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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Objection Deadline:** **April 12, 2013 at 4 p.m. CDT** **Hearing Date:** **April 29 to May 3, 2013 at 10 a.m. CDT** **Hearing Location:** **Courtroom 7 North**

UMWA'S OBJECTION TO THE MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§1113 AND 1114

Introduction

The Debtors' motion seeks to strip from 13,000 retirees and their families the safety net of retirement income and healthcare coverage they have earned in decades of collective bargaining with Patriot and its predecessors. It likewise seeks to eliminate all such gains for active employees, essentially returning them to the condition of non-union miners[1]—robbing them of all advantages they have garnered by choosing self-organization under federal statutes, save the right to withhold their labor, and thus making it more likely that they will in fact withhold it. While employing the verbiage of "necessity" and "equity," these radical changes are proposed in a thinly-veiled reference to the now-defunct business judgment standard: The changes are "necessary" only in light of self-imposed liquidity and EBITDA requirements,

[1] Actually, it seeks to put them in a worse position than non-union miners, who keep their mine-level incentives.

themselves put in place under the business judgment standard; and the changes are "fair" only in reference to Patriot's anti-union ideology. Patriot *can* emerge from bankruptcy with modest changes to its obligations, but it can*not* do so under the harsh and radical regime it has proposed.

Section 1113 was passed to halt the gross abuse of bankruptcy by employers that wielded the Code, in the words of the Second Circuit, "as a judicial hammer to break the union." In re Maxwell Newspapers, Inc., 981 F.2d 85, 89 (2d Cir. 1992). Prior to its enactment, rejection of labor agreements was governed by the "business judgment" standard, which nearly always resulted in a pro forma hearing followed by swift abrogation of the union contract. NLRB v Bildisco & Bildisco, 465 U.S. 513 (1984). Legal precedent and the legislative history[2] of §1113 show that a salient purpose of the statute was to require a more exacting standard and to create a strong presumption that the court would *not* reject an agreement absent adherence to the new, tougher standard.[3] Patriot fails to meet this exacting standard on any level.

UMWA members constitute approximately 1657 of the company's 4200 employees, or about 40% of the total and 57% of its hourly work force of 2900 miners. Patriot is using the

[2] Courts routinely rely on this legislative history in interpreting §1113. E.g., In re Truck Drivers Local 807 v. Carey Transportation, 816 F.2d 82, 88-89 (2nd Cir. 1987). Because there were no committee reports on the passage of §1113, "the Court must look to statements made by sponsors of the legislation on the floor of Congress for an expression of legislative intent." In re Ionosphere Clubs, 139 B.R. 772, 780 (S.D. N.Y. 1992), citing Regents of the University of California v. PERB, 485 U.S. 589, 595-597 (1988)(using floor statements of individual legislators to interpret Private Express Statute). The statements made in the House-Senate Conference on §1113 constitute the "only" legislative history of the statute, In re Unimet Corp., 842 F.2d 879, 883 n. 6 (6th Cir.), cert. denied, 488 U.S. 828 (1988), and therefore such statements "are the only authoritative indications of congressional intent." North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 527 (1982). Accord Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1085 (3d Cir. 1986)("[i]n this instance, ...[the court] must seek guidance from the sequence of events leading to the adoption of the final version of the bill, and the statements on the House and Senate floor of the legislators most involved in its drafting").

[3] Among other things, §1113 changed the substantive standard from mere "business judgment" to proof that (a) requested changes are limited to those necessary to permit reorganization; (b) the changes are fair and impose relatively equal sacrifice on all constituents; and (c) the balance of the equities tips decidedly in favor of rejection. Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82, 88 (2d Cir. 1987). These standards were designed to reverse Bildisco's more lenient standard. E.g., 130 Cong. Rec.H7494 (daily ed. June 29, 1984)(Remarks of Rep. Glickman); 130 Cong. Rec.H7496 (daily ed. June 29, 1984)(Remarks of Rep. Morrison). Rep. Morrison endorsed the standard in "The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors," 57 Am. Bankr. L. J. 299, 300, 319, which contains a strong presumption against rejection.

§1113 process to eliminate the past gains of these unionized miners, who historically sacrificed hourly compensation and pensions for retiree healthcare. They will be reduced to non-union conditions or worse without having had the historically higher compensation of non-union miners in the meantime. Alone among Patriot's constituencies, UMWA members will suffer a far greater percentage loss of compensation and benefits than any other group. By Patriot's own numbers, UMWA members and retirees make [redacted] of the sacrifices in the business plan. Patriot is abusing the bankruptcy process and §1113 for the exact purpose prohibited by Congress—as an excuse to rid itself of the union and of contract provisions that it perceives as undesirable.

Patriot's argument is premised on the notion that coal prices will remain low for the foreseeable future, leaving them unable to compete—and is provably wrong.[4] Using this incorrect assumption as a whip, Patriot then argues it must cut the difference from its unionized employees' benefits. It cuts the miners in a particularly onerous way--by eliminating pension accrual and healthcare for a group most vulnerable to chronic disease during retirement years.

Patriot admits that it manufactured its EBITDA and liquidity crises largely for purposes of this very motion, by setting the DIP covenants at levels that cannot be attained without the relief it demands from labor (Huffard Decl. ¶79)—a tacit admission that it is abusing this process to achieve permanent reduction in the standard of living for its miner employees as a purported solution to a temporary problem. The liquidity covenants were approved on the lesser business judgment standard, now outlawed insofar as labor agreements are concerned. The Debtors thus seek to leverage the Court to approve rejection *notwithstanding* their inability to meet the statutory criteria. Patriot raises the specter of its own default and liquidation unless the Court

[4] Coal prices and cash-flow are expected to rebound in 2015 and 2016. [redacted] Patriot identifies coal pricing as its greatest economic challenge, so this single error undermines its entire §1113 presentation.

grants its §§1113 and 1114 motion *on any standard,* a shameless form of bootstrapping. Patriot essentially argues that it has painted itself into a legal corner from which it can only be rescued by a judicial hammer to break the union and the contract.

At the hearing on management bonuses in this matter, CEO Hatfield gave as his reason for imposing a disproportionate share of these draconian cuts upon unionized miners the same retort that notorious criminal Willie Sutton gave for robbing banks—"because that's where the money is." Patriot has not considered other alternatives—such as streamlining its top-heavy management, or making other non-labor cuts—that would satisfy its short term need for cash. Instead, it attempts to justify cuts by arguing, incorrectly, that unionized miners are paid too well. Not only is union miner compensation competitive in the labor market, it is the most efficient labor Patriot has according to Patriot's own figures. Crushing the union satisfies management's anti-union ideology, not its need to weather a short term crisis of its own devising.

Patriot from its inception in 2007 acted in such a way as to create windfalls for its former parent. [redacted] To this very day, Patriot allows Peabody to foist upon it liability for retirees assumed by Peabody, taking action only at the insistence of the union in bargaining. While it belatedly sought a declaratory judgment that Peabody cannot escape its current obligations as a consequence of Patriot's motion for §1114 relief, there is no assurance of the outcome. As in all else, Patriot asks its unionized miners and retirees to bear the full risk of its recovery. Patriot has essentially dismissed the idea of pursuing its former parent for fraudulent conveyances—something it could have done years ago, before bankruptcy—as impractical, because of the limited time it has given itself to solve the crisis that it created. The only place to get the cash is not from a rich corporation, but from retirees.

The unfairness of these proposals culminates in a cruel joke: Patriot offers retirees, broken by a lifetime of working in the mines, and whose healthcare costs $77 million annually, a VEBA funded with $15 million, or enough to last ten weeks at best—long enough to get the retirees out of sight in time for plan confirmation, after which they will slowly die while Patriot watches from a discreet distance. [redacted] at a point when the VEBA will have been exhausted and defaulted on hundreds of millions of dollars of obligations. The sole remaining source of funding is a claim that Patriot admits cannot be quantified. Once again Patriot argues that it needs hard dollars in savings that can be quantified to "survive," while retirees who actually face a real battle for survival get company scrip that may be worthless.

For these and other reasons explained below, the motion must be denied.

STATEMENT OF FACTS

1. Patriot and Peabody

a. The Creation of Lifetime Retiree Coverage for Miners in America

In the wake of the Second World War, the UMWA struck the coal mining industry to obtain a national multi-employer retiree healthcare plan with guaranteed lifetime coverage. President Truman seized control of virtually all of the nation's bituminous coal mines in 1946 and ordered the Secretary of Interior to negotiate an agreement with the UMWA. Eastern Enterprises v. Apfel, 524 U.S. 498, 504-505 (1998); Holland v. Keenen Trucking, 102 F.3d 736, 738 (4^{th} Cir. 1996). That agreement created the first national program of coalminer pensions and lifetime retiree coverage which continues to exist to this day. Subsequently, the UMWA and the Bituminous Coal Operators' Association (BCOA) negotiated a standard industry agreement known as the National Bituminous Coal Wage Agreement (NBCWA), which maintained these benefits. Peabody and Arch belonged to BCOA and were parties to the NBCWA. (Buckner Decl. ¶45).

Two subsequent national strikes, both called primarily to maintain retiree benefits, led in 1990 to the creation of the Coal Commission[5] to study miner retiree health care benefits; Peabody's President and CEO served on this commission and joined its recommendation that:

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored.

The Coal Commission report led to the passage of the Coal Act, 26 U.S.C. §9701 et seq., which guaranteed the lifetime healthcare liabilities for existing retirees and a limited subset of future retirees. The UMWA and BCOA negotiated a subsequent 1993 NBCWA which maintained that each employer, including Peabody and Arch, would be liable for the lifetime healthcare of its own retirees, and that the 1993 benefit plan would be responsible only in the event that the retiree's last employer went out of business and could not financially bear the cost of the liabilities. This requirement was continued in the NBCWAs for 1998, 2003, 2007 and the current 2011 agreement.

b. Events Related to the Spin-offs

In 2005, Arch created Magnum by a spin-off designed to fail: It assigned 12.3% of its assets but 96.7% of its retiree healthcare liabilities to Magnum, reducing its own liabilities from

[5] During the 1989 Pittston Strike, then-Secretary of Labor Elizabeth Dole appointed a special mediator who assisted the company and the union to reach an agreement. As part of that agreement, Secretary Dole announced the formation of an Advisory Commission on United Mine Workers of America Retiree Health Benefits, which became known as the Coal Commission. The Commission issued a special report in 1990.

$402 million to $57 million or 85%. (Traynor Decl. ¶14).

Peabody created Patriot in October 2007 by a spin-off designed to fail: Patriot acquired the unionized operations of Peabody and a smaller non-union component, with 16% of its assets but 40% of the retiree liabilities, at the time, valued at approximately $555 million.[6] Its first annual report showed that Patriot was barely solvent, with $1.2 billion in assets and $1.1 billion in liabilities. [redacted]

Patriot reported a net loss of $123 million in 2007. (Traynor Decl. ¶8).

In 2008, Patriot acquired the Magnum operations for $709 million, becoming liable for more than another $500 million in retiree liabilities. These liabilities just prior to the acquisition were $555 million; afterwards, $1.065 billion. Today, these liabilities exceed $1.8 billion. Oddly for a company only six years old, Patriot has approximately 2900 miners but more than three times as many retirees—today, more than 11,000 retirees and beneficiaries, of whom more than 10,000 are UMWA-represented.[7] Ninety percent of the retirees have never worked for Patriot. (Traynor Decl. ¶5).

[redacted]

[6] Peabody and Patriot entered into two agreements addressing retiree healthcare: The Coal Act Liabilities Assumption Agreement and the NBCWA Individual Employers Liabilities Assumption Agreement. In the former, Patriot agreed to administer Coal Act benefits while Peabody assumed the liabilities and indemnified Patriot for any failure to pay the liabilities. In the latter, Peabody assumed responsibility for the retiree healthcare of miners who had a vested benefit in 2006 or before. Peabody assumed $616 million in liabilities and transferred to Patriot $555 million. Without this assumption, Patriot would have been insolvent at its creation.

[7] These numbers do not include active employee healthcare. Unionized employees and retirees comprise more than 15,250 of those persons covered by Patriot healthcare plans. The union-related Peabody retirees who may lose coverage if Patriot does not prevail in its declaratory judgment constitute another 3100 people. Thus, a company with 1657 unionized employees supports 13,000 retirees and their families, and potentially 16,000 others.

[redacted].

Prior to the spin-off, Peabody provided the UMWA with a broad written overview of the transaction and the transfer of health care liabilities to Patriot. Although UMWA could not block the spin-off, and it only acknowledged that Peabody's retention of responsibility for a group of approximately 8100 retirees would not create a labor-law relationship between UMWA and Peabody. Peabody almost immediately began violating its commitment to Patriot to pay for the retiree healthcare obligations it had assumed by shedding approximately 500 those retirees onto Patriot's books.[8] This additional liability constitutes another [redacted] per year that Patriot bears for the benefit of non-bankrupt Peabody.[9] (Mandarino Decl. ¶25) Patriot raised this issue with Peabody as early as November 2008, but did not attempt to shift the liability back to Peabody for fear that Peabody would retaliate by removing its customer contracts—[redacted] (Traynor Decl. ¶23).

Peabody also attempted to insert into the NBCWA Liabilities Assumption Agreement a "poison pill" that it claims will allow it to cut the health care of its retained retirees if Patriot gets §1114 relief. This group of 3100 beneficiaries who have healthcare from a solvent entity is thus placed potentially into jeopardy by the current motion.[10] (Traynor Decl. ¶¶18, 19).

[8] Peabody paid for approximately 100 of these 500 retirees for one year, and then ceased to do so on the grounds that it had been a mistake to cover them.

[9] UMWA brought this matter to the attention of Patriot in November 2012 when negotiations commenced.

[10] While the parties have used estimates from $1.4 billion (Patriot's) to $1.8 billion (UMWA's) for the amount of the union-related retiree healthcare liability, this sum explodes by $700 million more if the group covered by Patriot's declaratory judgment action against Peabody loses coverage and must be placed into the proposed VEBA. This action in turn makes the VEBA less solvent and dilutes the claims of all other creditors by a substantial sum.

Despite the burdens imposed upon Patriot at is birth, dooming it to fail, Patriot has not sought any recovery from Peabody for conveying liabilities without the assets necessary to sustain them. It has chosen instead to obtain the needed cash by taking it from its unionized workforce—as stated by its CEO Bennett Hatfield, because that is where the money is.

c. Patriot's Unionized Workforce, Their Wages and Benefits

The UMWA has represented workers in mining for 120 years. Like most labor organizations, it has sought to standardize wages, hours and working conditions in its industry to prevent the treatment of the labor of human beings as a point of competition between firms.[11] The industry standard agreement for coal mining is the National Bituminous Coal Wage Agreement or NBCWA to which Patriot is signatory.

Patriot is the sixth largest coal company in the Appalachian basin by tonnage. It employs 2900 miners of whom 57% or 1657 are UMWA members. As shown below, UMWA members are the most efficient and productive miners on Patriot's payroll and mine a disproportionate share of its coal. As a result, and contrary to the representations of so-called experts relied upon by the Debtors, union-mined coal at Patriot costs *less* per ton than its non-union equivalent. Thus, contrary to Patriot's representation, its unionized workers are not relatively overpaid, when cost is compared to productivity. The union wage is not the problem here.

Union workers in our country make higher wages: Known as the "union advantage," it holds true for all occupations in all industries, except one--mining. Wages in mining are *lower* for unionized workers than their non-union brethren.[12] Historically, the reason for this anomaly

[11] By act of Congress, "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. §17.
[12] In 2011, the Bureau of Labor Statistics recorded that in general, a union-represented worker made $205 more weekly than a non-union worker ($934 vs. $729), and $191 more in 2012 ($933 vs. 742). http://www.bls.gov/news.release/union2.t02.htm In mining in 2011, a union-represented worker made $64 less than a non-union worker ($1005 vs. $1069) and $1 less in 2012 ($1112 vs. $1113). http://www.bls.gov/news.release/union2.t04.htm .

is the higher proportion of compensation diverted by union contracts to health care. In this industry, and this one alone, workers prefer less take-home pay to the long-term security of guaranteed retiree healthcare. UMWA members have made this trade-off for decades: They have taken less pay than non-union miners in exchange for the promise that when they retire, they would have comprehensive health care for themselves and their families.

They made this trade-off because the job of mining coal is destructive to the human body. A Government Accounting Office Report on the healthcare of UMWA Fund beneficiaries concluded their care cost about 29% more than that of demographically similar Medicare beneficiaries (Cobin Decl. ¶¶22, 24; GAO Report, at p. 4). A study prepared by Mercer for the UMWA Funds found that this population "has an illness burden 32.4% higher than average for Medicare."[13] The detailed findings included significantly higher incidence of cardio-respiratory conditions (31.6% higher), congestive heart failure (63.3% higher), vascular (21.1% higher) and lung problems (31% higher) and cerebro-vascular issues (27.5% higher). A review of the letters from retirees submitted to the Court in this case demonstrates that Patriot miners share the same problems that Mercer highlighted among the Funds' population. The GAO study just cited however found that miners' health care benefits are *not* more generous than those typically found in unionized heavy industry. (Cobin Decl. ¶¶22, 24). The benefits are typical, but more costly, because miners' bodies suffer more to produce the incremental dollar for Patriot.

Contrary to the representations made by Patriot, retired miners do not enjoy a rich pension benefit. As early as 1990, the Coal Commission recognized that "Health care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts

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[13] Mercer, "Health Status Assessment Project, United Mine Workers of American Health and Retirement Funds," August 14, 2009 at p.1. See Cobin Decl. ¶24.

have traded lower pensions over the years for better health benefits." Eastern Enterprises v. Apfel, 524 U.S. 498, 511-512 (1998). The average UMWA pensioner had a monthly pension benefit of only $586.27 in 2012. The average surviving spouse benefit was $444.65 monthly. A 2010 study by the National Coordinating Committee for Multiemployer Plans (NCCMP) showed that median pension benefit for multiemployer plans was $908 per month, an amount that the NCCMP described as "an extremely modest benefit level under any standard."[14] That is to say, a miner's benefit is less than two-thirds of a "modest" pension; his widow's, less than half.

Wages and hours are not the only subjects of a labor agreement. Patriot's experts deem union work rules to be "inflexible," but they clearly do not decrease production—unionized production is equal to or greater than the level in the Debtors' non-union mines where they are literally no contractually-enforceable rules—and they save lives. It is today beyond cavil that unionized mines are safer than their non-union counterparts. Allison Morantz, *Coal Mine Safety: Do Unions Make a Difference?* STANFORD LAW SCH. LAW & ECON. OLIN PAPER SERIES, Paper No. 413 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846700 (finding unionized mines report fewer fatalities and traumatic injuries per hour than non-union).

2. The Size of the "Hole"

The premise of the current motion is that there is a $150 million per year "hole" in Patriot's EBITDA indefinitely into the future and a liquidity cliff in late 2013. Patriot is required to keep a minimum [redacted] liquidity "block" to avoid default. The liquidity requirement is thus self-imposed: Patriot agreed to this covenant with its lender, but it is not an economic

[14] *The Road to Recovery: The 2010 Update to the NCCMP Survey of the Funded Status of Multiemployer Defined Benefit Plans*, National Coordinating Committee on Multiemployer Pension Plans, page 8. (Buckner Decl. ¶27).

reality imposed by the marketplace.[15] Patriot has declared by fiat that the non-negotiable demand is [redacted], and that it can be achieved only from union miners and retirees.

a. Patriot's V-Shaped Recovery Curve

Patriot has overstated its needs, padding its costs and understating revenue with pessimistic pricing forecasts. Patriot's business plan shows that *without* any concessions from union workers or retirees, [redacted]. According to its business plan, in 2013, Patriot "needs" [redacted] in 2014 and [redacted] in 2015 to meet its covenants. By 2016, [redacted] are required to maintain the minimum level of liquidity required by its covenants. (Mandarino Decl. ¶12). [redacted]

b. The Effect of the Coal Price Rebound

Even this conclusion is premised on a view of coal market prices that assumes a continued depression in the industry; a more reasonable view, consistent with industry sources, is that a rebound in coal prices will increase Patriot's revenue [redacted] (Akunuri Decl. ¶23, Fig. 5). The rebound in prices shrinks the size of the "hole," [redacted][16]

This revenue adjustment assumes a constant level of production by Patriot, which is too conservative if prices rebound (Buckner Decl. ¶74). Patriot's own data show that thermal coal

[15] The Huffard Declaration admits in ¶79 that both the liquidity and EBITDA covenants were set to be unachievable without the labor concessions in the 5-year plan. Patriot has refused multiple requests by UMWA to renegotiate relief from its liquidity block with its present DIP lender or seek replacement financing. (Traynor Decl. ¶54, 68).
[16] This estimate is the more conservative of two prepared by Srinivas Akunuri of PricewaterhouseCoopers. The other estimate shows additional incremental revenue of [redacted] for the years 2013 to 2016 respectively, Akunuri Decl. ¶23, Fig. 5, making the "hole" shrink to [redacted].

exports from the United States increased from 37.7 million tons in 2011 to 66.3 million tons in 2012, a 28.6 million ton increase in one year. Increase in global demand for U.S. thermal coal should have a positive effect on pricing. (Buckner Decl. ¶72). It follows that Patriot can attempt to produce more, and make more revenue per incremental unit, thus reducing its need.[17]

The foregoing concerns only thermal coal. Patriot also understates the price of its metallurgical coal production according to the Quarterly U.S. Coal Report prepared by Energy Ventures Analyst Inc.[18] (Buckner Decl. ¶75). Metallurgical coal prices spiked in 2011 due to floods and strikes in Australia, the world's largest exporter of this type of coal. Patriot has inappropriately projected a permanent downward trend in the price of this coal, rather than recognizing that the current drop in price represents a return to normal pre-2011 spike prices. (Buckner Decl. ¶77-78). The likely effect of metallurgical coal prices leveling off is that Patriot has again exaggerated the size of its EBITDA "hole."

c. Overstated Expenses in Patriot's Business Plan

Even these numbers greatly overstate Patriot's needs. Despite its contention that Patriot had achieved all other possible savings so that it had nowhere to turn but its union miners and retirees, the UMWA in negotiations was able to identify for Patriot [redacted] in additional savings through 2016, of which [redacted] occur in the first two years of its plan (Mandarino Decl. ¶¶19, 29). These savings consist of: [redacted]

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[17] UMWA offered in each of its counterproposals modified scheduling and overtime provisions to enable Patriot to increase production at union mines dramatically to maximize the benefit from such increased demand and pricing. Patriot rejected such proposals as providing no meaningful benefit. (Traynor Decl. ¶60, 61).

[18] EVA is the firm of Patriot's expert on coal pricing Seth Schwartz. Schwartz's firm thus provides the industry generally a more optimistic view of metallic coal pricing than he provides Patriot for purposes of achieving concessions through §§1113 and 1114.

[redacted] These savings further close the remaining "hole" in 2013 and 2014, so that in 2013 a "hole" of only [redacted] remains, and in 2014, only [redacted] remains.[20] [redacted] so these additional savings provide Patriot a robust future cash stream, without requiring its retirees to lose their healthcare or its active workers to abandon the gains of collective bargaining over the past six decades.

3. Filling the "Hole" in Patriot's EBITDA and Liquidity

The modest remaining funding gap for Patriot after adjusting for its understatement of revenue and it overstatement of expenses ranges [redacted] The UMWA has offered Patriot a package of concessions valued at $300 million—more than enough to see Patriot through its crisis (Mandarino Decl. ¶33)—including $55 million of cash savings in 2013 alone, again more than enough to fill any gap (Mandarino Decl. ¶35). The proposal provides work rule changes to address Patriot's concern that it is hamstrung by regulation; direct wage concessions; and proposals to ease restrictions on production (which should amplify Patriot's recovery as prices rebound). (Mandarino Decl. ¶33).

[redacted]

[19] Patriot's unionized mines have a supervisory to hourly ratio of 1 to 4.3, which is identical to the industry average. Its non-union mines are top-heavy, with one supervisor to every 2.9 workers, versus 3.8 in the industry generally. (Mandarino Decl. ¶26). In other words, Patriot's non-union miners have 32% more supervision.

[20] Using the coal pricing additional revenues and resultant calculated "hole" from fn. 16, these extra savings [redacted]

Because Patriot's crisis is demonstrably temporary, the UMWA proposed a "snap-back," that is a return of concessions after the crisis passes. Patriot rejected this proposal, but it amounts to only [redacted] in free cash flow generated by UMWA concessions (Mandarino Decl. ¶37).

a. Labor's "Fair" Share of the Burden

Patriot projects savings of [redacted] from all sources; of this amount, UMWA and its retirees (who constitute 40% of employees and 57% of hourly employees) shoulder 87% of the burden (Mandarino Decl. ¶20). The justification for this disproportionately harsh treatment is a caricature of organized labor: Overpaid, with generous benefits, these union workers produce less and hamper the company with a straightjacket of rules.

In reality, unionized miners are more, not less, efficient than Patriot's non-union miners.[21] Patriot's union mine produces coal more cheaply per ton than its non-union mines, in some geographical regions by as much [redacted] per ton (Buckner Decl. ¶57). Based on the data of Patriot's own expert witness,[22] Patriot's total costs of thermal coal operation in Appalachian is about $70 per ton, comparable to the average cost of its non-union competitors, despite its allegedly higher labor cost and less efficient work rules. Patriot's Federal #2 mine (unionized) has average productivity of about 3.35 tons, higher than both Panther (non-union, 2.2) and Brody (non-union, 1.49). Patriot's other unionized mines in the same region have

[21] Patriot's expert on this question, Schwartz, erroneously equates higher *per hour* union labor cost with higher total cost. The error is implicit in his data. He observes that costs doubled from 2005 to 2012 in Appalachia, even though *labor* costs did not double over the same period, making it impossible that labor alone drove total cost. An analysis of these costs shows that less than $1.60 per ton is attributable to labor (Buckner Decl. ¶71). Schwartz's declaration shows UMWA miners account for 59% of the coal production (14.235 million tons out of 24.114 million total, Schwartz Decl. p. 7) but only 57% of the mine workforce—meaning that the unionized workforce despite its "inflexible" work rules is more productive than the non-union.

[22] See Seth Schwartz Declaration of March 29, 2013 in opposition to appointment of an equity security committee.

substantially the same productivity as the non-union mines despite having "unreasonable" work rules. (Buckner Decl. ¶64).

Schwartz's data show that several unionized Patriot competitors covered by the NBCWA and the same work rules Patriot is seeking to reject here are substantially more productive than non-union mines in the same areas. For 2012 the non-union Bailey Mine has productivity lower than five mines where the employees are represented by the UMWA. Even though labor costs imposed by work rules such as requiring helpers and prohibiting switching crews on the face are constant from year to year, many mines listed in Schwartz's exhibits experienced dramatic changes in their productivity, sometimes changing by more than one ton per hour in a single year. Productivity is affected by factors other than work rules (Buckner Decl. ¶59). Patriot cannot show that the rules actually have the negative effects it claims.[23]

Patriot likewise exaggerates its competitive disadvantage. Patriot's actual total long term labor liability under the UMWA retiree health insurance counterproposal is [redacted] under the current UMWA retiree health proposal. Using 2012 sales numbers as Schwartz does, Patriot's total long term labor liability per ton sold would be [redacted] per ton, while its total long term labor and environmental liability per ton sold would be [redacted] per ton under the current UMWA retiree health proposal. Both figures are substantially *lower* than the corresponding per ton liabilities of Walter and Consol. (Buckner Decl. ¶99).

While Patriot claims that its §1113 proposal will result in its union and non-union employees receiving the same compensation, this claim disregards incentives and other compensation only available to its non-union employees. [redacted], in the Illinois Basin incentive and other compensation for Patriot's

[23] Indeed, Patriot's initial proposals provided to the UMWA in November 2012 showed that it expected zero savings from some of these work rule changes. (Traynor Dec. ¶ 30).

union employees ranged from [redacted], while incentive and other compensation for Patriot's non-union employees ranged from [redacted]. Similarly, in Appalachia incentive and other compensation for Patriot's union employees ranged between [redacted], while incentive and other compensation for Patriot's non-union employees ranged between [redacted]. Because these non-union miners receive more incentive compensation than union miners, reducing wages and benefits to non-union levels means that Patriot's non-union miners will receive a richer total package of compensation per hour than Patriot's more productive union employees (Buckner Decl. ¶69).

b. The False Analogy to Gateway

Patriot contends that because mines under the Gateway contracts have lower wages and benefits than other mines covered by the NBCWA, all of the remainder of Patriot's unionized operation should also have reduced wages and benefits. Patriot's contention is incorrect both because the wages and benefits at Gateway are higher than the wages and benefits that Patriot is offering to the UMWA in its §1113/§1114 proposals, and because eliminating the pension and retiree health benefits at other UMWA mines would negate the very purpose of the UMWA in entering into the Gateway agreements. (Buckner Decl. ¶89, 90).

The four Gateway mines are tiny. Gateway Eagle, Campbell's Creek #10, and Farley Eagle currently have 40, 35, and 35 miners respectively, while the fourth, Sugar Maple, closed due to the inability to make a profit given its small size and other challenges. Patriot operated the three remaining mines through non-union contractors and did not employ any miners directly before it decided to operate the mines itself. When Patriot approached the UMWA about making these operations union, Patriot imposed conditions including exclusion from the pension plan, exclusion from retiree health eligibility unless the employee was killed or injured while working, and looser subcontracting restrictions. At the same time, the River Edge Mine, which once employed almost 200 UMWA miners but since had been reduced to a much smaller number, was scheduled to close. The UMWA agreed to Patriot's condition of excluding pension and retiree healthcare from the Gateway agreement provided it could accommodate the goal of maximizing employee-earned wages, pension credits, and retiree health eligibility over their working lifetimes (Buckner Decl. ¶¶87-90). The UMWA thus negotiated a wage rate that was $3.50 *higher* than the NBCWA, as well as a 401(k) contribution of $6 per hour worked, approximately [redacted] the 401(k) contribution Patriot is currently proposing in its §1113 proposals to the remaining UMWA represented employees. (Buckner Decl. ¶89).

In addition to higher wages and 401(k) contributions, the UMWA negotiated rights for employees at Gateway Eagle to transfer to other UMWA represented mines where they could earn retiree healthcare eligibility and pension credits. The UMWA thereby secured for all members the opportunity to earn pension and retiree health benefits through transfers among UMWA mines, and to earn higher wages and additional retirement income through the 401(k) plan once they had earned sufficient pension and retiree health credits at other mines. The UMWA explained to Patriot in negotiations that eliminating pensions and retiree healthcare at other UMWA mines vitiates the very purposes that motivated it to agree to the pension and retiree health provisions of the Gateway Eagle agreement. (Buckner Decl. ¶90).[24]

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[24] Similar arrangements were made when Patriot approached UMWA about Sugar Maple. Because Sugar Maple was an even smaller operation than Gateway Eagle, Patriot could not afford the wages and benefits at Gateway Eagle. Patriot therefore agreed to pay at Sugar Maple a wage equal to the UMWA rate, as well as 401(k) contributions of $2.50 per hour. UMWA used Sugar Maple as the model for agreements at Farley Eagle and Campbell's Creek #10 when faced with the layoff of, and need to provide work opportunities to, many miners due to the closing of the Big Mountain Complex. (Buckner Decl. ¶¶91-92).

c. The Retirees' "Fair" Share of the Burden

Miners historically worked for lower than non-union wages and accepted smaller pensions to achieve guaranteed lifetime healthcare. A lifetime of working in a mine destroys the human body: Miners suffer more serious illness, more often, and at greater cost to treat. This liability is low-balled by Patriot at [redacted] by assuming healthcare inflation will fall to historic lows in an unrealistically short period—just six years (Cobin Decl. ¶¶5-8). Using a more realistic actuarial model, which gradually reduces inflation over time, this liability is better estimated at [redacted].[25] (Cobin Decl. ¶¶9-10).

Patriot proposes to garner [redacted] in annual savings by shedding this liability from its books into an essentially unfunded Voluntary Employee Benefit Association or VEBA. This vehicle is however but a euphemism for saying that Patriot proposes, like Peabody before it, to abandon its retirees to their fate, now that they have (for Patriot) outlived their usefulness.

Legitimate VEBAs have existed: The Cobin Declaration outlines that in several noted bankruptcy proceedings or similar out-of-court settlements for distressed companies, VEBAs have replaced corporate lifetime healthcare guarantees with plans funded typically with two-thirds of the liability (ranging from 57% to 83%). (Cobin Decl. ¶¶17-19). Because VEBAs have no ability to make actuarial corrections to funding as time goes on, they must subsist (or fail) based solely on the funding sources at the time of their creation (Cobin Decl. ¶20); hence the importance of adequately funding a VEBA at creation.

Patriot proposes to fund the VEBA with $15 million, [redacted], and probably less time given estimated 7.5% administrative costs. (Buckner Decl. ¶97) Thereafter, it proposes to supplement the VEBA with a profit-sharing component that

[25] Not counting Peabody retirees who might lose healthcare if the court grants this motion, and included in the §1114 proposal for this eventuality. They would increase the liability by $700 million to a colossal $2.5 billion.

[redacted]. By 2016, the profit sharing component would have added [redacted].[26] (Cobin Decl. ¶¶14-16; Mandarino Decl. ¶¶42-54). In contrast to legitimate VEBAs previously approved by courts, the contribution here is approximately [redacted] of the liability, not 60%-70% as is typical.

Patriot responds that an unsecured claim might provide [redacted] of value.[27] The uncertainty of funding this liability makes it impractical, see Mandarino Declaration ¶¶55-62, and contrasts sharply with legitimate proposals such as Dana (funded with nearly all cash) or AK Steel (half funded with cash, and half with other consideration). (Cobin Decl. ¶¶19-20.) Even assuming a high-end recovery for the Patriot proposal, the funds are still [redacted] of the liability, far lower than any legitimately funded similar plan.

Patriot's proposal also ignores the impact of its withdrawal from the pension plan, which triggers a $960 million claim and vastly dilutes the claim pool in this case, including of course the retiree claim of the VEBA. (Mandarino Decl. ¶58). This result pushes the VEBA claim toward the lower end of recovery—in effect, providing enough coverage to last through [redacted].

While Patriot glibly assumes the Affordable Care Act will rescue retired miners, it provides no real reason to sustain this belief. Miner pensions are small, far below the average, and are insufficient to pay for the premiums required in ACA exchanges. Given a typical miner pension of $586 per month, and assuming the lowest estimated annual premium under the ACA

[26] Annual expenses of $77 million equate to $211,000 per day. An additional $[redacted] pays for [redacted] days, assuming no administrative costs. The profit-sharing contribution is only about [redacted] of the eligible profit (Mandarino Decl. ¶¶52), a reminder that Patriot is essentially shedding its entire non-Coal Act liability at little or no cost.

[27] That is, enough for [redacted] – [redacted] the funding of the least-funded legitimate VEBA cited (Ford), or [redacted] of the Goodyear VEBA. (Cobin Decl. ¶¶19-20).

of $6400 for family coverage (Cobin Decl. ¶11), health care under the exchanges would consume 91% of the miner's income, leaving him and his family $53 per month for food, rent, and all other necessities of life. At the higher end of ACA exchange premium, the miner could not pay for 11 months of health coverage with 100% of his annual income.

ARGUMENT

I. PATRIOT'S PROPOSALS DO NOT MEET THE STANDARD OF "NECESSITY."

A. Patriot Cannot Meet Its Heavy Burden To Prove That Its Draconian Proposals Are Necessary.

Courts examine the requirements for rejection of a collective bargaining agreement under the nine-factor test articulated in In re American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn.1984). In re Valley Steel Products Co., 142 B.R. 337, 339-340 (E.D. Mo. 1992):

1. The debtor must make a proposal to the union to modify the collective bargaining agreement;

2. The proposal must be based on the most complete and reliable information available at the time of the proposal;

3. The proposed modifications must be necessary to permit the reorganization of the debtor;

4. The proposed modifications must assure that all creditors, the debtor and all the affected parties are treated fairly and equitably;

5. The debtor must provide the union such relevant information as is necessary to evaluate the proposal;

6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union;

7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

8. The union must have refused to accept the proposal without good cause; and

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

The Debtors have the burden as to every element, and as to the ninth element, clear and convincing proof is required. In re Liberty Cab & Limousine Co. Inc., 194 B.R. 770, 776 (Bankr. E.D. Pa. 1996); In re U.S. Truck Co. Holdings, 2000 Bankr. LEXIS 1376 (Bankr. E.D. Mich. Sept. 29, 2000), citing In re Walway Co., 69 B.R. 967, 972 (Bankr. E.D. Mich. 1987) and In re American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn.1984).

Congress knew that if a debtor could not meet every requirement of the statute, it might be forced to liquidate instead; yet, no requirement of §1113 is optional. It is not a set of suggestions but a series of prohibitions designed to prevent rejection in all but limited cases. If it does not provide *all* information necessary to evaluate the fairness of its proposal, its application must be denied. The court is not free to excuse *any* §1113 requirement. If even one of the nine elements is missing, the application must be denied. UFCW Local 211 v. Family Snacks, Inc. (In re Family Snacks Inc.), 257 B.R. 884, 898 (8th BAP 2001); In re United States Truck Co. Holdings, 2000 Bankr. LEXIS 1376 (Bankr. E.D. Mich. Sept. 29, 2000) (citing Walway at 972).

Section 1113(b)(1)(A) limits the debtor to proposing only "those necessary modifications in...benefits and protections that are necessary to permit the reorganization of the debtor." Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82, 88 (2d Cir. 1987). The use of "necessary" twice in the applicable section is not a legislative gaffe, but was done deliberately to emphasize the limited nature of the changes allowed. 130 Cong. Rec. S8898 (daily ed. June 29, 1984)(Remarks of Sen. Packwood) ("The word 'necessary' inserted twice into this provision clearly emphasizes this required aspect of the proposal"). In re Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir. 1986) (citing remarks of Sen. Packwood). A union has cause to refuse to accept unnecessary changes.

The Eighth Circuit has not interpreted the term "necessary" under § 1113(b)(1)(A).[28] After exhaustive analysis of the legislative history, the Third Circuit construed necessity strictly to signify only modifications that the debtor is constrained to accept to prevent liquidation, finding that the court should not focus on the debtor's general long-term viability. In Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1088-1089 (3d Cir. 1986). The Second Circuit has concluded that a concessions proposal is "necessary" if it "contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully." Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82, 88 (2d Cir. 1987). Patriot has assumed the applicability of the latter standard.[29] Under any standard, a debtor has the "burden to demonstrate that each of its proposed modifications, both economic and non-economic, are necessary to its business plan." In re AMR Corp., 477 B.R. 384, 411 (Bankr. S.D.N.Y. 2012)(quoting Teamsters Nat'l Freight Indus. Negotiating Comm. v. Howard's Express, Inc. (In re Howard's Express, Inc.), 151 F.App'x. 46, 49 (2d Cir. 2005)). "The court must also consider whether the employer, although needing some modifications to successfully reorganize, has sought changes to the contract which materially exceed such needs. The result of such overreaching is that rejection will be prohibited." In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991). Where a debtor

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[28] An appellate panel in this Circuit has interpreted the term but only in the circumstance of §1113's applicability to a liquidating chapter 11 case. There, it concluded that "'necessary to permit the reorganization of the debtor' means necessary to accommodate the confirmation of a Chapter 11 plan," a standard different from both the Third and Second Circuits. UFCW Local 211 v. Family Snacks, Inc. (In re: Family Snacks, Inc.), 257 B.R. 884, 897 (8th Cir. B.A.P. 2001). Family Snacks was wrongly decided because it ignored the absolute requirement imposed by the Supreme Court in NLRB v. Bildisco that the rejection of a contract be necessary for the *rehabilitation* of a debtor, not merely confirmation of a liquidating plan. "Since the policy of Chapter 11 is to permit successful *rehabilitation* of debtors, rejection should not be permitted without a finding that *that policy* would be served by such action." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 526 (1984) (emphasis added). Family Snacks is thus inapposite.

[29] Lower courts within the Circuit have been split. In the single §1113 decision rendered by this Court, it chose to follow the Carey analysis, as did a court in the Western District. See In re Valley Steel Products Co., 142 B.R. 337, 342 (Bankr. E.D. Mo. 1992); In re Smith Mechanical Contractors, 152 L.R.R.M. 2432 (Bankr. W.D. Mo. 1995). An Iowa court adopted the Third Circuit approach. In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991).

overreaches, the necessity requirement of §1113(b)(1) is not satisfied and the debtor's motion should be denied. See In re Pinnacle Airlines Corp., 483 B.R. 381, 415 (Bankr. S.D.N.Y. 2012).

Patriot therefore must demonstrate that each one of its proposals is necessary towards its emergence as a viable economic organization. Association of Flight Attendants v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006). While it is true that no single element of the plan must be the "but-for" causation of the company's salvation, there must be a causal connection between not getting the relief sought and not reorganizing. A debtor therefore has no right to financial relief that would make it lucratively profitable, as opposed to viable. A debtor therefore may not, for example, ask the union to accept wages that are lower than the wages paid by its competitors. In re Pinnacle Airlines Corp., 483 B.R. 381, 415 (Bankr. S.D.N.Y. 2012). Because Patriot's own calculations [redacted], it cannot make this showing; i.e., its proposal for a concessionary contract until 2018 and permanent concessions in the form of pension relief and elimination of retiree healthcare are plainly unlawful. Rather, Patriot's proposals are unnecessary in that they would make Patriot a lucrative rather than merely viable enterprise, generating [redacted] dollars in positive cash flow between 2014-2016, so that it can afford to pay [redacted] in bonuses to its senior management using "savings" that it realized by dramatically reducing the standard of living of its union employees and retirees.

Even putting aside this insurmountable objection to its proposal, the "necessity" inquiry in turn requires Patriot to state what the "gap" is between its current financial performance and the performance needed to emerge, and what proportion of the gap is filled by the proposed labor concessions. In effect the questions are "how big is the hole?" and "who will fill it?" See Fiber Glass Industries, Inc., 49 B.R. 202, 206 (Bankr. N.D.N.Y. 1985) (holding the debtor did not establish that rejection was necessary, as it failed to offer evidence concerning how its labor costs fit into an overall plan of reorganization: "Although it is clear from the legislative history that the debtor is not required to have a detailed plan of reorganization…the debtor does need to justify the particular modifications in light of a general scheme"). See also Association of Flight Attendants v. Mesaba Aviation, Inc., 350 B.R. 435, 451 (D. Minn. 2006) (discusses an 8% EBIT margin as a measure of gap to be filled). Patriot instead has shown that it is seeking to take advantage of a temporary crisis to break the strength of its employees' union permanently; and to exploit its temporary straits to rid itself of its retirees and pensioners.

B. Patriot Is Seeking More In Concessions Than It Needs.

1. *Patriot Impermissibly Seeks a Permanent Solution to a Temporary Crisis.*

To determine whether changes are necessary for a successful reorganization, the Court must look "into the debtor's ultimate future and estimate what the debtor needs to attain financial health….Thus, a court should focus on the long-term economic viability of the reorganized debtor, as opposed to the debtor's short-term economics." In re AMR Corp., 477 B.R. 384, 407 (Bankr. S.D.N.Y. 2012) (internal citations omitted). Patriot has no long-term problem. [redacted] That is, Patriot has proven it has a purely temporary crisis. Indeed, because the crisis in the short run is caused by the covenants Patriot negotiated with its lenders, the crisis is not only temporary, but self-imposed and significantly restricts what is "necessary" in terms of concessions from the Unions and retirees.

Patriot, however, seeks permanent concessions in response to the temporary crisis of its own making. Half of the $150 million concession it seeks is to eliminate retiree healthcare and shift the obligation to a sham VEBA. The annual costs to provide such healthcare are $77 million and rising. Because Patriot is funding the VEBA with only $15 million in cash, the savings ([redacted]) [redacted]. The other half of the concessions extend beyond the two year period [redacted], calculated using overly conservative projections of coal prices and hence future revenue. [redacted].

In G & C Foundry, 2006 Bank. Lexis 4582 *29 (Bankr. N.D. Ohio 2006), the debtor did not make any projections of future revenue, but rather argued that because the current snap-shot of its financial condition revealed a need for labor cost savings, it was entitled to make the savings permanent. The court rejected this argument, holding that a debtor's current need cannot justify its demand for permanent savings. Similarly, Patriot's demand for permanent savings is not necessary because even without any §1113 or §1114 savings, and with its overly conservative coal price projections, [redacted]. Permitting the Debtors to obtain permanent relief based upon a snap-shot of current finances, while the coal industry is in the trough of a business cycle, gives Patriot's future owners a windfall at the expense of workers and retirees. Patriot is only entitled to the quantum of relief that would allow it to emerge as a viable, rather than as a lucratively profitable enterprise. Association of Flight Attendants v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006).

2. *Patriot Skewed Its Revenue Forecast By Low-Balling Coal Prices.*

Patriot's own five-year plan is based upon unreasonably conservative coal price projections. As explained in the Akunuri declaration, economic indicators show a shrinking supply of natural gas which will drive-up its price. The price of natural gas is self-correcting in that when the price is lowered sufficiently that production is not cost effective, the supply of natural gas will shrink and prices will rise. (Akunuri Decl. ¶14-18) Even at current prices, approximately double the historically-low natural gas prices reached in 2012, coal is gaining market share as the fuel of choice in electricity generation at the expense of natural gas. (Akunuri Decl. ¶13) Coal prices therefore are expected to rebound, as shown for example by the increases in the future pricing of thermal coal. One of the pessimistic predictions by Patriot's expert on coal prices Seth Schwartz is demonstrably false: While Schwartz claimed that future pricing of natural gas would not reach $4.10 per million BTU until the end of 2014, in fact on March 27, 2013 natural gas futures contracts for 2013 deliveries traded at an average of $4.12 per million BTU. (Akunuri Decl. ¶11) Using an average of the more realistic and higher SNL and Wood McKenzie prices, and even assuming current production levels, Patriot understates its revenue generated from thermal coal by an average of [redacted]. Patriot clearly does not need $150 million of permanent relief to emerge as a viable enterprise.

3. *Expenses Were Not "Cut to the Bone."*

Despite the argument that Patriot has nowhere left to turn, the UMWA identified in bargaining [redacted] of savings forgone by management. Some of these are simply "padding" expenses by Patriot, for example, the [redacted]. Others reflect a simple choice to prefer cutting workers' wages to making sensible decisions about costs. For example, capital expenditures cannot be deferred indefinitely, but Patriot does not need to defer them indefinitely—just until it passes its temporary crisis in 2013 and 2014. This deferral saves [redacted]. Requiring managers to forego bonuses is valued at [redacted]; again, Patriot here merely makes a choice that bonuses for certain non-union employees are preferable to keeping its healthcare promises. It is not a question of need, but of assigning the pain of rehabilitation selectively.

4. *Patriot's Top-Heavy Non-Union Operations Are Less Efficient Than Its Union Mines*

Throughout its presentation, Patriot and its experts have assumed a cliché about American union labor: That it is overpaid, purportedly justifying the Court in reducing union wages to the non-union level. For example, its coal pricing expert Schwartz argued that the proposals are "necessary to the company's survival" because companies with "union operations have substantially higher costs per ton to produce coal than non-union producers." He further states that these higher costs are "in the form of higher wages and benefits as well as lower productivity due to work rules mandated by the agreements." (Schwartz Decl. page 3). These claims that union miners are compensated "over the market" are false.

Schwartz' conclusion was merely announced *ex cathedra* as an anti-union paradigm: Nowhere does he analyze the size of the "hole" that needs to be filled or whether there are other savings that could reduce costs. Labor cost is but one of many costs, all of which may vary from mine to mine, which determine a mine's overall costs of coal production. It is therefore simply incorrect for Schwartz to assume that a mine's overall costs of production are higher because its labor costs are higher. Indeed, according to Schwartz's own data in Appalachia Patriot's mines had a cost per ton produced in the low $70s during the first three quarters of 2012, while the average cost per ton produced in the region was $80 per ton during the same period. (Schwartz

Decl. Opposing Equity Committee Motion, figure F, G). Patriot's mines in Central Appalachia were thus in a *positive* competitive position relative to its competitors.

Schwartz nevertheless failed to demonstrate that union labor costs need to be reduced for Patriot to compete. His own data claim that total production costs in Central Appalachia doubled from 2005 to 2012, even though labor costs did not increase by nearly that much during the corresponding time period. Clearly, there are far more prominent drivers of production cost increases than labor costs.[30] Likewise, his claim that union operations have substantially higher costs per ton than non-union operations is belied by his own and other publicly available data. Union labor is more productive than non-union labor, and requires less supervision; so that any additional cost is justified by extra value that union labor is providing to Patriot. Even assuming union miners are "overpaid" in some abstract sense, slashing compensation is not required for Patriot's survival when its total production costs per ton at union facilities are already lower than its own non-union mines and in line with the production costs of its competitors.

Schwartz' own data shows that union productivity is substantially higher than non-union. Union workers are only 57% of the miners but mine 59% of the tonnage. (Schwartz Decl. pg. 7) They produce as much or more coal than the comparable non-union mines across the board. Even with higher wages, their cost per ton is therefore lower than the non-union equivalent, with the differential as high as [redacted] per ton, and on average, is about [redacted] per ton. (Buckner Decl. ¶86) This number, about [redacted] per ton, is the tangible cost to Patriot of being non-union in those mines. Patriot loses rather than gains by having cheaper but less productive non-union

[30] Schwartz's graph shows northern Appalachian costs increasing from about $20 per ton in 2005 to about $45 per ton in 2012, an increase of about $25 per ton. Northern Appalachia is a region with significant UMWA presence, with Schwartz's data showing about 40% of the production coming from UMWA mines. NBCWA top wages increased about $6.30 per hour over the same period. At a productivity rate of 4 tons per hour, the increase in wages would have contributed about $1.58 per ton to the cost increase, or about 6.3% of the total increase.

labor. Conversely, [redacted] per ton represents the value to Patriot of not being union: It prefers to lose this money rather than be a union company. This ideology is not a value §1113 seeks to protect.

Not only are union miners more productive, they work with less supervision, thus saving Patriot overhead costs. Patriot's union mines have a ratio of 1 to 4.3 supervisors to workers—the same as the industry average for union mines. Patriot's non-union mines have 32% more supervision than the non-union average, or 1 to 2.9 instead of 1 to 3.8. Patriot may choose to be top-heavy in its less productive non-union operations of course, but §1113 does not provide relief to such a debtor who would rather be non-union than efficient. By definition, such folly is a choice, not a necessity.

Patriot's claim that more restrictive union work rules make mines less productive than its non-union counterparts is once again betrayed by its own expert's data. Schwartz's chart on p. 37 of his declaration betrays faulty logic: During 2012 at least five competing mines organized by the UMWA, with the same NBCWA work rules that Patriot seeks to shed in its §1113 proposals, had *better* productivity than the non-union Bailey Mine. In the Illinois Basin more than a dozen non-union mines had lower productivity than Patriot's unionized Highland Mine. (Schwartz Decl. pg. 39) Clearly work rules alone do not determine productivity.[31]

A mine's productivity and its costs are not composed of just labor input. Productivity is also driven by capital investment, geological conditions, the age of a mine (e.g., how long the haulage may be from the face to the outside), and the quality of management. Schwartz lays the whole burden of productivity on the NBCWA, but he cites only two work rules that "lower"

[31] Similarly, Schwartz compares productivity at longwall mines in northern Appalachia to Patriot's Federal #2 to conclude that work rules reduce productivity at Federal; however, his own data shows that other mines with *the same work rules* under the NBCWA at Consol, Alpha and Murray Energy are more productive than Federal. In 2012 he shows that Robinson Run, Loveridge, Cumberland, McElroy and Powhatan all have higher productivity than Federal. Each of these mines operates under the NBCWA and has the same rules as Federal #2. Schwartz' conclusion that work rules determine productivity is manifestly incorrect.

productivity—the requirement to have continuous miner helpers and the inability to exchange crews at the face, known as a "hotseat exchange." Continuous miner helpers is a safety issue—one reason why Patriot's union mines are safer than their non-union counterparts, and a debtor cannot argue that exposing workers to undue risk of injury is a necessity under §1113. Patriot's own analysis shows that hotseat exchange affects only one mine, Black Oak. Both Federal#2 and Highland already permit hotseat exchanges. Because the UMWA agreed to permit hotseat exchanges at Black Oak, Schwartz's use of this issue as an impediment to productivity is misleading and shows he does not know what has transpired in the negotiations. (Buckner Decl. ¶60)

Implicit in the Schwartz analysis is that the only costs that can be addressed are labor costs; that is, rather than addressing the true source of its cost increase, Patriot is merely subsidizing those costs by shifting them to union workers. For example, his analysis of the Illinois Basin mines shows that Highland labor costs represent less than 35% of its total cash costs, yet he concludes that labor cuts are necessary without addressing the remaining 65% of costs. (Buckner Decl. ¶58) The logical endpoint of this subsidy is that eventually wages will be pushed to the legal minimum, at which point the mines will have to close if indeed no other cost containment is possible. If true, then the mines should be closed now rather than force workers to subsidize higher-than-market costs with lower-than-market wages; if not true, then Schwartz' analysis is based on a false premise and should be discounted by the Court.

Data from the U.S. Energy Information Administration, the independent statistical and analytical arm of the U.S. Department of Energy, show that Patriot's union mines are in line with the average productivity in their respective regions. For example, Schwartz shows productivity at Highland at 3.86 tons per hour in 2011. EIA's most recent Annual Coal Report shows average underground coal mine productivity in western Kentucky at 3.53 tons per hour, and for the Illinois Basin EIA reports productivity at 3.70 tons per hour. In northern Appalachia, EIA reports average underground productivity at 3.45 tons per hour compared to Schwartz's calculation of 3.35 tons per hour at Federal #2. While Schwartz did not provide calculations of Patriot's central Appalachian mines, they are in line with EIA averages (1.46 at Black Oak and 2.16 at Big Mountain vs. southern West Virginian and Central Appalachian averages of 1.62 and 1.65 respectively).[32] Patriot thus has not proven that its unionized mines are its problem; to the contrary, it appears that if the non-union mines had only average supervision, and were as productive as union mines, Patriot's EBITDA hole would shrink.

While a unionized workforce that is the highest paid in the industry may perforce take some pay cuts, see In re Delta Air Lines, 351 B.R. 67 (Bankr. S.D. N.Y. 2006)(regional airline demonstrated that modifications sought were necessary to permit reorganization because pay rates, work rules, and benefits enjoyed by flight attendants exceeded values in all three categories of other regional airlines in competition with debtor), it does not follow that §1113 compels a race-to-the-bottom, such that workers with the standard compensation package in the industry can be forced to the very lowest on the theory that pay cuts are now mandatory in bankruptcy. Accord In re Delta Air Lines, 359 B.R. 468 (Bankr. S.D.N.Y. 2006)(economies sought by regional airline were absolutely "necessary" within meaning of §1113 where debtor proved that its pilot costs were highest in regional airline industry, retirement benefits were among best, debtor's work rules were more favorable than comparable work rules of other regional carriers, and debtor's share of regional business with its national carrier had plummeted).

[32] Mine Health and Safety Administration data yield similar conclusions. Non-union mines have productivity numbers of 1.49 and 2.2 (Brody and Panther respectively) vs. 1.46, 2.16 and 3.35 (Black Oak, Big Mountain and Federal #2 respectively).

The relevant standard requires that the changes be those necessary to a successful reorganization—not that Patriot emerge from bankruptcy poised to be the most profitable coal company or even that it be poised to be as profitable as the average coal company. The focus is whether the debtor can emerge as a viable concern, not maximizing its profit once it emerges.

C. The Court Should Reject Patriot's "Last Man Standing" Argument.

Patriot argues that it set its obligations to all other parties in the bankruptcy in stone before coming to the union. Thus it made the decision to reward its managers with bonuses; to impose very modest cuts on its non-union employees; to modify its non-labor costs in various ways; and as shown above in Part B, to have ignored real and substantial opportunities for savings. Having "exhausted" these other "opportunities," Patriot then turned to its unionized employees and retirees for everything else on the theory that they were the only place left to go—in effect, the union was the "last man standing."

The "last man standing" argument is antithetical to §§1113 and 1114. Not only does it usurp the Court's functions to determine what is necessary and fair, the argument is a lugubrious attempt to substitute the business judgment standard for the actual standard in the statutes. Unquestionably one major objective of §1113 was to eliminate the business judgment standard as it applied to union contract rejection. N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984), was legislatively reversed on this very point.[33] Patriot created the "hole" in its liquidity and EBITDA by exercising its business judgment; it sought approval of those parameters on that

[33] There is virtual unanimity among courts and commentators that a salient purpose of §1113 was to ensure that debtors could not rid themselves of union contracts using the business judgment standard. Section 1113 changed the substantive standard to proof that (a) requested changes are limited to those necessary to permit reorganization; (b) the changes are fair and impose relatively equal sacrifice on all constituents; and (c) the balance of the equities tips decidedly in favor of rejection. Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82, 88 (2d Cir. 1987). These standards were designed to reverse Bildisco's lenient standard. E.g., 130 Cong. Rec.H7494 (daily ed. June 29, 1984)(Remarks of Rep. Glickman); 130 Cong. Rec.H7496 (daily ed. June 29, 1984)(Remarks of Rep. Morrison). Rep. Morrison endorsed the standard in "The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors," 57 AM. BANKR. L. J. 299, 300, 319, which contains a strong presumption against rejection.

standard. It later decided, unilaterally, using its "business judgment," what commitments it would make to other constituents and managers, how to cut non-union wages, and all other components of its plan. The concessions it seeks are "necessary" only relevant to that plan. By insisting it must have $150 million of concessions from the union because of the business plan, Patriot admits it is seeking concessions as a matter of its business judgment, not because it is "necessary" within the meaning of the statute.

Such efforts fail because they blatantly violate the statutory command. In In re Delta Air Lines, 342 B.R. 685, 696-697 (S.D.N.Y. 2006), the court held that contingency agreements with two unions were an impermissible attempt to usurp the court's function under ¶1113 as to a third union, treated as UMWA is here as the "last man standing:"

> And that brings us to the fundamental defect in Comair's arguments based upon the ALPA and IAM contingency clauses. The structure of Section 1113(b) and (c) requires a debtor to make a proposal to the union representing those employees covered by the specific collective bargaining agreement sought to be rejected. That specific proposal, and the union's and the debtor's conduct in relation thereto, is what must be tested under the subjective criteria set forth in subsections (b) and (c). Most important, it is for the Court to make all determinations with respect to the statutory criteria. The tacit consequence of Comair's arguments predicated upon the purported exigency created by the ALPA and IAM contingency clauses would be to usurp the Court's function in judging Comair's non-negotiable $8.9 million Section 1113 proposal to the IBT…It is not acceptable to say that Comair, by reaching agreement with the pilots and the machinists, can preempt for the flight attendants the Section 1113 process of proposal, good faith negotiations, and determinations by the Bankruptcy Court of all issues relating to necessity, fairness, good faith negotiations, good cause and balance of the equities….

Accord In re The Lady H Coal Company, Inc., 193 B.R. 233, 243 (S.D. W. Va. 1996) ("[A] debtor has a duty under §1113 to not obligate itself prior to negotiations with its union employees, which would likely preclude reaching a compromise.")

D. A Self-Imposed Liquidity Crisis Does Not Justify The Present Abuse of §1113.

The foregoing demonstrates that Patriot has failed to prove its demands are necessary in the sense of §1113. As the court noted in Manor Oak Skilled Nursing Facilities, 201 Bankr. 348, 349 (W.D. N.Y. 1996), "[i]f the Debtor cannot...make the requisite showing for rejection, then it may be unreorganizable. That is not an uncommon condition." No Court has the power to disregard a federal statute because the debtor painted itself into a legal corner, regardless of the consequences to the DIP lenders or others.

The contention that a loan arrangement, entered into on the basis of the business judgment standard, can trump the statutory requirements of §1113 is breathtaking in its lawlessness. While the legislative reversal of Bildisco has spawned an inordinate amount of debate by commentators and a split in the circuits over the meaning of "necessity," all agree on one core principle: Congress passed §1113 not to endorse the business judgment standard, but to require courts to apply a more exacting standard. Carey, supra, at 88. At bottom, then, Patriot's invitation that the Court reject the contracts because they must be rejected to satisfy the loan commitments is repudiation of constitutional government, and an act of sheer lawlessness.

Rather, under §1113 a contract can only be rejected after a meaningful bargaining process was attempted but failed. In re Hoffman Bros. Packing Co., 173 B.R. 177, 182 (BAP 9th Cir. 1994). Therefore, a union would have good cause to reject the debtor's proposal to modify a collective bargaining agreement if aspects of the proposal were intended to forestall agreement and permit the debtor to outright seek contract rejection instead. In re Northwest Airlines, 346 B.R. 307, 327 (Bankr. S.D. N.Y. 2006). By negotiating EBITDA and liquidity covenants into its DIP financing at levels that could not be reached without substantial reduction to the wages and benefits of union employees and retirees, the Debtors presented the drastic and life altering cuts to the UMWA as a *fait accompli*, and short-circuited discussions that the parties could have had to provide the Debtors with necessary savings more acceptable to the UMWA and its constituencies. That they chose not to do so is another reason to deny the relief sought.

E. Patriot Inappropriately Seeks Non-Economic Concessions.

Proposals with no economic savings attached to them, such as absenteeism and tardiness policies sought by Patriot in this case, are not necessary to reorganization. In re Valley Kitchen, 52 B.R. 493, 495-496 (Bankr. S.D.Ohio 1985). The Debtors' citation of Appletree Markets, 155 B.R. 431, 441 (S.D.Tex. 1993) admits that non-economic changes in a §1113 proposal must have a direct financial impact to pass muster. Patriot's attempt to abuse the bankruptcy process to obtain its "wish list" of work rule modifications cannot meet this strict standard. For example, Patriot provided a very dubious quantification of value for its proposal to change the attendance rule, so that an employee can be discharged for just two "unexcused" absences in 30 days. Patriot assumes for its Federal Mine that the new attendance rules will reduce absences by half, and allow it to reduce its union staff at the mine by 10 employees, without citing any facts or analysis supporting either assumption. The claim that it can save the labor costs of 10 employees is especially dubious, when absent employees are not paid for days that they do not work; and it is unlikely that Patriot is currently paying employees who are kept in "reserve" and not working. Given the physical damage caused by a lifetime of working in the mines, it is normal that miners have more absences than employees with less physically demanding jobs. Patriot's draconian attendance rules, particularly in conjunction with its proposal to eliminate up to 19 days of leave, will deprive it of its experienced workforce, and increase its operational costs on a long-term basis. Because Patriot's work rule proposals are not tied to any real savings, they militate against its §1113 request for relief. In re G & C Foundry, 2006 Bankr. Lexis 4582 at 32-33.

II. THE PROPOSALS ARE NOT FAIR AND EQUITABLE.

A. Unionized Miners and Retirees Are Being Asked To Shoulder A Disproportionate Share Of The Sacrifice Required To Reorganize Patriot, And Virtually The Entire Risk Of Its Reorganization.

Sections 1113 and 1114 impose a fairness requirement. Both statutes require "all of the affected parties [be] treated fairly and equitably" and the balance of equities must clearly tip in favor of the Debtors' proposal. In re Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006). See also In re Farmland Indus., 294 B.R. 903, 913-914 (Bankr. W.D. Mo. 2003)(because of the similarities between §§ 1113 and 1114, the balancing of the equities test applies to a request to terminate retiree benefits.) These provisions were enacted to "spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree." In Re Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir.), cert. denied, 479 U.S. 949 (1986).

Senator Packwood observed on the floor of the Senate:

> [T]he focus for cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices in the reorganization process will be spread among all affected parties. This consideration is desirable since *experience shows that when workers know they alone are not bearing the brunt of the sacrifices, they will agree to shoulder their fair share...*

130 Cong. Rec. S8898 (daily ed. June 29, 1984)(Remarks of Sen. Packwood). See also 130 Cong. Rec. H7489, H7491, H7494-7496 (daily ed. June 29, 1984) (Remarks of Reps. Rodino, Moorehead, Lungren, and Morrison) ("This section would ensure that...employees do not bear the entire financial burden of making the reorganization work or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices").

The congressional conferees gave the courts specific guidance on this equity requirement, citing In re Blue Ribbon Transportation, 113 L.R.R.M. 3505 (Bankr. D. R.I. 1983) in the congressional record. The court in Blue Ribbon required that management salaries be reduced by 25%, that perks be eliminated, and that other concessions be made by management officials.[34] See also In re Jefley, Inc., 219 B.R. 88 (Bankr. E.D. Pa. 1998) (compensation of principals was too high to find that wage cuts for retail clerks were fair and equitable); In re Express Freight Lines, Inc., 119 B.R. 1006, 1017 (Bankr. E.D. Wis. 1991); In re Kentucky Truck Sales, 52 B.R. 797 (Bankr. W.D. Ky. 1985); In re Cook United, 50 B.R. 561 (Bankr. N.D. Ohio 1985). Holders of perfected security interests who stand to benefit greatly from a successful reorganization are included among the groups that must make sacrifices. In re Indiana Grocery Co., 136 B.R. 182 (Bankr. S.D. Ind. 1990)(holding that "though necessary...wage reductions must also be fair and equitable" and that debtor "failed to prove that top management and creditors are bearing an equitable burden in [its] reorganization, and thus, that all affected parties are treated fairly and equitably"). Patriot has already broken with this requirement: It endeavors to pay bonuses to managers and includes [redacted] future bonuses in its business plan.

Courts recognize that cost-cutting burdens must be shared among affected parties and that to the extent some groups are asked to contribute more than others, the different contribution levels must be justified under the circumstances. In re Pinnacle Airlines Corp., 483 B.R. 381, 407-408 (Bankr. S.D.N.Y. 2012). See In re Elec. Contracting Servs. Co., 305 B.R. 22, 28 (Bankr. D. Colo. 2003)("A debtor will not be allowed to reject a union contract where it has demanded sacrifices of its union without shareholders, non-union employees and creditors also making sacrifices."); In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 647-648 (Bankr. N.D. Iowa 1991)(debtor should show that costs *not* associated with the union contracts have been reduced; limited constituencies should not have to bear the entire burden to preserve everyone's jobs).

[34] The congressional expectation shown by its citation of Blue Ribbon contrasts sharply with Patriot's behavior here, seeking bonuses for managers at the same time it extracts huge, literally life-threatening concessions from workers and retirees. For this reason alone, the motion should be denied.

A debtor meets the fairness requirement if "its proposal treats the union fairly when compared with the burden imposed on other parties by the debtor's additional cost-cutting measures and the Chapter 11 process generally." In re AMR Corp., 477 B.R. 384, 408-409 (Bankr. S.D.N.Y. 2012). A "debtor should show that major creditors who stand to benefit greatly from successful reorganization and from concessions employees make ... are bearing in some manner their fair share of the burden of reorganization." Ass'n of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435, 461 (D. Minn. 2006) (citing In re Indiana Grocery Co., Inc., 136 B.R. at 195). The Court "must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each must face," In re Farmland Indus., 294 B.R. 903, 913-914 (Bankr. W.D. Mo. 2003); In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 646 (Bankr. N.D. Iowa 1991).

In In re Delta Air Lines, 342 B.R. 685 (S.D.N.Y. 2006), the court noted that when a group is asked to contribute more than its pro rata share of sacrifices relative to its size, the debtor cannot sustain its burden of proof without justifying the disproportionate share of the sacrifices. In Delta, flight attendants bore twice their pro rata share. Here, the union workforce (40% of the total workforce) is bearing 87% of the load.

Paying lip service to these principles, Patriot argues that its proposals would not reduce union employees to compensation levels lower than compensation paid to its non-union employees. The premise that the proposals would leave union and non-union employees equally compensated is demonstrably false. Patriot's non-union employees are eligible for far more generous incentive payments than its union employees. While non-union incentive payments can exceed [redacted], incentive payments available to union employees rarely exceed [redacted]. (Schwartz Decl. pg. 33) Patriot's §1113 proposal, in contrast to its representations to the

Court, will leave its non-union employees with a richer package of overall compensation when compared to its generally more productive and less-supervised union employees.

The apparent equality between union and non-union compensation in the proposal ignores that historically the UMWA bargained for lower wages and pensions for its union employees in return for guaranteed lifetime healthcare. Depriving the UMWA retirees of the very lifetime health benefit for which they exchanged wages and pension benefits for six decades, by replacing the health benefit with a VEBA that will run out of money in 2½ months, will result in the union retirees receiving substantially less in wages and benefits from their lifetime of working at the mines, when compared to their non-union counterparts, who will keep the extra consideration they were paid in cash over the same period.

Patriot's additional premise is that it is fair to reduce its union and non-union employees to the same compensation levels, thus wiping out decades of collective bargaining gains for its union employees. This rule would always require the elimination of all benefits of collective bargaining at an employer with both union and non-union employees—manifestly not the intent of §1113 or its history. Regardless whether union and non-union employees started out at the same level of compensation, each constituency must make equitable sacrifices toward the debtor's reorganization. In re Pierce Terminal Warehouse, 133 B.R. 639, 648 (Bankr. N.D.Iowa 1991) (Union employees should not bear entire cost of reorganization, even though pre-petition they received larger compensation package than non-union employees). Patriot is not justified in asking its union employees to take wage cuts that amount to nearly [redacted], pension cuts of $5 per hour, as well as dramatic reduction in their health insurance benefits, when its non-union employees are making far smaller sacrifices toward its successful reorganization.

The total sacrifice from Patriot's non-union employees and retirees is [redacted] during the years of 2013-2016, a relatively small contribution when compared to the [redacted] million that Patriot is asking from its unionized employees and retirees during the same time period. (Huffard Dec. ¶40) Patriot's unionized workforce totals 1,657, while Patriot's total hourly workforce is 2,900. Patriot is therefore asking its average union employee to make a total sacrifice of about [redacted] over four years, more than seven times greater than the [redacted] in total sacrifice over four years that it has required from a typical non-union miner. There are one-third more unionized miners than non-union at Patriot (1657 vs. about 1300), but unionized miners make nine times the sacrifice [redacted]. This treatment is not "fair and equitable" by any measure.[35] UMWA members and retirees are the only constituency in absolute or relative terms making the quantity of sacrifices demanded by Patriot; no other group gives so much. Under the logic of Delta, Patriot has an especially heavy burden to justify this apparent inequity.

B. Patriot Ignores The Quality Of Sacrifices Made By Miners And Retirees.

UMWA miners over time have built up wages, benefits and working conditions that undergird a decent, American, middle-class life. Patriot says it can no longer afford to keep the promise that a miner will have the benefits of a decent standard of living, but these are not "Cadillac" benefits. UMWA members and retirees have neither the lavish lifestyles of Patriot upper level managers nor the comfortable working conditions of accountants and investment bankers. The benefits are commensurate with the needs of people whose bodies are—still today—broken down by a lifetime of work in the mines. Hence it is not reasonable to compare

[35] The text assumes that cuts imposed by Patriot upon its non-union employees means its hourly workers alone. Huffard did not separately describe savings from management wages and benefits, so it may even be that his [redacted] figure includes all cuts to the wages and benefits of Patriot management. Patriot's business plan gives its management [redacted] dollars in bonuses and stock options over the next five years, as coal prices recover and Patriot becomes profitable again. In other words, whatever sacrifices Patriot management make towards its successful reorganization will be recompensed several times over by bonuses once Patriot recovers.

their benefits to the average American's, even in heavy industry. The 2009 Mercer study cited above shows that these miners have a greater burden from illness than their contemporaries for the most serious conditions—something confirmed by a review of the letters from retirees submitted to the Court in this case. It also shows that the analysis performed by Mr. Terry for Patriot was willfully blind, as it sought to justify "average" treatment for a population that has historically accepted extraordinary risks on the promise of commensurate care.

Section 1113, of course, does not permit the Court to make value judgments about the relative desirability of certain constituents. It cannot for example decide that trade creditors are more worthy than union workers, and so the latter should make a transfer payment to the former. E.g., In re Cedar Rapids Meats, 117 B.R. 448, 451 (Bankr. N.D. Ohio 1990) (Debtor's desire to enhance position of some creditors at the expense of employees is not a legitimate reason for a motion under §1113). Courts however are not to consider merely the quantity of sacrifice, but the qualitative nature of the sacrifice. Hence the "balancing of the equities" test calls for consideration of the "cost-spreading abilities of the parties." E.g., NLRB v Bildisco & Bildisco, 465 U.S. 513 (1984). Many creditors in this case loaned money knowing that they bore the risk commensurate with the return. Even trade creditors, which are generally businesses, have some ability to plan for delinquent accounts. Workers are not entrepreneurs and have not agreed in their contract to any risk in exchange for return upon investment; by definition they have less "cost-spreading ability" because they earn their daily bread in the sweat of their brow. Retirees by definition do not have this ability at all: They have the promise of healthcare, earned over a lifetime, and nothing more. Patriot ignores these fundamental differences in the quality of sacrifice by treating its retirees as if they were ordinary unsecured creditors, a proposition antithetical to §1114, which would not exist if Congress had intended retirees to be treated like unsecured creditors. No statute would have been needed to obtain this result.

Patriot's cavalier and sweeping statement that mine worker benefits are "generous" is contradicted by a GAO report studying these benefits and finding they are "generally comparable" to those prevalent in large manufacturing employers. Terry likewise assumes that these "generous" health care benefits fell accidentally from the sky. In fact, they were bargained for at the expense of a lower wage than non-union miners make. A 1990 study by the Coal Commission concluded "[h]ealth care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, *but also because coal miners in their labor contracts have traded lower pensions over the years for better health benefits.*" The Commission's conclusion that union miners have *lower* pensions is sustained by analysis: The average UMWA pensioner had a pension benefit of $586.27 in 2012. The average surviving spouse benefit was $444.65. A 2010 study by the National Coordinating Committee for Multiemployer Plans (NCCMP) showed that median pension benefit for multiemployer plans was $908 per month, an amount that the NCCMP described as "an extremely modest benefit level under any standard." These smaller pensions underscore the inability of retirees to "spread costs" by making sacrifices elsewhere in their lives. Given that the average UMWA pensioner earns a pension of about $586 per month, buying family coverage on the market would consume all of the monthly pension benefit and then some.

Against this backdrop, the VEBA proposal is especially onerous and inequitable for Patriot retirees. The initial $15 million contribution is pitiable in both absolute terms—providing a mere 10 weeks of benefits, even assuming zero administrative costs—and relative to the VEBAs in bankruptcies of similar size, where half or more of the total obligation is supplied in cash. The profit-sharing component is illusory. It provides no benefit for at least two years. Retirees cannot borrow money for their health care over such an extended period. The "monetized" claim component, even if achieved immediately at the high end of Patriot's estimate, satisfies [redacted] of the obligation (as opposed to a more typical 60-70% in VEBAs previously approved by bankruptcy courts). This assumption, however, asks that retirees, the most vulnerable group in the bankruptcy, take an extraordinary risk in a market of complete uncertainty. Indeed, it is ironic that Patriot demands "hard dollar" concessions from its workers and retirees, but in return offers them blandishments and an expression of hope that the VEBA turns out to be more than a will o' the wisp.

Because Patriot also plans to withdraw from the pension plan, it knows it will trigger a $960 million claim that will vastly dilute the claims of all creditors, but of course also the VEBA. Hence, it knows that the "monetized" claim will not have the rosy projections of value given in its motion. Likewise, future cadres of Patriot retirees will go to their retirements even less prepared, with lesser pensions, and with no retiree healthcare. Patriot's expert Terry considers them no worse off than the average American who lacks comprehensive care. Of course, Mr. Terry has never worked in a mine.

C. <u>The UMWA Had Good Cause To Reject Patriot's VEBA Proposal.</u>

The UMWA had good cause, on behalf of its represented retirees, to reject Patriot's VEBA proposal to eliminate their health insurance for no benefit in return. As in <u>In re Speco Corp.</u>, 195 B.R. 674, 679 (Bankr. S.D.Ohio 2006), the retiree representative has good cause to reject a proposal to eliminate retiree health insurance for no returning consideration:

> The Court cannot conceive, at this time, of arriving at a decision that the retirees' refusal to accept nothing in exchange for their (retiree health benefit) rights constitutes a lack of good cause. The latest proposal constitutes nothing more

> than an attempt to unilaterally terminate the retiree benefits and is precisely what §1114 was intended to prevent.

Under the Code the retirees would have a right to an unsecured claim for the value of their terminated benefits even if there were no §1114. Patriot values the retirees' claim at a mere $1.022 billion (Huffard Dec. ¶68), almost $800 million less than a realistic valuation of the value of the retirees' claims. Just like the retirees in Speco Corp., the UMWA retirees had good cause to reject Patriot's offer to reduce their health insurance coverage from lifetime coverage to 10 weeks of coverage, with no returning consideration.

Given that retiree benefits are especially protected under §1114, in enacting §1114 Congress made clear that retirees cannot be locked into dramatically reduced benefits when the debtor's economic situation improves. In re Tower Auto Inc., 241 F.R.D. 162, 168 (S.D.N.Y. 2006). Patriot as noted will earn [redacted] in profit over the next three years. Under its currently proposed formula, slightly over [redacted] will be paid toward the VEBA ([redacted]). The remaining profits will be distributed to Patriot's already well-compensated executives and managers, its exit financiers and other unsecured creditors. It would not include the UMWA retirees given that under Patriot's scenario they will have already monetized their claim for as little as [redacted] per dollar to survive in the meantime. Patriot's §1114 proposal therefore was not equitable, and the UMWA had good cause to reject the proposal on behalf of the retirees.

Finally, the good faith of the debtor is central to the granting of a §1114 motion. A debtor's promise of retiree benefits made while intending to escape those obligations is relevant to the Court's analysis. In re UAL Corp., 307 B.R. 80 (Bankr. N.D. IL. 2004) (authorizing an examiner to investigate whether debtor promised retiree health benefits in exchange for early retirement, while intending to move to reduce the benefits later). At the same time Patriot assumed health obligations for many Peabody retirees, it knew full well that on a long term basis its ability to fund retiree health benefits was not sustainable. Patriot should not be allowed to relieve itself of the obligations, which it voluntarily assumed, in bankruptcy court. Otherwise, it is being used as a mere way-station for Peabody and Arch to shed their retiree obligations.

D. Circumstances Here Warrant A Requirement That Wages And Benefits "Snap Back."

The consideration of a snap-back provision relates to fairness. In re Walway Co., 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987). While a debtor is not always required to include a snap-back provision in its proposals, snap-back provisions are favored because they ensure that once a company is profitable enough for successful reorganization, further profits not 'necessary' for reorganization are returned to the employees who made the concessions. Ass'n of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435, 458-459 (D. Minn. 2006). To meet the requirement of good faith bargaining under §1113, a debtor must at least consider the possibility of including a snap-back provision in its proposals. Id. In re Pinnacle Airlines Corp., 483 B.R. 381, 416 (Bankr. S.D.N.Y. 2012) (equity requires giving the employees who made the sacrifices a share in the fruits of any future profits and avoiding windfalls to others).

Patriot has steadfastly refused to negotiate a snap-back of union wages and benefits, even for 2016 when Patriot is projected to turn a [redacted]. Patriot's §1113 and §1114 proposals will thus result in management receiving large bonuses, which are paid for by life-altering wage and benefit cuts to its union employees and retirees, which by 2016 will not be needed for Patriot's viability. Patriot's proposals therefore inequitably require its union employees and retirees to pay the vast majority of the costs of its successful reorganization, but return to them few benefits in an eventual successful reorganization. In re Cook United Inc., 50 B.R. 561, 565 (Bankr. N.D.Ohio 1985)(management's preferred solution of cuts to wages of union employees without any cuts to upper management wages, though management felt their wages were justified, cannot be imposed by judicial fiat).

Patriot's refusal to consider the UMWA's snap-back proposals renders its own demands especially inequitable. Patriot's position in the case at bar is even more egregious because it has made forecasts showing that it will make [redacted] of dollars in profit in a few years, once it gets past its liquidity crisis, and refuses to share any of the benefits of its recovery with the very employees whose labor made the recovery possible. It is inappropriate to freeze the wages of workers at reduced levels so that they would not share in the benefit if the company later outperforms the projections that formed the basis for its demands. Wheeling Pittsburgh Steel Corp. v. United Steelworkers, 791 F. 2d 1074, 1093 (3d Cir. 1986). Other bankruptcy constituents will reap the fruits of the Debtors' recovery which are directly traceable to the continuing sacrificed made by the unionized workforce. Such is inequitable. Mesaba Aviation, 350 B.R. 105, 111 (Bankr. D. Minn. 2006).

Pursuant to the recovery projected in Patriot's five year plan, its other creditors, investors, management, and non-union employees would all share in the benefits of its recovery, while its union employees and retirees are locked into their reduced wages and benefits until 2018, long after Patriot has recovered to become a lucratively profitable enterprise. Patriot's proposals therefore seek to have all other constituents benefit from the continuing and unnecessary sacrifices of the UMWA employees and retirees, and are hugely inequitable.

E. Patriot's Reliance On The Terms In The Union's Initial Contract With Gateway Is Disingenuous.

Patriot repeatedly cites the Gateway contract as an example of UMWA conceding the equity of its demands—in effect that this contract sets the "market" for union labor. It also falsely equates its proposal to the conditions in the Gateway contracts.

At the outset, §1113 specifically prohibits this resort to outside labor contracts. Representative Lungren in the floor debates on §1113 specifically articulated consideration of the equities by court "should be on the basis of facts *directly resulting from the contract between the debtor and his employees, contracts immediately before the bankruptcy judge* in the chapter 11 proceedings. It should not involve contracts with unions other than those immediately before the court." 130 Cong. Rec.H7495 (daily ed. June 29, 1984)(Remarks of Rep. Lungren)(emphasis added). This prohibition prevents the union from arguing, for example, that Patriot should be denied relief to help other companies not before the court with other contracts; it likewise prevents Patriot from skipping the requirements to show necessity and equity and to instead rely on the lowest-cost contract it can find as setting the ceiling on all labor contracts.

Gateway operations are tiny relative to Patriot: The three mines which make up Gateway operations have 40, 35 and 35 miners respectively, and thus 110 in total. All of the operations are "new" in the sense that Patriot formerly operated them entirely with contractors, and the UMWA signed first-ever collective bargaining agreements to obtain a foothold in these formerly non-union operations. The earliest such contracts arose in January 2011, the year before bankruptcy. Gateway was never subject to a contract providing for a pension or retiree health care. The Gateway contracts contained provisions allowing miners there to transfer to Patriot mines that were covered by NBCWA conditions, including pension and retiree healthcare.

The critical factor in the UMWA's agreement to these operations was that they provided work to miners who had vested pensions or retiree care from other work. These miners could transfer into Gateway for the higher hourly wages prevalent there without loss of their vested benefits; miners at Gateway without vested benefits could transfer to other Patriot operations to earn pension credit and retiree coverage. Finally, the agreements at Gateway contained maps, to illustrate graphically where the lesser terms would be allowed to prevail. Patriot agreed in these contracts that it would not extend the terms to other mines.[36]

The conditions at Gateway are better than the ones Patriot seeks to impose company-wide. At the largest of the Gateway operations, the wages are $3.50 higher than the NBCWA rates in general effect at Patriot; the 401(k) contribution is $6 per hour, and injured miners are guaranteed lifetime retiree coverage. At Sugar Maple, wages were the same as NBCWA wages and the 401(k) was $2.50 hour; this mine is now closed. Farley Eagle is scheduled to exhaust its reserves and was a temporary operation that provided short-run work for miners laid off from other operations that were closing. Patriot's effort to use the initial Gateway labor agreements covering a tiny workforce as a fulcrum to lever itself out of longstanding collective bargaining agreements covering 15 times their number is thus unavailing and does not tip the equities toward §1113 relief.

F. The Equities Tip Decidedly Against The Proposals Made By Patriot.

Finally, the balance of the equities does not favor rejection of the UMWA collective bargaining agreements. Courts are required to consider the likelihood and consequences of liquidation if the Debtors' motion is denied; and the likelihood and consequences of a strike if the Debtors' motion is granted. Mesaba Airlines, 350 B.R. at 462. On the one hand, a strike that cannot be enjoined by the Court will become a reality should the Court reject the collective bargaining agreement and modify retiree benefits. See Northwest Airlines v. Ass'n of Flight Attendants, 483 F. 3d 160, 173 (2nd Cir. 2007) (For employers covered by the National Labor Relations Act following contract rejection a union is no longer bound by any no strike clauses that it may have at one time agreed to); Briggs Transportation Co. v. Teamsters, 739 F.2d 341

[36] The last of these three agreements was negotiated shortly before the bankruptcy in 2012. It may be that Patriot already contemplated using the temporary Farley Eagle contract as a "wedge" to undermine working conditions at all Patriot mines, in violation of its promise that the conditions would be confined to the Gateway operations alone.

(8th Cir.) cert. denied, 469 U.S. 917 (1984) (strike to force employer to adhere to rejected agreement could not be enjoined by bankruptcy court).

On the other hand, the problems at Patriot are temporary, and even under its own conservative coal price and production estimates it will turn [redacted] in profit between 2014 and 2016. It can therefore successfully reorganize if it receives temporary labor cost relief from the UMWA, the amount of which is largely offset once more realistic coal prices are used to compute Patriot's revenue, and if Patriot takes advantage of the additional non-labor cost savings opportunities identified by the UMWA. Denying Patriot's motions is unlikely to lead to liquidation: Patriot can reorganize under proposals for temporary relief that permit the UMWA and its retirees to share in Patriot's recovery, and such a successful reorganization will generate far greater value for Patriot's creditors than liquidation. Balancing the equities favors denial of Patriot's motions when the interests of all constituents would benefit from avoiding a strike that will lead to Patriot's liquidation. The only factor that cannot be accommodated is the anti-union ideology of management, but perhaps Patriot can survive without it.

III. PATRIOT FAILED TO SATISFY THE PROCEDURAL REQUISITES OF §1113 AND 1114.

A. Patriot Failed To Supply Necessary Information.

The proposal underlying a §1113 motion must be based upon "the most complete and reliable information available." In re K & B Mounting, Inc., 50 B.R. 460, 465 (Bankr. N.D. Ind. 1985). Congress codified an affirmative obligation to provide that information to the union in §1113(b)(1)(B): "[T]he debtor in possession...shall...provide...the representative of the employees with such relevant information as is necessary to evaluate the proposal." The requirement of *completeness* shows that Congress viewed the debtor's obligation expansively.

E.g., 130 Cong. Rec.H7496 (daily ed. June 29, 1984)(Remarks of Rep. Morrison);[37] 130 Cong. Rec. S8890 (daily ed. June 29, 1984)(Remarks of Sen. Dole);[38] 130 Cong. Rec. S8893 (daily ed. June 29, 1984)(Remarks of Sen. Hatch);[39] 130 Cong. Rec. S8899 (daily ed. June 29, 1984)(remarks of Sen. Kennedy)(reading Rep. Morrison's remarks).

Courts interpret this obligation expansively. Debtor applications which fail to provide all relevant information are routinely denied. E.g., In re Mesaba Aviation, 341 B.R. 693 (D. Minn. 2006); In re American Provision Co., 44 B.R. 907, 909 n. 2 (Bankr. D. Minn. 1984); K & B Mounting, supra, 50 B.R. at 467-468;[40] In re Fiber Glass Industries, Inc., 49 B.R. 202, 206 (Bankr. N.D. N.Y. 1985)(failure to disclose business plan to union); Mesaba, supra (rejection denied where company failed to provide dynamic model of business plan to union). See also In re Saco Local Development Corp., 30 B.R. 862 (Bankr. D. Me. 1983)(court struck from evidence debtor's financial statements where debtor withheld notes to financial statements).

Meaningful bargaining cannot be done with one party in the dark. The UMWA was entitled to know management's objectives, who else is making sacrifices, why the concessions are necessary to achieve a successful reorganization of the debtor, and so on. In re Schauer Mfg. Corp., 145 B.R. 32, 35 (Bankr. S.D. Ohio 1992). Relevant information must be disclosed "subsequent to filing a petition and prior to filing an application seeking rejection." Teamsters

[37] "The Trustee has *an affirmative obligation to provide all the relevant financial and other information* necessary to adequately evaluate the proposal and if that obligation is not met or if the trustee otherwise delays the proceeding, the application should be denied" [emphasis added]. Representative Morrison was a sponsor of §1113.

[38] "And it requires that debtor to provide all relevant information concerning the proposal to the unions prior to seeking such rejection." Senator Dole was an avowed opponent of §1113.

[39] "[T]he conference bill requires the debtor to provide the union with relevant information that is necessary to evaluating [sic] its proposal." Senator Hatch characterized himself as a "staunch opponent" of the bill. Id.

[40] "[T]he debtor must provide to the union *enough information to justify each of its proposed modifications*. The debtor was incorrect when it stated that it 'need not explain' to the union the consequences of possible liquidation; that explanation is exactly what the debtor was required to make. And the test, in justifying *each of the proposed modifications, is necessity, not convenience or desirability.*" (emphasis added).

Airline Div. v. Frontier Airlines, Inc., 2009 U.S. Dist. LEXIS 61699 (S.D.N.Y. July 20, 2009). The Debtors here failed to fulfill information requests that were necessary to the UMWA's ability to evaluate the proposal. There was foot-dragging by Patriot on many subjects, but two in particular frustrated bargaining that could have reached a deal had Patriot fulfilled its statutory duties. The first is the quantification of the VEBA claim; the second is the dynamic business model. There can be no serious argument but that this information was relevant and necessary.[41]

Half of the savings sought come from eliminating retiree health care; Patriot knew that such a proposal could not be considered without providing a substantive alternative, and hence it should have known it would have to quantify the source of funding for the VEBA in concrete terms. When Patriot based most of its VEBA funding proposal on the alleged value that the UMWA could realize from selling an unsecured claim, it steadfastly refused to respond to information requests from the UMWA's advisors designed to pin down what real funding underlay the proposal. The UMWA needed information to evaluate the likely recovery from the sale of the unsecured claim and whether such recovery could provide realistic workable funding from a VEBA. (Mandarino Dec. ¶55) Without reliable information on likely funding for the VEBA the UMWA could not agree to Patriot's retiree health insurance proposal without breaching its duty to its retirees. Instead, Patriot asked the retirees to take a pig-in-a-poke. Patriot has therefore failed to provide to the UMWA information necessary to evaluate its proposals, thus dooming its §1113 and §1114 motions.

Providing the union a dynamic model of the business plan, allowing it to test the employer's scenarios and to run its own recovery scenarios, is today acknowledged to be

[41] Debtors' failure to provide information is further proof of bad faith. See In re Mesaba Aviation, Inc., 341 B.R. 693, 728-729 (Bankr. D.Minn. 2006) (debtor's "vague and somewhat plastic excuses" for not providing information to the union proved it had "a less-than-replete intent to reach an agreement in which the unions were fully informed," and supported a finding that the debtor was not meeting and bargaining in good faith.)

fundamental to meaningful negotiations. In re Mesaba Aviation, 341 B.R. 693, 717 (Bankr. D. Minn. 2006). As the Mandarino declaration explains, the Debtors never developed a fully dynamic model of its business plan. Rather, information needed to forecast the Debtor's financial performance needed to be entered by a number of people who are located in different geographical locations. (Mandarino Dec. ¶70-71) As a result of the need for these inputs from different geographical locations, Patriot's offer to allow the UMWA's advisors to access its system in St. Louis did not offer to the UMWA the same computer software access which it used to develop its business plan projections. Patriot's own advisors indeed expressed doubt that scenarios could be run by imputing data at St. Louis alone. (Mandarino Dec. ¶71) Patriot never gave the UMWA either an explanation of what data needed to be entered from which location, or a full opportunity to enter data into the system to verify Patriot's assumptions and projections. Patriot's failure to provide requested and relevant information is fatal to its motions.

The UMWA was thus relegated to using a series of snapshots of the Debtors' financial performance. A budgeting analysis that simply takes a snapshot view of the current financial situation is plainly not sufficient. In re G & C Foundry Co., 2006 Bankr. LEXIS 4582 (Bankr. N.D. Ohio 2006) (where Debtor testified that new business was on the horizon and he expected to increase monthly base sales but there was no evidence that those projections were considered in developing the proposal presented to the Union).

> The complete and reliable information requirement goes to the comprehensiveness of the underlying factual support for a debtor's projections under § 1113(a)—its breadth, depth, and objective credibility. The statute's idea is that a debtor-employer must make a proposal firmly grounded in the historical reality of operational economics, an unvarnished evaluation of its current straits, and a thorough analysis of all of the incidents of income and expense that would bear on its ability to maintain a going concern in the future, whether subject to the financial obligations of its collective bargaining agreement(s) or not. The requirement essentially bars a debtor in possession from making a proposal that is

> cursory or arbitrary, or one whose specific terms are result-driven in isolation rather than process-derived and based on actual experience.

In re Mesaba Aviation, Inc., 341 B.R. 693, 709 (Bankr. D. Minn. 2006). Patriot's use of scenarios that relied on manual inputs deprived the UMWA of the ability to test hypotheses and to evaluate Patriot's contentions made at the table. Patriot derived some tactical and perhaps litigation advantage from being able to "keep control" over the discussions but in so doing it made reaching an ultimate agreement in good faith, perhaps on a basis other than a union-busting scenario, practically impossible to achieve. Sections 1113 and 1114 were intended not to reward this behavior but to prohibit it, and the Court should deny the motion.

IV. RELIEF SHOULD NOT BE GRANTED BECAUSE PATRIOT COULD REAP A HUGE WINDFALL FROM PEABODY AND ARCH.

At bottom, Patriot never recovered from its own birth: It was saddled with below-cost contracts from its parents and a disproportionate share of legacy liabilities, with barely the assets to function in good times. A downturn in coal markets pushed it over the brink of insolvency. If successful in the current motion, then as a last gift to its former parents, it will break its union, lower the cost of production industry-wide, undermining other workers and retirees in this troubled industry, and use the Court to eliminate the retiree healthcare of thousands for the first time since 1946.

It did not have to be thus. Patriot could have sought relief long before bankruptcy for Peabody's and Arch's creation of only nominally solvent entities saddled with huge liabilities. In fact, it still can do so. Nothing in the five-year plan stops Patriot from keeping all of the savings it may obtain in §§1113 and 1114 proceedings and still suing its former parents for fraudulent conveyances or to adjust the number of retirees for whom Peabody is accountable.

The approximately 500 retirees for whom Peabody should be accountable, but has shifted back to Patriot, cost Patriot [redacted] per year.

Patriot will emerge from bankruptcy as not merely viable, but super-profitable, having destroyed its union, ruined the lives of its dimly-remembered retirees, and won recompense from Peabody and Arch. This result is so glaringly unjust that it would seem to overshadow all else.

Patriot responds that such a recovery is too speculative to consider and does not obviate its immediate needs. This response protests too much: Patriot concedes in Huffard Decl. ¶79 that it created the current needs by agreement with its DIP lenders on covenants it could not achieve without concessions; it thus built-in to its model that it would someday confront the Court with a motion that sought too much, but left liquidation as the only alternative.

Patriot also ignores that unlike cases where a union sought to avoid a structural problem by citing a one-time litigation bonanza, this case presents the very opposite: Patriot's problem is not structural but temporary, and the litigation against Peabody and Arch could permanently alter the balance of retiree obligations in Patriot's favor.

This case is therefore unlike Mesaba Aviation, No. 05-39258 (GFK) (Bankr, D. Minn. 2006), wherein the court ultimately would not consider the debtor's potential recovery on a claim during the course of the §1113 proceedings. The reasons for its decision are inapplicable here as shown by the district court's appellate review: "The Court concludes that the bankruptcy court did not err in basing its necessity decision on Mesaba's operational expenses. The discovery of the possibility of a one-time infusion of cash would be helpful to the estate, for instance in continuing operations for a longer period of time; however, it would not cure Mesaba's ongoing money loss each month; it would merely delay the exhaustion of Mesaba's cash." Ass'n of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435, 464 (D. Minn. 2006). Here the facts are quite different and warrant a different result. A cash infusion would not merely prove "helpful" in the temporary continuation of the Debtors' operations; rather the temporary needs of the Debtors might have been completely avoided by timely action, and any action, even in the future, will restore the concessions from union workers and retirees needed to bridge the gap. It begs the question why Patriot did not seek this resort five years ago, and why instead, it chose to negotiate bank covenants that ensured its downfall absent a §§1113 and 1114 result that called for gutting the contract and retiree healthcare.

V. PATRIOT'S 11TH HOUR FOURTH 1113 AND FIFTH 1114 PROPOSAL.

The Court should not consider the Debtors' Fourth sec.1113 and Fifth sec. 1114 proposals, which were not delivered to UMWA until approximately 9:00 p.m. EST on April 10, 2013. The Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits was filed on March 14, 2013. Under Frontier Airlines, and the plain language of sec 1113, the Court may not base rejection upon a proposal made once a motion has been filed.

In Teamsters Airline Div. v. Frontier Airlines, Inc., the Court noted that:

> Proposals that are made after the debtor's application for rejection but prior to commencement of the hearing play an important part in the statutory scheme. They are relevant to the statute's good-faith negotiation requirement and to whether a union has good cause to reject the debtor's proposal. See 11 U.S.C. §§ 1113(b)(2) and (c)(2). Inadequate proposals made during the negotiation period could doom the debtor's application because they may reflect a failure to negotiate in good faith. *Nevertheless, the proposal which is scrutinized for compliance with subsection (b)(1)(A) is the initial proposal made prior to the pre-hearing negotiations that follow.*

2009 U.S. Dist. LEXIS 61699 *29 (S.D.N.Y. July 20, 2009) (emphasis added).

The timing of the proposal is indicative of bad faith and tactical behavior to disadvantage the employees and retirees in litigation. Patriot withheld its proposal until after the deadline for expert witness disclosures and after the depositions of its President and CEO Bennett Hatfield and Vice President of Human Resources Dale Lucha, and until the late in the evening before the deposition of Patriot's VEBA expert, Thomas Terry, thus depriving the UMWA and its advisers of the opportunity to respond to the proposal. There is no reason Patriot could not have presented its proposal earlier.

Finally, the timing effectively deprived the union of meaningful opportunity to negotiate over its terms, coming in the middle of daily depositions and less than two weeks before the pre-trial conference in this matter. Such conduct is inconsistent with the provisions of sections 1113 and 1114.

CONCLUSION

No UMWA retirees with guaranteed retiree healthcare have ever been forced to give up those benefits since the union first won them in 1946. Had Patriot accepted the UMWA's counterproposal, it would have been literally the first time such a covered group made such a concession: It is an indication of how hard the UMWA strove to achieve a consensual resolution here. As Senator Packwood observed in 1984, union workers were willing to shoulder their share of the burden to rehabilitate these Debtors in their hour of need, albeit a temporary period largely the result of their own DIP covenants.

Patriot responded with doctrinaire and fixed positions: Accept a VEBA with no real funding. Trust us that the claim for it will be worth something. Give up your work rules, even though we cannot quantify any savings for them. Continue to produce more coal than our non-union miners, but work for less. Surrender your pension. Do not expect any concessions to be returned, though we make huge profits in a few years. And no, we are not giving up our management bonuses.

The conferees who created §1113 and §1114 might have imagined this motion as a caricature of a real motion for relief made in good faith. A company that should have pursued its remedies against its parents years ago, for having set up an insolvent entity to collapse along with spun-off retiree liabilities, paints itself into a legal corner by agreeing to financing covenants that cannot be met without relief obtainable only through court action—and then presents itself to this Court with the demand that it obtain the relief because otherwise it will fail. It steadfastly refuses to consider alternatives despite the utterly temporary nature of its problem. The "only" solution is to find 87% of its needs from 40% of its employees, including its most vulnerable and deserving constituents, retirees whose lives literally depend on the promise now to be broken. "Like an elephant standing three inches from the viewer's eye, it is at first hard to recognize" the enormity of what is transpiring here. See United States v. City of Hialeah, 140 F.3d 968, 984 (11th Cir. 1998).

For all the reasons stated herein, the Court should deny this motion.

Dated this 11th day of April, 2013.

The United Mine Workers of America

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