties.

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

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

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

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

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

23 THE COURT: All right.

24 MR. WILLARD: Thank you.

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

1 the U.S. Trustee, Mrs. Long?

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

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

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

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

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

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

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

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

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

1 sufficiently funded to survive.

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

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

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

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

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

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

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

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

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

18 THE COURT: All right. Thank you.

19 All right, next, Citibank, Mr. Smolinsky?

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

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

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

7 Your Honor, if you recall, at the outset of this
8 hearing, our objection focused really just on two issues. One,
9 that we were not taking a position with respect to 1113 and
10 1114. And two, the only position we were taking is an
11 objection, to the extent the Court grants the motion, that that
12 order should not have a preclusive effect with regards to
13 substantive consolidation or nonconsolidation.

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

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

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

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

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

13 THE COURT: All right.

14 MR. SCHNABEL: Thank you.

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

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

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

25 THE COURT: All right. Then

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

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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.

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that I have nothing else to add. Thank you.

2 THE COURT: All right. Thank you.

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

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

9 THE COURT: Thank you.

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

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

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

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

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

1 this separate fund.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 much less discussions about how pension contributions would
2 affect it.

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

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

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

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

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

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

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

1 on their side.

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

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

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

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

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

24 We know that necessity is the touchstone of Section
25 1113 and 1114, and we will spend some time on that a bit later.

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

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

10 MR. PERILLO: I do not, Your Honor.

11 THE COURT: Thank you.

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

15 THE COURT: All right.

16 MR. KAMINETZKY: -- flip along.

17 THE COURT: Okay.

18 MR. KAMINETZKY: There are worse things in life.

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

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

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

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

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

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

1 well be greater.

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

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

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

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

1 relevant facts.

2 Fact: Patriot's negotiation team took part in
3 twelve -- twelve negotiation sessions before the motion was
4 filed, and four after the motion was filed. The CEO, Mr.
5 Hatfield, personally participated in each of these meetings.
6 The record reflects that Patriot accommodated the UMWA at every
7 turn. Patriot met with the UMWA at times when convenient to
8 the UMWA and at locations where convenient to the UMWA.
9 To take one example, Mr. Hatfield testified that last week the
10 Patriot negotiation team here in St. Louis cleared their
11 schedules on short notice and flew out to Virginia for an extra
12 day of negotiations. You could also see, for additional
13 information about this, Robertson declaration, paragraphs 7,
14 102, 134, 191, and 193, and Robertson's reply declaration,
15 paragraphs 4, 5, and 6.

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

21 And if you could pull up the next slide.

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

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

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

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

16 What a bizarre argument. First, as a legal matter, it
17 is proper to make post-motion proposals; it happens regularly.
18 The case law supports it, as does the statute, which provides
19 that negotiations must occur "during the period beginning on
20 the date of the making of the initial proposal and ending on
21 the date of the hearing". That's 1113(b)(2) and 1114(f)(2).
22 And the Court ruled on Monday that it will consider all post-
23 motion proposals made by parties for all purposes.

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

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

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

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

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

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

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

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

1 that is what you would expect the statute to say or require.
2 In real life, however, the statute requires the debtor to
3 provide the union with "such relevant information as is
4 necessary to evaluate the proposals 1113(b)(1)(A) and
5 1114(f)(1)(A)".

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

12 Again, let's start with the facts.

13 Fact: Patriot set up an extensive electronic data
14 room a month before it even made its first proposal, and
15 provided a wealth of information about its business to the
16 UMWA, amounting to nearly 43,000 pages, prior to filing its
17 motion, and amounting to nearly 48,000 pages to date. And I
18 refer the Court to Robertson declaration, paragraph 8 and
19 Robertson's reply declaration, paragraph 5.

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

1 79, and 88. We never said no -- never said no to a single
2 relevant request for information.

3 Fact: Not only did Patriot locate and supply pre-
4 existing business records to the UMWA, it generated documents
5 and schedules specifically in response to UMWA's request. And
6 I refer the Court to Robertson declaration, paragraphs 14 and
7 192.

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

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

1 Pull up the next slide.

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

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

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

1 30th at page 36, 17 through 22. That model, which is a live
2 Excel model that is fully functional and capable of running
3 multiple scenarios, was provided to the union. And that's
4 Huffard reply declaration, paragraphs 52 through 56, as well as
5 his trial testimony at page 36 and 37.

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

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

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

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

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

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

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

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

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

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

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

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

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

13 Now, you also heard testimony of Mr. Traynor. He
14 first said that the requested information was not provided.
15 When pushed on cross, he finally conceded that information was
16 in fact provided by the company and Blackstone on April 24 and
17 25, but that he was not satisfied with the response and he
18 wanted more. Well, if all it takes to lose 1113 and 14 is for
19 a lawyer on the other side to make an amorphous claim that it
20 was dissatisfied and wants more information, then 1113 and
21 1114s would be unwinnable. And Mr. Mandarino, the union's
22 financial advisor, did not testify -- did not testify that he
23 needed any additional information. He testified, instead, that
24 Blackstone provided the union with "a sophisticated and dynamic
25 model regarding the equity stake".

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

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

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

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

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

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

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

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

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

8 Then in a status report dated January 22nd, 2013, PwC
9 stated that it was reviewing the list and would "let the
10 debtors know if there are any remaining questions or follow-ups
11 regarding this item". And that's Joint Exhibit 48. There was
12 no further mention of the Peabody-assumed group until March
13 29th, 2013. And that's Joint Exhibit 85 at page 5. And just
14 yesterday -- just yesterday, Mr. Mandarino admitted on cross
15 that this information was provided.

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

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

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

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

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

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

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

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

9 And my favorite, the last one, historical annual
10 capital expenditure amounts on an overall company basis from
11 2006 through 2008, notwithstanding the fact, of course, that
12 Patriot did not even exist prior to 2007.

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

18 Let's move on to fair and equitable. Under Section
19 1113 and 1114, Patriot must prove that the proposals treat all
20 parties "fairly and equitably". That's 1113(b)(1)(A) and
21 1114(f)(1)(A). Under the relevant law, fair treatment must be
22 tailored to the circumstances. It does not require across the
23 board identical treatment, and it is simply not the case that
24 dollar for dollar concessions need to be made by every
25 constituency. And that's in the Mesaba case, 349 B.R. 749 and

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

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

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

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

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

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

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

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

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

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

1 unrebutted.

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

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

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

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

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

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

1 compensation. Again, I refer to Huffard declaration, paragraph
2 39 to 41, and Hatfield declaration, paragraph 87 to 92.

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

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

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

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

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

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

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

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

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

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

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

5 Now, even more suspect, however, is that he selected a
6 model that, in his own words, would balloon the retiree health
7 care liability estimate. Mr. Cobin testified that he's only
8 seen this "Getzen model" used by two audit clients. It's not
9 standard practice, it's not required by GAAP, and a couple of
10 years ago, no one was using it. What's more, he took this
11 model, an outlier to begin with, and manipulated the baseline
12 assumptions to exaggerate the liability even more. He told you
13 just yesterday that CPI and GDP are the primary drivers of the
14 model and that if you wanted to put your thumb on the scale and
15 push up liability, these are the inputs you tweak. So what did
16 he do? Well, he tweaked them; he put his thumb on the scale.
17 He tweaked the baseline inputs. The results: a Getzen model
18 on steroids, projecting an excessive liability amounting to
19 1.79 billion dollars.

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

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

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

19 More important, however, a cessation of savings, a
20 snapback is impossible under the circumstances. As Mr. Huffard
21 testified, in his professional experience, lenders need some
22 certainty about a company's cost structure before extending
23 exit financing. I turn your attention to Huffard declaration
24 49, and to Mr. Huffard's trial testimony.

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

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

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

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

1 and emerge.

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

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

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

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

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

22 So then taking a step back, what, in essence, the UMWA
23 is asking the Court to do is punish Patriot for the actions of
24 other coal companies. The union is asking Your Honor to deny
25 1113 and 1114 relief and propel the debtors into liquidation to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And this testimony didn't only come from our financial

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

6 Indeed, the bankruptcy court's words are dispositive,
7 and frankly, law of the case. And I'm quoting from ECF number
8 275 at page 11. This is from the court: "The debtors are
9 unable to obtain financing on more favorable terms from sources
10 other than the DIP lenders pursuant to the DIP document."

11 Seventh, the union challenges certain work rule
12 modification which it labels as noneconomic modifications that
13 should not have found their way into the proposals. But as Mr.
14 Lucha, Mr. Hatfield, and Mr. Robertson consistently testified,
15 these changes have economic benefits. The most striking
16 example is the attendance modification. As Mr. Lucha clearly
17 testified, having people show up for work more often can
18 significantly reduce costs and improve efficiency. And I point
19 the Court to Lucha's reply declaration, paragraphs 7 through
20 10, and Mr. Lucha's trial testimony on day 2 at pages 377 to
21 378.

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

1 2012, and that testimony is entirely un rebutted. And that's in
2 Lucha's reply declaration, paragraphs 11 through 15.

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

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

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

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

8 Let's go to one of the final factors, the balance of
9 equities. Turning to the next element, under Section 1113 and
10 1114, Patriot has to show that "the balance of equities favors
11 rejection". That's 1113(c)(3) and 1114(g)(3). Through its
12 declaration and through the testimony of Mr. Huffard and Mr.
13 Hatfield, Patriot established that it will liquidate if the
14 proposals are not implemented, which will result in the loss of
15 jobs, the elimination of benefits, and the evaporation of value
16 for all of Patriot's creditors.

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

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

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

11 But rather than arguing, I think it would be best to
12 use the time on this issue for me to simply read from the
13 court's decision in Mesaba. There the union argued that if
14 1113 relief were proposed, the union would strike. The court
15 responded to the union's threat as follows, and again, I'm just
16 reading from the Mesaba decision because I think it's exactly
17 pertinent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 Now, the funds have asserted with zero evidence that
15 withdrawing from the 1974 plan is unnecessary because the
16 contribution rates schedule that the funds sent to Patriot
17 may -- may not go into effect. Bear in mind that these rates
18 are not Patriot's predictions for future rates, they aren't
19 speculation by Patriot as the union suggests, these are the
20 rate schedules created and adopted by the BCOA and the UMW and
21 sent by the funds to all employers as the best estimate of what
22 the future rates will be. This is reflected in Joint Exhibit
23 262 and Mr. Stover's deposition, pages 43 to 45, and page 57.

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

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

10 Patriot asked the funds to just put it in writing,
11 give Patriot and its potential investors and lenders an
12 assurance that the company will be not forced back into
13 bankruptcy, Chapter 22, by skyrocketing contribution rates in
14 2017. The funds have refused and have left Patriot in the
15 untenable position of convincing investors that these predicted
16 rates set forth in the funding plan won't happen because Mr.
17 Goodchild said so.

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

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

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

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

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

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

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

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

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

15 In any event, as you heard on the first day of trial
16 Mr. Goodchild has no authority to make assurances or negotiate,
17 and that's why we are where we are. If we ever get to those
18 assurances we would not withdraw. And even if we don't get
19 those assurances we will withdraw but pay withdrawal
20 liabilities installment payments under ERISA and not generate
21 an unsecured claim, pursuant to ERISA 4219(c)(1), and we will
22 not generate an unsecured claim. And I refer the Court to the
23 cases cited on page 44 of our reply brief, especially footnote
24 32, which is the testimony of Mr. Stover.

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

1 2012 bonus trust, which are multiemployer plans to which the
2 debtors contribute approximately eight million dollars annually
3 pursuant to the 2011 NBCWA. As stated by Mr. Stover at his
4 deposition and by Mr. Goodchild in his opening statement, in
5 contrast to a defined benefit plan, like the 1974 plan, these
6 are defined contribution plans, there's nothing special or
7 unique about these plans. Unfortunately, the debtors simply
8 cannot afford to participate in them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. PERILLO: Yes, Your Honor.

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

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

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

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

16 Mr. Perillo, you may proceed.

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

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

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

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

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

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

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

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

10 I also want to be clear that when these cases say they
11 hope that the union leaders will somehow make a decision that
12 doesn't hurt their members, they are, again, engaging a classic
13 1920s caricature, unions are democratic organizations, we elect
14 our leaders, they are us.

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

23 MR. PERILLO: Let me quote to you the Supreme Court of
24 the United States in the famous Buffalo Forge case at 428 U.S.
25 397,409. This case is one of those 1967 advised the federal

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

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

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

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

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

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

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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. Kaminetzky, 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

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

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

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

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

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

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

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

1 within one of the exceptions in subpart C.

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

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

13 There is going to be, if you pause rejection, a
14 960 million dollars claim on top of the \$1.8 billion retiree
15 liability. There is going to be a flood of union claims. We
16 own this debtor already.

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

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

25 Now we got a very enlightening lesson on the cost

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

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

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

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

25 This particular equity focuses on the quality of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Again, Perry Mandarino's testimony of yesterday showed
11 that our VEBA proposal is going to save the company the same 75
12 million dollars that it thinks its VEBA proposal is going to
13 save it. And that we have offered up 26 million dollars of
14 1113 concessions and that we provide the debtor in 2014 and the
15 following years the same 150 million dollars that it wants by
16 identifying other savings that it can achieve.

17 Mr. Mandarino was criticized for inventing out of old
18 cloth this notion that Patriot has a top heavy management. But
19 when you go to Mr. Lucia's Exhibit, which is I believe, tab
20 116, and look to see at the Panther and Black Stallion mines,
21 what is the actual ratio of hourly supervisory or salaried
22 workers? It's exactly the ratio Mr. Mandarino said it was.
23 And as he testified, two-thirds of the savings comes straight
24 from those mines.

25 And the same exhibit shows contrary to the statements

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

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

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

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

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

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

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

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

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

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

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

1 know, it'll happen by next January.

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

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

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

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

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

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

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

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

1 history.

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

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

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

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

1 will not be impossible to implement."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 "Subsequent to filing a petition and prior to filing

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

4 It's mandatory. It's not advisory and that means that
5 on March 13th, that was the last day, the last day that the
6 debtor legally could provide information to consider for any
7 proposal including the proposals made on April 10th and April
8 23rd.

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

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

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

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

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

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

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

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

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

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

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

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

12 I point out one final thing, Your Honor, on the
13 question of information. We still can't figure out what the
14 equity stake is worth and neither can a lot of other parties in
15 this proceeding. And because that is the heart and soul of the
16 1114 motion, even if the debtor wasn't obviously untimely under
17 the statute in providing information, we would have the right
18 to refuse this proposal and we would expect that the court
19 would deny the motion because of the lack of relevant
20 information.

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

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

1 making a disproportionate contribution to the sacrifices in
2 this case.

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

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

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

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

1 that the law?

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

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

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

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

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

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

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

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

1 791 F 2d 1074. The court also discussed the need for snap back
2 as a matter of fairness and equity. The court noted that under
3 Wheeling Pittsburg proposals labor costs would remain frozen.
4 The court then recited the company's argument that such a
5 proposal would provide cost stability for the company and wage
6 stability for union employees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 So why wasn't a fraudulent conveyance action brought
18 then in 2011 because they surely knew they were losing massive
19 amounts of money because of that? or in 2010 or in 2009 or in
20 2008, the year after its birth when it was losing money?

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

25 So there was unreasonable delay in pursuing Peabody.

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

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

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

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

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

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

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

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

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

16 I understand that the debtor's paired back Mr.
17 Akunuri's project. There might be an extra
18 100 million dollars of revenue in those out years.

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

1 I think, Your Honor, I would commend to the Court the
2 decision in Fiberglass Industries, a decision that is found at
3 49 BR 202, a decision from the Northern District of New York
4 where the bankruptcy said that a debtor could not establish
5 necessity under section 1113 from the bottom up. It has to
6 calculate its need first and then determine how it will meet
7 that need.

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

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

20 Mr. Huffard's testimony, he pointed out that he's
21 looking for 163 million dollars of union concessions and about
22 17 million dollars in nonunion concessions in these early
23 years.

24 163 million dollars divided by the -- by our -- well,
25 excuse me. Of that 163 million dollars about half is 1113

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 Parties will go back to the bargaining table and we
7 have time to reach a deal; the company is not going to breach
8 its liquidity covenant for many months more, until the end of
9 this year. It's not going to run out of cash until early next
10 year. I believe, Your Honor, that the debtor simply has failed
11 to meet the standards that are enacted in Sections 1113 and
12 1114. But I pledge to you, the UMWA will work to try and
13 achieve a consensual resolution. But if that consensual
14 resolution is brought at a time when we no longer have the
15 protection of our agreement, I will simply remind the court of
16 our longstanding slogan: no contract, no work. This is our
17 policy and it fits well within the policies of the United
18 States of America.

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

1 THE COURT: Thank you.

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

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

9 MR. KAMINETZKY: Thank you.

10 THE COURT: Thank you.

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

12 THE CLERK: We're back on the record.

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

14 All right, Mr. Kaminetzky, you may proceed.

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

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

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

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

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

1 matter and other matters.

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

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

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

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

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

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

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

10 Mr. Perillo then talked about productivity, union
11 versus non-union. All I could do is, once again, point the
12 court to Mr. Lucia's analysis on this issue. It really speaks
13 for itself, and it's found in the reply declaration, paragraphs
14 19 to 25, and the attachments to that declaration, 11A and 11B.
15 I don't have to say more; Mr. Lucia says everything you need to
16 know.

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

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

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

14 Now, throughout Mr. Perillo's presentation, he talked
15 a lot about legislative history, and may I say, he's been
16 cherry-picking the legislative history, and I point Your Honor
17 to our reply brief on page 30, footnote 19, and that footnote
18 also speaks for itself. Mr. Perillo also cites from
19 legislative history of bills that were rejected. But, I always
20 know I'm doing well in a argument when the other side has
21 legislative history and we have cases. And one thing about
22 1113 and 1114, is there're a lot of cases in this area, and for
23 Mr. Perillo to think that a cherry-picked legislative history
24 somehow trumps case-law, I think is just wrong.

25 Mr. Perillo also talked about a term sheet that the

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

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

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

1 proposal before that proposal even existed. That's what he got
2 in here and said. He said that, "We lose, because on March
3 14th, we didn't give the union a proposal -- information about
4 our April 10th proposal." Now, how you could do that, I'm not
5 sure. Clearly, all he's trying to do is boot-strap this cute
6 little argument into a re-argument of something that the judge
7 already ruled. But, it's even better than that. Because if
8 you look at the actual statute, now looking through 1113 (b)
9 (1) (A), which is what Mr. Perillo read to the court, he
10 actually left out four very important words. Let me read to
11 you; the statute actually says. It says, "Make a proposal to
12 the authorized representatives of the employees covered by such
13 agreement." Then, this is what he said, "Based on the most
14 complete and reliable information." He stopped there. You
15 know what the next words are: available at the time of such
16 proposal. I'm not sure how the information was available at
17 the time of such -- again, information about a proposal made on
18 April 10th was not available on March 14th.

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

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

3 Mr. Perillo tried to point to a purported conflict in
4 testimony on whether and what was provided during the meetings
5 of April 24th and 25th to the union, and he said, "Well how are
6 we going to be able to decide who's telling the truth on the
7 debtors' witnesses." I didn't quite see the conflict, but let
8 me suggest this. Let's listen to Mr. Mandarino, who said on
9 the stand under oath, that he received the information on April
10 25th. So you could ignore anything, any of the company
11 witnesses that Mr. Perillo pointed out, said, and just listen
12 to Mr. Mandarino. That's just fine with us.

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

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

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

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

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

16 Mr. Perillo suggested that competitiveness has
17 absolutely nothing to do with 1113 relief. That's just wrong;
18 that's not what the cases say. We cite cases in our brief,
19 starting with Carey, that becoming a competitive, being able to
20 survive in the competitive industry that you're in, is an
21 important factor, or the important factor, of restructuring an
22 1113 and 1114.

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

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

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

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

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

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

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

1 Your Honor.

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

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

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

16 IN UNISON: Laughter.

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

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

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

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

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

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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.

Sharona Shapiro

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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

Copies Mailed To:

Brian C. Walsh, Bryan Cave LLP, 211 N Broadway Suite 3600, St. Louis, MO. 63102
Rev. 12/10