1
2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF MISSOURI
4 -x
5 In the Matter of:
6 PATRIOT COAL CORPORATION, et al., Case No.
7 Debtors. 12-51502
8 -x
9 ROBIN LAND COMPANY, LLC, Plaintiffs,
10 - against - Adv. Proc. No.
11 STB VENTURES, INC., Defendants. 12-04355
12 -x
13 PATRIOT COAL CORPORATION, Plaintiffs,
14 - against - Adv. Proc. No.
15 PEABODY HOLDING COMPANY, LLC, Defendants. 13-04067
16 -x
17 United States Bankruptcy Court
18 111 South 10th Street
19 4th Floor
20 St. Louis, Missouri
21 April 23, 2013
22 10:22 AM
23 B E F O R E:
24 HON. KATHY A. SURRATT-STATES
25 U.S. BANKRUPTCY JUDGE

1
2 Motion for Order (a) Directing Debtors To File and Serve a
3 Response to Objection Filed by Creditor Payne-Gallatin Company
4 (Smotkin, Howard) (3419)
5
6 Motion for an Order Authorizing the Modification and
7 Termination of certain Non-Vested Benefits for Non-Union
8 Retiree Benefit Participants by Debtor (3503)
9
10 Pre-Hearing Conference - Motion to Reject Collective Bargaining
11 Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C.
12 1113, 1114 of the Bankruptcy Code Filed by Debtor (3214)
13
14 Pre-Trial Conference (Adv. Proc. 13-04067)
15
16 Motion for 2004 Examination of Peabody Energy Corp by Debtor
17 and Creditors' Committee (3494)
18
19 Motion for Judgment on Pleadings, Motion to Dismiss Defendants
20 Counterclaims by Plaintiff Robin Land Company (36) (Adv. Proc.
21 12-04355)
22
23 Motion (I) Under Bankruptcy Code Section 365(D)(3) to Compel
24 Robin Land
25

1 Supplemental Application to Employ Ernst & Young LLP as
2 Independent Auditor and Second Supplemental Application for
3 Authority to Expand the Scope of Employment and Retention Nunc
4 Pro Tunc by Debtor (3501)
5
6 Corrected Motion of Certain Interested Shareholders for Entry
7 of an Order Directing the Appointment of an Official Committee
8 of Equity Security Holders Pursuant to Bankruptcy Code
9 1102(a)(2) filed by Michael Robert Carney on behalf of Certain
10 Interested Shareholders (417)
11
12 Adv. Proc. 12-04355 Called on Pages 3 and 4 of the hearing
13 docket.
14
15 Pre-Trial - Called on Page 3 of the hearing docket. (Adv. Proc.
16 13-04067)
17
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1 P R O C E E D I N G S
2 THE CLERK: Please rise. The United States Bankruptcy
3 Court of the Eastern District of Missouri is now in session.
4 The Honorable Kathy A. Surratt-States presiding.
5 THE COURT: Good morning. Please be seated.
6 IN UNISON: Good morning, Your Honor.
7 THE COURT: I apologize for our delay in getting
8 started, but I believe we have cleared up our telephone
9 conference problems then this morning. Let me start then
10 first, since there are a number of matters on the docket with
11 appearances in the courtroom, please.
12 MR. HUEBNER: Good morning, Your Honor. For the
13 record, I am Marshall Huebner of Davis Polk and Wardwell LLP
14 here on behalf of the ninety-nine Patriot debtors.
15 THE COURT: Good morning.
16 MR. HUEBNER: And there are a variety of Davis Polk
17 colleagues, Your Honor, which I'll discuss in a moment. I
18 don't know if you want each of them to make an appearance
19 separately. I think we have noted their names on the sign-in
20 sheet and they can introduce themselves when their matters are
21 up.
22 THE COURT: All right. That'll be fine. Thank you.
23 MR. WILLARD: Good morning, Your Honor. May it please
24 the Court, Greg Willard and Angie Schisler on behalf of the
25 official unsecured creditors' committee, with the exception of

1 Ms. Schisler and I will not be appearing in matter 3494. With
2 us today also is our co-counsel, Mr. Tom Mayer from the Kramer
3 Levin firm.
4 And I'd like to introduce to the Court for the first
5 time our co-counsel, Mr. Brad O'Neill.
6 MR. O'NEILL: Good morning, Your Honor.
7 THE COURT: Good morning.
8 MR. TURNER: Good morning, Your Honor. Marshall
9 Turner on behalf of Citibank as first out DIP agent. Also in
10 the courtroom is Joe Smolinsky from Weil, Gotshal & Manges.
11 MR. SMOLINSKY: Good morning, Your Honor.
12 THE COURT: Good morning.
13 MR. PERILLO: Good morning, Your Honor. Fred Perillo
14 on behalf of the United Mine Workers of America.
15 THE COURT: Good morning.
16 MS. LONG: Leonora Long on behalf of the United States
17 Trustee.
18 THE COURT: Good morning.
19 MS. LONG: Good morning, Your Honor.
20 MS. TOLEDO: Good morning, Your Honor. Laura Toledo
21 on behalf of Bank of America as the second out DIP agent.
22 Appearing in the courtroom with me today is Ana Alfonso --
23 THE COURT: Good morning.
24 MS. TOLEDO: -- of Willkie Farr. And on the phone are
25 Margot Schonholtz and Penelope Jensen.

1 THE COURT: All right. Good morning.
2 MS. ALFONSO: Good morning.
3 MR. SMOTKIN: Good morning, Your Honor. Howard
4 Smotkin of Stone, Leyton & Gershman appearing on behalf of
5 Payne-Gallatin Company and John Plan (ph.) Company.
6 THE COURT: Good morning.
7 MR. SILVERSTEIN: Good morning, Your Honor. Paul
8 Silverstein and Jon Levine from Andrews Kurth, counsel to
9 Wilmington Trust as indenture trustee for the 8.25 percent
10 bonds.
11 THE COURT: All right. Good morning.
12 MR. SILVERSTEIN: Thank you.
13 MR. COHEN: Good morning, Your Honor. Jon Cohen with
14 Stahl Cowen Crowley on behalf of the retiree committee --
15 salaried retiree committee.
16 MR. RISKE: Good morning, Your Honor. Tom Riske on
17 behalf of the salaried retiree committee.
18 THE COURT: Good morning.
19 MR. COUSINS: Good morning, Your Honor. Steven
20 Cousins of Armstrong Teasdale on behalf of Peabody Energy
21 Corporation. I am pleased to announce that we're being joined
22 by our co-counsel of Jones Day, Mr. Jack Newman --
23 THE COURT: Good morning.
24 MR. COUSINS: -- and Ms. Paula Wilson and Ms. Irene
25 Fiorentinos. And we're glad to be here.

1 THE COURT: All right. Good morning.
2 UNIDENTIFIED SPEAKER: Good morning, Your Honor.
3 MR. JOHNSON: Good morning, Your Honor. Eric Johnson
4 with Spencer Fane Britt & Browne on behalf of U.S. Bank
5 National Association as indenture trustee with respect to the
6 3.25 convertible senior bonds. And with me today is lead
7 counsel Eric Schnabel and Patrick McLaughlin with the Dorsey &
8 Whitney law firm.
9 THE COURT: Good morning.
10 IN UNISON: Good morning, Your Honor.
11 MS. CLAIR: Good morning, Judge. Bonnie Clair for the
12 Ohio Valley Coal Company and Ohio Valley Transloadings. With
13 me this morning is Leonard Marsico of McGuireWoods, along with
14 Mark Freedlander of that firm as well.
15 THE COURT: Good morning.
16 UNIDENTIFIED SPEAKER: Good morning, Judge.
17 MR. HALL: Good morning, Your Honor. John Hall from
18 Lewis Rice on behalf of Arch Coal and the Arch Coal entities.
19 Here today are lead counsel Avi Luft and James Croft of the
20 Cleary Gottlieb firm.
21 THE COURT: All right. Good morning.
22 UNIDENTIFIED SPEAKER: Good morning.
23 THE COURT: Good morning.
24 MR. GOODMAN: Good morning, Your Honor. Peter Goodman
25 from McKool Smith and my colleague, Mike Carney, from McKool

1 Smith on behalf of the interested shareholders.
2 THE COURT: Good morning.
3 MR. MOEDRITZER: Good morning, Your Honor. Mark
4 Moedritzer of Shook, Hardy & Bacon in Kansas City on behalf of
5 STB Ventures. Also in the courtroom is my co-counsel, Joe Bunn
6 (ph.).
7 THE COURT: Good morning.
8 MR. GOODCHILD: Good morning, Your Honor. John
9 Goodchild. I'm with the law firm of Morgan Lewis & Bockius.
10 I'm here on behalf of the UMWA health and retirement funds,
11 including the 1974 pension plan.
12 THE COURT: Good morning.
13 MR. WELCH: Good morning, Your Honor. Richard Welch
14 with the law firm of Mooney, Green, Saindon, Murphy & Welch
15 also for the UMWA health and retirement funds.
16 THE COURT: Good morning.
17 MR. ROBBINS: Good morning, Your Honor. I'm Larry
18 Robbins from the firm of Robbins Russell in Washington DC for
19 the noteholders Aurelius and Knighthead. Joined by my partner,
20 Alan Strasser, who will also appear on one of the motions
21 today. As well as by our co-counsel from St. Louis, Steve
22 Goldstein, who's here from the firm of Goldstein & Pressman.
23 THE COURT: Good morning.
24 MR. ROBBINS: Thank you, Your Honor.
25 UNIDENTIFIED SPEAKER: Good morning.

1 THE COURT: Good morning.
2 MR. DOYLE: Good morning, Your Honor. Dan Doyle,
3 Lathrop & Gage for Caterpillar Financial Services Corporation,
4 as well as Caterpillar Global Mining.
5 THE COURT: Good morning.
6 All right. And then on the phone I have Ms. Samet on
7 behalf of the debtors.
8 MS. SAMET: Present.
9 THE COURT: Okay. Good morning.
10 And I have Ms. Schonholtz and Ms. Jensen on behalf of
11 Bank of America.
12 MS. SCHONHOLTZ: We are present. Good morning, Your
13 Honor.
14 THE COURT: Good morning.
15 I have Brian Meldrum on behalf of Argonaut Insurance.
16 MR. MELDRUM: I'm here, Judge. Thank you.
17 THE COURT: All right. Good morning.
18 Tom Persinger on behalf of Payne-Gallatin.
19 MR. PERSINGER: Good morning, Your Honor. Present.
20 THE COURT: Good morning.
21 And Jason Alter on behalf of Alice Wright, et al.
22 MR. ALTER: Yes. Good morning, Your Honor.
23 THE COURT: All right. And I will remind everyone on
24 the telephone: please keep your phone on mute except when
25 speaking.

1 All right. I'll take a few minutes now to make my
2 administrative announcements that I usually make at the end,
3 while I have all of counsel present. I would like to first
4 acknowledge over 850 letters that have been received, read by
5 me and placed on the record as correspondence. As such letters
6 continue to arrive I will continue to read them and place them
7 on the record. I thank all of those who have taken the time to
8 address the Court and share their thoughts.
9 Let me give you the future court dates for our status
10 hearings, will be May 21st, June 18th and July 23rd at 10 a.m.
11 I will remind everyone, of course, appearances in court, that
12 all parties that have entered their appearance in this case are
13 welcome to appear in person in court or request to appear by
14 telephone. And you make that request to appear by telephone
15 through my courtroom deputy, John Howley. When you are
16 provided with the call-in information, as noted on Mr. Howley's
17 e-mail you are not to share that information with anyone else.
18 If it comes to my attention that the call-in information is
19 being shared with other parties that have not been approved and
20 authorized to appear by telephone, all appearances by telephone
21 will be discontinued.
22 Also, today we have set up overflow, since the
23 courtroom is quite full, down in Courtroom 5 South. We have
24 video and audio feed, so I will remind all the attorneys that
25 you need to be at the podium when speaking so you can be seen

1 and heard down in the overflow room. It is my understanding
2 that we do have some people there who are interested in the
3 hearing.
4 All right. Then we will take up the docket in the
5 order that it appears. The first motion is authorization to
6 assume or reject unexpired leases. It is my understanding that
7 that motion has been adjourned to May 21st?
8 MR. HUEBNER: Yes, Your Honor.
9 THE COURT: All right.
10 MR. HUEBNER: For the record, Marshall Huebner. And
11 that is correct.
12 THE COURT: All right. Thank you.
13 Then next is the motion of Payne-Gallatin Company
14 directing a response and scheduling a mediation. Mr. Smotkin?
15 MR. SMOTKIN: Good morning, Your Honor.
16 THE COURT: Good morning.
17 MR. SMOTKIN: We've been conversing with the debtor on
18 that. In particular we've been talking to Jonathan Martin.
19 And essentially, Your Honor, at this point we're going to
20 withdraw the request for mediation. We couldn't get any
21 traction on that so we're going to --
22 THE COURT: That was --
23 MR. SMOTKIN: -- withdraw that request.
24 THE COURT: That was my reading. It sounded like the
25 debtors weren't interested in mediation, and mediation only

1 works if both parties are interested.
2 MR. SMOTKIN: Correct.
3 THE COURT: So at this point then are we going to set
4 up a briefing schedule to brief the issues?
5 MR. SMOTKIN: Your Honor, the way we have it currently
6 set up, by agreement we would propose to have the Court hear
7 the legal issue on May 21st. We essentially divided this into
8 two issues. One is the legal issue under the terms of the
9 lease. And then the next, depending on what the Court
10 determines with respect to the legal issue, at a later date we
11 would schedule a damage hearing if the Court decides in Payne-
12 Gallatin's favor. If the Court does not decide in Payne-
13 Gallatin's favor then there would not be a need for a damage
14 hearing at that point. We've submitted --
15 THE COURT: Do we think it has to be bifurcate -- I
16 guess the way I read it was that, yes, I would look at the
17 legal issue, but then that would directly flow into how we're
18 going to do it. Because the issue is the calculations of the
19 amounts that are due, correct?
20 MR. SMOTKIN: Your Honor, yes. There are essentially
21 two issues. One is the interpretation of the lease and whether
22 the amounts are due, what -- essentially what's the definition
23 of gross sales. Our position is the debtor's been deducting
24 certain transportation costs from gross sales on which we are
25 properly due a royalty. So we believe those amounts that have

1 been deducted should be added back and we should receive a
2 royalty on the gross sales price.
3 In our discussions with the debtor, trying to be
4 efficient with the Court's time and the debtor's time, the
5 debtor proposed that we break it up into two issues so that the
6 Court doesn't have to hear the damage issue if the Court would
7 decide against Payne-Gallatin on the first issue. Which we
8 don't believe will be the case, but certainly we can understand
9 the position and we are trying to be as frugal as possible with
10 respect to resources for all parties concerned, Your Honor.
11 THE COURT: All right. So there's some agreement then
12 on what the briefing schedule will be for that?
13 MR. SMOTKIN: Yes, Your Honor. We submitted a
14 proposed scheduling order to the debtors. We did that
15 yesterday. They're reviewing it. We expect to receive comment
16 shortly. We look forward to receiving those comments.
17 Essentially, we also expect to provide them with a
18 post stipulation of fact on the narrow factual issues that the
19 Court needs to know about it in order to decide the legal issue
20 and then in connection with that, we're going to -- if issues
21 come up during the course of our discussions and scheduling, I
22 would expect that perhaps we may be calling the Court for some
23 guidance on certain issues if we can't negotiate or resolve
24 them without the Court's involvement.
25 THE COURT: All right. And then I assume it is a

1 fairly quick briefing schedule then if we're going to take this
2 matter up then on May 21st then for some brief oral argument;
3 is what we anticipate?
4 MR. SMOTKIN: Yes, Your Honor. I would anticipate
5 that we would submit the brief probably five days before the
6 hearing if that's -- if the Court --
7 THE COURT: We need a little bit of time to look at
8 it.
9 MR. SMOTKIN: Well, certainly, Your Honor, I mean,
10 that's -- obviously we're doing a scheduling order to -- that
11 we can agree on and then, of course -- it's always up to the
12 Court to decide whether those time frames are appropriate or
13 whether we're cutting it too close.
14 THE COURT: All right. So you're anticipating
15 simultaneous briefing -- briefs or --
16 MR. SMOTKIN: Yes, Your Honor.
17 THE COURT: Okay. Simultaneous. Yeah, if y'all could
18 back those dates up just a teeny tiny bit to give us enough
19 time to make sure that we can review the matter.
20 MR. SMOTKIN: Certainly, Your Honor. What would be
21 the Court's pleasure for briefing on the issue?
22 THE COURT: Ms. Magnus (ph.), what would be our --
23 MR. MARTIN: Your Honor, could I have just a minute
24 because there may be some confusion?
25 THE COURT: Certainly.

1 MR. MARTIN: For the record, Jonathan Martin from
2 Davis Polk, for the debtors. We just received the proposed
3 scheduling order yesterday.
4 THE COURT: Yeah.
5 MR. MARTIN: So there may have been a misimpression
6 that there is agreement on the proposed scheduling order.
7 THE COURT: No, I think Mr. Smotkin indicated --
8 MR. MARTIN: I -- okay. I just wanted to --
9 THE COURT: -- you all had gotten it and were
10 reviewing it, but there was no agreement and there might be
11 some changes.
12 MR. MARTIN: Thank you, Your Honor. And the one thing
13 that I do think we would disagree on is the simultaneous
14 briefing because they are asking for a do-over on their
15 objection; and the way this should work that they file their
16 objection and we reply. We're happy to do it on a quick
17 schedule as they request, but that's the way it should proceed.
18 MR. SMOTKIN: Your Honor, we only have five minutes.
19 I'm not sure what Mr. Martin means by a do-over. The
20 objection's still pending. It's out there, we filed it and we
21 objected to the cure amount on the basis of this issue. So
22 it's been -- it's an issue that's teed up. The Court hasn't
23 heard it before.
24 THE COURT: Correct. For looking for a response and
25 the memorandum in support of your objection and their response,

1 that -- I don't care if it's simultaneous or if it's, you know,
2 one one day and then we got the next one seven days later or
3 whatever.
4 I can either -- I can pick some dates for you now or,
5 Mr. Smotkin, do you want to spend some more time seeing if you
6 all can agree to some dates?
7 MR. SMOTKIN: Your Honor, I'm happy to talk to
8 Mr. Martin and see if we can get that resolved and then contact
9 the Court if there's an issue and certainly will contact the
10 Court to advise them of the dates that we agreed to and see if
11 that meets with the Court's approval.
12 THE COURT: All right. All right, then I will mark
13 that matter then as -- well, the motion directly the debtors to
14 file a response; you're withdrawing part of the motion,
15 Mr. Smotkin, or the whole motion?
16 MR. SMOTKIN: Part of the motion, Your Honor, with
17 respect to mediation.
18 THE COURT: Withdrawing the part regarding mediation
19 and then I'll look for an agreed order, then, as far as a
20 response and the briefing and a consensual briefing schedule
21 then by the parties?
22 MR. SMOTKIN: Yes, Your Honor.
23 THE COURT: All right. Thank you.
24 MR. SMOTKIN: Thank you.
25 THE COURT: All right. Then next is the motion for

1 order authorizing modification and termination of certain
2 nonvested benefits for nonunion retiree benefits participants.
3 It's my understanding that matter is close to settlement and
4 it's going to be continued?
5 MR. RESNICK: Actually, Your Honor -- good morning.
6 This is Brian Resnick of Davis Polk on behalf of the debtors.
7 THE COURT: Good morning.
8 MR. RESNICK: The matter is actually fully settled I'm
9 pleased to report.
10 THE COURT: All right.
11 MR. RESNICK: And we have an agreed upon order with --
12 it's agreed upon with the retiree committee and we've been
13 working with the creditors' committee and they don't object to
14 it and no other party has filed an objection. I'm happy to
15 describe the settlement very briefly for, Your Honor, if you'd
16 like, and then I can hand up the order, we can e-mail it to
17 chambers.
18 THE COURT: All right. Briefly.
19 MR. RESNICK: Sure. So the settlement, their -- I
20 guess I'd view it as five material terms.
21 First, the debtors have agreed to continue to provide
22 benefits through July 31st, after which time the retirees will
23 be eligible to purchase a continuation of benefits in
24 accordance with COBRA.
25 Second, the retiree committee will establish a VEBA on

1 behalf of the retirees, and the debtors will initially fund the
2 VEBA with 250,000 dollars of cash.
3 Point three is that upon the effective date of
4 reorganization the debtors would fund the VEBA with 3.75
5 million dollars of equity, basically shares of reorganized
6 Patriot.
7 And point four is that the debtors will continue to
8 provide life insurance up to a 30,000-dollar cap and will
9 negotiate with the retiree representative to possibly replace
10 those benefits with other benefits so long as they're
11 economically neutral or more favorable to the debtors.
12 And lastly, because this has been a lot of work for
13 Mr. Cohen, we've agreed to increase the expense reimbursement
14 cap by 50,000 dollars to 300,000 dollars. And, Your Honor, we
15 believe this proposed order will facilitate a smooth transition
16 for the retirees.
17 I should note that only the debtors that are currently
18 obligated under these benefit plans are obligated under the
19 order going forward, and the settlement saves the debtors
20 approximately 26.9 million dollars of cash over the next five
21 years and we believe that the sacrifices that the retirees are
22 making is fair and appropriate in light of the sacrifices that
23 we are asking of the union retirees.
24 So that is the settlement and I just wanted to thank
25 Jon Cohen for working productively and expeditiously and

1 resolving this matter and the seven members of the retiree
2 committee for their dedicated service.
3 THE COURT: All right. Thank you.
4 MR. RESNICK: Would you like me to hand up a copy of
5 the order, Your Honor?
6 THE COURT: You may. Thank you. All right. Then
7 we'll have that order entered as soon as possible.
8 MR. RESNICK: Thank you, Your Honor.
9 THE COURT: Thank you. All right. Then next on the
10 docket is the pre-trial conference on the 1113, 1114 motion and
11 the pre-trial in the adversary Patriot Coal v. Peabody
12 Holdings.
13 Good morning, Mr. Moskowitz. I believe I've seen a
14 stipulation has been entered and we are ready to go on April
15 the 29th. Today I will inform all the parties, other than the
16 debtors, the UMWA, and the funds that time will be kept
17 pursuant to the order that was entered for opening and closing
18 statements. There's a lot of material to be covered. All
19 right.
20 Mr. Moskowitz, are there any concerns or requests then
21 this morning on behalf of the debtors?
22 MR. MOSKOWITZ: Good morning, Your Honor. For the
23 record Elliot Moskowitz of the law firm of Davis Polk,
24 representing the debtors.
25 I don't think so, Your Honor. I think that a lot of

1 paper is certainly coming into the Court, as I am sure you are
2 well aware.
3 THE COURT: Yes, it is.
4 MR. MOSKOWITZ: And more is coming this afternoon, but
5 despite that, I think the parties have coordinated well with
6 one another. Discovery is essentially complete. Fourteen fact
7 and expert witness depositions have occurred. Document
8 discovery is complete.
9 As of this afternoon briefing will be complete. So I
10 think with respect to the 1113, 1114 proceedings, things are
11 quite on track and the parties are coordinating well with
12 respect to the hearing on Monday that is scheduled to begin
13 Monday morning.
14 With respect to the Peabody adversary proceeding, as I
15 think Your Honor is aware, it's not only a motion for summary
16 judgment that the debtors have filed, but Peabody has also
17 filed a motion to dismiss. Those two matters are on the
18 identical track and will be argued at the same time. Briefing
19 for that will be completed on April 26th, so very shortly.
20 And I guess the one question that we have for Your
21 Honor is, right now those matters have been set for a hearing
22 and for oral argument as the first item to occur on the morning
23 of April 29th, the week of the 1113, 1114 hearing, and the
24 parties are content to have that occur at that time, but if
25 Your Honor had a different view as to when that should occur

1 over the course of the week, that would be fine as well. I
2 just think we wanted to get some sense of when that argument
3 will occur for counsel travel schedules and such.
4 Again, from the debtor's perspective it would be fine
5 and appropriate for that matter to be heard first, as long as
6 it's heard that week.
7 THE COURT: All right. I have to be honest with you,
8 Mr. Moskowitz; I haven't quite gotten to what the schedule will
9 be next week in preparing for today, but -- yes?
10 MR. NEWMAN: Your Honor, good morning.
11 THE COURT: Morning.
12 MR. NEWMAN: Jack Newman from Jones Day on behalf of
13 Peabody and we're the defendants in that action, and I just
14 wanted to be up here to listen to what the Court had to say
15 about scheduling. I would ask that if the Court is not going
16 to hear it on Monday morning, that it not hear it on Thursday,
17 just for scheduling purposes.
18 THE COURT: Certainly.
19 MR. NEWMAN: But if -- it would be very helpful if we
20 knew today when it was going to be because while Mr. Moskowitz
21 has to be here anyway, that would be the sole matter on which
22 we would be appearing.
23 THE COURT: All right. Let me confer with my law
24 clerk when I take the first break and then I'll let you know,
25 about middle of the day then, what time we'll take that matter

1 up during the week.
2 MR. NEWMAN: Thank you, Your Honor.
3 THE COURT: All right. Thank you.
4 MR. MOSKOWITZ: Thank you, Your Honor. I'll just
5 leave you with a recommendation respectively with respect to
6 that issue.
7 THE COURT: Certainly.
8 MR. MOSKOWITZ: And again, no strong views on this.
9 It may make sense just to do it first --
10 THE COURT: Sure.
11 MR. MOSKOWITZ: -- and not have it disrupt the week or
12 be at the end of the week because I suspect the parties will
13 have to be fairly nimble over the course of the week with
14 respect to scheduling, so it may just make sense to --
15 THE COURT: Sure.
16 MR. MOSKOWITZ: -- not have that hanging out there and
17 we can just dispense with it immediately, but no strong views,
18 Your Honor.
19 THE COURT: Right, certainly. That's fine. Just, I
20 hadn't actually thought about it.
21 MR. MOSKOWITZ: Understood and appreciate it.
22 THE COURT: All right. Thank you.
23 MR. MOSKOWITZ: So unless Your Honor has any further
24 questions, we have nothing further with respect to the pre-
25 trial conferences.

1 THE COURT: No, nothing else.
2 Mr. Perillo, anything on behalf of the UMWA?
3 MR. PERILLO: Good morning, Your Honor. I'm a little
4 bit deaf today because my eyes popped on the plane. I'm not if
5 I heard Mr. Moskowitz correctly, but there is one more
6 deposition outstanding which is an amendment to the agreed-upon
7 procedures previously given to you and the parties are
8 negotiating tomorrow and the next day in hopes of achieving a
9 resolution. Those are the only amendments I would offer.
10 Otherwise I concur with counsel.
11 THE COURT: All right. Thank you.
12 Any concerns from the UMWA funds, Mr. Goodchild?
13 MR. GOODCHILD: Thank you, Your Honor. John Goodchild
14 on behalf of the funds. We concur with statements from
15 counsel.
16 THE COURT: All right. Thank you. All right. Then
17 if there are no other issues, we will be ready to go then on
18 Monday the 29th. Thank you. All right.
19 Next is the motion for the 2004 examination of
20 Peabody. I have read the motion. I have read Peabody's
21 objection, the debtor's reply that was filed on Sunday, and I'm
22 very familiar with both the arguments presented and the three
23 remaining issues of which there is an impasse because it
24 appears that Peabody will include paper and electronic
25 documents from files concerning the agreed fourteen persons and

1 the additional nine identified persons from January 1, 2005
2 through May 1, 2008.
3 So it appears to me that what remains is the issue
4 concerning how many backup tapes will be restored, whether a
5 custodian-based search is sufficient, and the inclusion of the
6 UMWA in the 2004 exam in light of a litigation against Peabody
7 in West Virginia. First I'll ask the debtors or the committees
8 or both in ten minutes or less to let me know if there's been
9 any progress over the weekend and where we are on this.
10 MR. RUSSANO: Your Honor, Michael -- good morning.
11 Michael Russano on behalf of the debtors from Davis Polk. In
12 terms of progress, Your Honor, no, I think you've -- I'll have
13 Mr. O'Neill speak to the confidentiality issue, but with
14 respect to the backup tape issue and the non-e-mail electronic
15 document issue, I think we remain where we were last week once
16 the motions were filed.
17 Mr. O'Neill, if you want to --
18 MR. O'NEILL: Your Honor, there actually were some
19 discussions over the course of the weekend and the parties
20 tried to work things out and although I don't think we're there
21 on any of the issues yet, I can report to you some progress on
22 the confidentiality issue. Whereas previously the committee
23 had sought to simply exclude any union representatives or
24 employees who were involved in the West Virginia litigation,
25 upon reflection it is agreed to limit the number of people who

1 would be able to view confidential information to simply
2 Mr. Perillo, its outside counsel in this matter and
3 Mr. Crandall, who is its general counsel. So two people.
4 Mr. Crandall, as Your Honor will recall, was involved in the
5 West Virginia proceeding but he is committed to remove himself
6 from those proceedings and to take no further part in them and
7 not to share any information he might receive here with anyone
8 whose involved in those proceedings. Thank you, Your Honor.
9 THE COURT: All right. All right. All right. Then
10 why don't I start -- since I know what the arguments are, let
11 me start with Peabody's response and their argument and then
12 I'll take up the debtors and then I'll see if the UMWA has any
13 brief comments.
14 MR. NEWMAN: Sure, Your Honor.
15 MR. COUSINS: Your Honor, Steven Cousins. Mr. Jack
16 Newman will be arguing on behalf of Peabody Energy Company.
17 THE COURT: All right. Mr. Newman.
18 MR. NEWMAN: Good morning, again, Your Honor.
19 THE COURT: Good morning.
20 MR. NEWMAN: Your Honor, Peabody is not here to
21 contest that there would be 2004 discovery. You've seen that
22 from our submission. We've also made a, I would say, huge --
23 certainly a generous proposal here that by our estimate and it
24 always costs more than you ever think, but by our estimate our
25 own proposal is already at a quarter of a million dollar cost

1 just through the initial review, and we're going to bear that
2 cost, Your Honor.
3 The debtors have no documents from us yet because
4 there is the problem that has developed over the
5 confidentiality order. We've been prepared to produce at least
6 some documents for quite some time but because of the absence
7 of a confidentiality order, we have not done that, and yet
8 despite not having received anything from us, they're saying
9 they want more, more, more than what we have proposed.
10 And what we're saying here is only that 2004 is not
11 limitless and it doesn't depart from reason and that context
12 does matter. And what we have proposed, Your Honor, is a huge
13 quantity of documents, and I submit to you that 2004 doesn't
14 say shop until you drop. 2004 says a reasonable inquiry into a
15 potential asset and here it's a supposed claim, and I think
16 2004 also says that any request for this must be considered in
17 context. And what is the context here?
18 There is a former connection between the two companies
19 with a number of people, including its general counsel --
20 Patriot's general counsel and its current counsel in this
21 proceeding having had a connection with Patriot in earlier
22 times, including in the pre-spinoff time. So it's not as if
23 they are strangers to these materials.
24 Secondly, of course, they took a lot of materials with
25 them by agreement at the time of the spinoff. Now, that's not

1 the end. We understand that that's the beginning but it is a
2 huge quantity of documents and it provides context for the
3 appropriateness of their effort here to shop till you drop.
4 We also know that whether or not there is any validity
5 to a claim, it's essentially likely to be made already.
6 There's the low litigation. The union had what it thought was
7 enough information to make a claim in West Virginia and why do
8 we think that, well not because we think there's any merit
9 whatsoever to a claim, but it's de rigeur in a situation of
10 this kind. And I suggest to you, Your Honor, if you look at
11 the reply statements submitted by the debtors that there's kind
12 of been a subtle shift in the approach that they take to why
13 they need the additional discovery beyond the amount that we
14 have proposed, and it's a shift to -- not to whether they think
15 they could bring a claim but how good it is.
16 So I suggest to you that what they're really doing now
17 is what several Courts have said and Collier says is not really
18 the purpose of 2004 and that is to just continue with discovery
19 for as long and as deep as they can in a 2004 context before
20 bringing a claim where they have to proceed under the Federal
21 Rules of Civil Procedure.
22 Now, I've talked about a huge quantity of materials
23 and as you know from the filings, we've agreed based on
24 fourteen initial custodians and now nine additional ones to
25 look for materials, to interview the fourteen and -- the nine

1 are not people that are at Peabody anymore; they're at Patriot
2 but -- and among the fourteen, one is deceased, some are gone
3 but we've interviewed what we can, attempted to locate where
4 documents are -- these fourteen custodians which were suggested
5 by Patriot, where they have stored their documents, where they
6 might have had access and so forth and gone and searched there.
7 What it appears that Patriot wants, what it appears
8 that debtors want is something -- and the committee -- is
9 something way, way, way beyond that that is very, very hard to
10 cabin, and that's without seeing the documents that they get in
11 response to what we have proposed, Your Honor.
12 So what we're really here to say is that, look, you're
13 going to get a large quantity of documents. Because of the
14 confidentiality situation, you haven't seen document number 1
15 from us yet, get that production, and let's see whether or not
16 there is any set of documents that you think is missing or
17 something else.
18 So we don't think, given the cost -- estimated cost
19 already, which is probably going to be exceeded substantially,
20 because it always occurs that way, that there is no call at
21 this point for more.
22 Now, in the last very short period of time before this
23 hearing -- last night, a little over the weekend, early this
24 morning -- there have been some further discussions in an
25 effort to see if there's some way that we can get a little

1 clarity on, and a little confining to what additional might be
2 required if we were to go beyond what has already been
3 proposed. That would be a change from our discussion so far
4 and the custodian-based discovery. We just haven't had the
5 time, given the scheduling of this hearing and the complexity
6 of this issue, to determine whether or not there is some basis
7 upon which we can reach a further resolution that could be
8 acceptable to Peabody. It is not a simple exercise, Your
9 Honor, because we're looking so long in the past, and there
10 would be so many different people involved.
11 So I would suggest that we have proposed is big, it's
12 enough, it's expensive, and that's what the Court ought to
13 limit the nature of that search.
14 And then we have the issue more generally, Your Honor,
15 of the backup tapes, which have to do with e-mail and
16 attachments. And we've tried to make clear in what we have
17 submitted to the Court the nature of the e-mail system which
18 was in existence before the middle of 2008 when there was a
19 changeover in systems. When there was that changeover in
20 systems, subsequent to that time, there isn't an automatic
21 delete feature. So what would have been in mailboxes at the
22 time of the switchover in 2008, unless specifically
23 individually deleted, would still be there. And of course,
24 there was a document hold that was put on later on. But in --
25 so that there should be documents from, and most of the

1 custodians, from mid-2007. The debtors want to go back to the
2 beginning of 2005, and up through the early -- first few months
3 of 2008. That implicates backup tapes. The way the system
4 worked back then is that inboxes and specific folders were
5 retained in the system for one year without automatic deletion.
6 What we have proposed on that basis is that there be four
7 backup tapes that are restored. And what that would do is
8 cover inboxes and folders, during the entire period from the
9 beginning of 2005 through I think it's the end of the roughly
10 the first four months, or the first few months of 2008.
11 Now, the debtors make, and the committee, makes a big
12 issue about the fact that, while inboxes and folders -- that
13 is, things that were in the inbox, and things that people had
14 saved in particular folders -- have the one-year treatment.
15 That sent e-mails -- we all went to law school to learn about
16 sent e-mails, didn't we, Your Honor? That sent e-mails are
17 saved in the sent box only for sixty days. So therefore, if
18 someone sent an e-mail to someone who is not one of the
19 custodians -- one of the other twenty-two -- then that e-mail
20 might not be captured. Of course, there are many, many
21 different sources for e-mails that are sent. We all know that
22 they pop up anywhere. It could be sent to someone who isn't a
23 custodian, and that custodian forwards it on to -- or that
24 noncustodian forwards it onto someone who is.
25 So our suggestion, Your Honor, is we -- and our

1 proposal -- and this is all within the ambit of the 250,000,
2 including initial review -- is that you accept that.
3 And finally, on the UMW issue, Your Honor, we are just
4 unalterably opposed to Mr. Crandall having access to the
5 confidential information of Peabody. Outside counsel is
6 entirely satisfactory and do the work necessary on the
7 committee. And everything that has occurred from the public
8 vilification, the participation to date in the low litigation,
9 as an actual appearing lawyer tells us, we can't have him
10 getting this confidential information. We're perfectly willing
11 to share it with outside counsel.
12 THE COURT: All right. Thank you, Mr. Newman. Let me
13 ask you one question. When you talk about the four backup
14 tapes, is that -- I guess it's covering each year period; 2005,
15 2006, 2007, and the first part of 2008?
16 MR. NEWMAN: Yes, Your Honor. Although, we would give
17 that option to the debtors and the committee so they could
18 designate when it was. But our thought was, if they designated
19 certain ones that seemed to be obvious to everybody, then it
20 would cover that period. And they're asking for backup tapes
21 every thirty days for which there is absolutely no logical
22 basis.
23 Our suggestion is, you look at the sixty days for sent
24 e-mail, we think that should be no concern, but that's the
25 start for any negotiation on how many additional tapes, if any,

1 should be restored.
2 THE COURT: All right. Thank --
3 MR. NEWMAN: But four is plenty.
4 THE COURT: All right. Thank you.
5 Mr. Russano?
6 MR. RUSSANO: Good morning again, Your Honor. Once
7 again, just for the record, Michael Russano from Davis Polk on
8 behalf of the debtors.
9 Your Honor, Mr. Newman discussed context, and I agree
10 with Mr. Newman that the context here is important because it
11 informs why this discovery that we're asking for is so critical
12 to ascertaining the value of important potential estate causes
13 of action. I think Mr. Newman referred to there being a
14 connection. Your Honor, there's a lot more than that.
15 Patriot, as we explained in our papers, is a Peabody
16 creation. Peabody selected which assets, which mines it would
17 keep, and which would go. Peabody alone decided what
18 liabilities it would retain, and what liabilities would be
19 shifted to Patriot. Peabody's personnel determined what
20 projections would be used to create Patriot's business plan.
21 And Peabody dictated the terms of the ongoing contractual
22 relationship between the companies. Put simply, Peabody
23 designed the house, it built the house, and it decided who
24 would live in the house.
25 Peabody talks in its brief, it devotes a lot of

1 attention to an argument that it bears no responsibility for
2 what has happened to Patriot. And today is not the day for
3 that to be. But Peabody's defense does serve to demonstrate
4 that a comprehensive and careful investigation into the spinoff
5 is absolutely necessary to determine what claims may be brought
6 and against whom. And Your Honor, that's why we served months
7 ago a draft 2004 subpoena, back in January. And a lot of work
8 has been done with counsel for Peabody since. We've reached
9 agreement on a number of issues that have been alluded to;
10 custodian lists, a negotiated set of five broad-topic matters,
11 and a production date range. And we do welcome Peabody's move
12 in its response papers with respect to two of the five disputed
13 issues. But the issues that remain are very important.
14 Now, Mr. Newman referred to Rule 2004 as not being
15 limitless. But what he doesn't refer to are the cases, the
16 numerous cases where courts time and time again refer to Rule
17 2004 as authorizing something so broad as even a fishing
18 expedition.
19 But, Your Honor, that's not what we're asking for
20 here. We've already negotiated with Peabody with respect to
21 the scope of the request.
22 What we have now, and I'm going to put the
23 confidentiality issue aside that Mr. O'Neill will speak to, and
24 has spoken to. We're talking about two discrete issues; backup
25 tapes and non-e-mail electronic documents. Let me first discus

1 backup tapes, because I think that is a critical, critical
2 issue.
3 You've heard that Peabody has refused to restore more
4 than four days -- four days -- of backup tapes over a nearly
5 three-and-a-half-year period. That position, as I'll explain
6 to you, guarantees that responsive e-mails will be forever lost
7 between gaps in restoration days.
8 The problem is that, until the middle of 2008, well
9 after the spin, Peabody automatically deleted all e-mail from
10 its deleted folders that was more than a day old, all sent
11 e-mail that was more than sixty days old, and all other e-mail
12 that was more than a year old.
13 Mr. Newman doesn't dispute, and you heard this a
14 moment ago, that the current e-mail system, therefore, contains
15 incoming and foldered e-mail dating no earlier than the middle
16 of 2007, which is just a few months before the spin, which
17 discussions regarding the spin have been ongoing for years and
18 years. And that it doesn't contain any outgoing e-mail any
19 earlier than early 2008, which is after the spin. And the fact
20 that there has been a litigation hold in place that wasn't put
21 in place until five years after all of this occurred at the
22 earliest really doesn't have any bearing on this issue.
23 And nor is it an answer for Peabody to say that the
24 fact that there was a sixty-day deletion process for sent mail
25 isn't a problem, because one custodian's sent mail is another

1 custodian's -- comes into another custodian's inbox.
2 We simply can't assume that all responsive e-mails
3 were sent to one of the other document custodians. The
4 fourteen Peabody custodians, plus the nine additional
5 custodians, those are negotiated.
6 Your Honor, we had a list of dozens of custodians.
7 E-mails went to numerous parties who aren't document custodians
8 and, I'm confident, third parties, as well, such as financial
9 advisors, just to name one example.
10 This is discussed in detail in our papers, and I don't
11 want to belabor the point, Your Honor. But the bottom line is
12 this: the backup tapes are the only -- the only source of
13 e-mail for a great majority of the relevant period.
14 Now, in terms of costs, our view is that, when you
15 look at the cost in light of the gravity of the claims being
16 investigated, those costs are truly de minimis. The cost of
17 restoring backup tapes is 165 dollars per tape, which amounts
18 to 330 dollars for each backup day. Peabody doesn't dispute
19 those numbers. What they argue is that other processing costs
20 should be factored into the cost of restoring backup tapes. We
21 disagree with that strongly. The cost that they're talking
22 about apply regardless of whether or not the data is on a
23 backup tape.
24 But Your Honor, even Peabody's inflated estimate of
25 5,000 dollars per restoration day is not unduly burdensome,

1 given the size of the spinoff and the potential claims at
2 issue. Peabody itself, in its papers, talks about a one-
3 billion-dollar spinoff.
4 Your Honor, for these reasons, we believe we have
5 amply demonstrated good cause to seek restoration of one set of
6 backup tapes, one day per month.
7 Now, Mr. Newman said there's no rationale for that. I
8 couldn't disagree more. And I think the reason he says that is
9 because there was a sixty-day deletion policy for sent mail.
10 But what he ignores is the one-day deletion policy for e-mail
11 that comes into someone's mailbox and that every day they hit
12 delete on; one-day deletion. What we have chosen is to split
13 the difference; every thirty days. It's not perfect, but we
14 think it's a reasonable compromise.
15 Your Honor, the second dispute is much narrower, at
16 least in my view. Peabody has agreed -- already agreed -- to
17 produce non-e-mail electronic documents. All the movants are
18 asking for is that Peabody search for those documents in
19 locations that Peabody knows or learns they're likely to be
20 found; no more and no less. Peabody, however, argues that the
21 scope of where it looks for documents should be limited to the
22 fourteen Peabody custodians; essentially, places those
23 custodians save files, or where those custodians know that
24 files were saved. And Your Honor, we don't disagree that
25 that's an important part of the diligence process, but these

1 custodians were selected because of their involvement in the
2 spinoff, not because they have any particular knowledge about
3 where documents are saved. They simply may not know, or they
4 may have forgotten, or those documents may have been moved in
5 the years since.
6 It's well established that a party is charged with
7 knowledge of its own documents, and Peabody can't ignore a
8 location that it knows or learns is likely to contain
9 responsive documents.
10 Your Honor, let me just quickly address two legal
11 arguments that Mr. Newman referred to. The first is this
12 argument that Peabody advances that Rule 2004 doesn't apply
13 because an adversary proceeding is, quote, likely to be filed.
14 Your Honor, no such exception to rule 2004 discovery exists,
15 and Peabody can't cite to a single case in support of its
16 position. All of the cases they cite hold that Rule 2004
17 discovery is not allowed when an adversary proceeding is
18 actually pending.
19 And as we pointed out in our reply, numerous courts
20 have expressly rejected attempts to create the exception that
21 Peabody is advancing. And there's a very good reason for that.
22 Once an adversary proceeding is pending, the parties have Rule
23 26. But before that time, Rule 2004 is the only means of
24 obtaining discovery. Here, no adversary proceeding is pending
25 and Rule 2004 applies.

1 And, Your Honor, one last final point. Peabody makes
2 an argument that, because it believes that the movants could
3 file a nonfrivolous complaint, that no discovery is necessary.
4 Even if we assume that Peabody is right about the ability to
5 file such a complaint today, they fail to identify a single
6 case that Rule 2004 is limited to just enough to avoid Rule 11
7 sanctions. And the only case they do cite, a 1983 case out of
8 Massachusetts, In re GHR Energy, takes pains to state that it
9 isn't creating a blanket rule. The court expressly stated it
10 was exercising discretion to deny discovery because the debtor
11 couldn't show that the subject of that discovery had any
12 relevant information. Obviously, that is far from the
13 situation we have here.
14 The Mirant case which we discuss, is far more
15 instructive. And just like in Mirant, we believe it is in the
16 interest of the debtors, their estates, and their creditors
17 that the motion be granted.
18 Unless Your Honor has any questions, at this point, I
19 would ask if Mr. O'Neill has anything to add.
20 THE COURT: All right. No, I have no other questions
21 at this time.
22 Mr. O'Neill?
23 MR. O'NEILL: Your Honor, just a few quick points.
24 Mr. Newman raised the connection between Patriot and Peabody as
25 a potential justification for limiting discovery pursuant to

1 Rule 2004. I don't agree with that argument, but I'd just
2 point out to the Court that, whatever relevance it has, it has
3 none with respect to the committee. The committee was never
4 part of Peabody and does not have access to witnesses, or
5 documents, or evidence relating to Peabody.
6 Two, Mr. Newman suggested that Peabody just hasn't had
7 enough time to respond to these discovery requests. Your
8 Honor, we sent out meet and confer letter under the local rules
9 on January the 11th. We spent sixty days trying to negotiate
10 something and, ultimately, we couldn't get there, and we had to
11 make this motion.
12 Time has passed. The motion, frankly, had helped to
13 narrow the issues, but I think we've gotten as far as the
14 parties can get, Your Honor, and Your Honor should make a
15 decision.
16 Finally -- or actually, one -- Mr. Newman suggested
17 that the debtors and the committee are somehow interested in
18 extending discovery further than it's already gone. I'd just
19 like to point out to the Court that we haven't gotten a single
20 piece of paper from Peabody. We've been negotiating to get
21 documents. We haven't gotten anything. We're not trying to
22 extend discovery; we're trying to get discovery.
23 Finally, Your Honor, on the confidentiality issue, Mr.
24 Crandall is an active participant in the committee. He's not a
25 potted plant. Mr. Perillo, as capable as he is, is only

1 outside counsel, and he can't take the place of an informed,
2 active client on the committee. Mr. Crandall would be subject
3 to an agreed protective order signed by Your Honor, an order of
4 The Court, prohibiting him from sharing confidential
5 information with people involved in the West Virginia
6 litigation.
7 On that ground, Your Honor, we do not believe there's
8 any reasonable basis to object to permitting him, and him
9 alone -- not the remainder of the employees of the union or its
10 professionals -- access to confidential information in
11 connection with the committee's investigation of potential
12 claims against Peabody. Thank you.
13 THE COURT: All right. Thank you.
14 Mr. Perillo?
15 MR. PERILLO: May I just briefly address that last
16 point, Your Honor?
17 THE COURT: Yes.
18 MR. PERILLO: As the Court knows, the U.S. Trustee
19 appointed the UMWA, and not me personally, to the committee. I
20 wasn't even retained by the UMWA until November 29th of last
21 year. They owe me nothing. They could fire me tomorrow, or
22 maybe more realistically, May 4th. And --
23 THE COURT: We're not counting on that, Mr. Perillo.
24 MR. PERILLO: -- the substantive rights of the UMWA
25 shouldn't depend on the identity of their lawyer.

1 The other point I wanted to make, Your Honor, is as an
2 outside counsel for the UMWA, I have an ethical obligation to
3 communicate with the client. I don't know how I would possibly
4 be able to do that, if I was subject to a confidentiality
5 agreement which instructed me not to communicate with anyone at
6 my client. There has to be at least one person. And so the
7 offer to make that a single person who is on the staff of the
8 UMWA I think goes as far as is legally possible to go toward us
9 making a concession for confidentiality.
10 Thank you, Your Honor.
11 THE COURT: All right. Thank you.
12 All right, Mr. Newman, did you have anything else,
13 briefly, on behalf of Peabody?
14 MR. NEWMAN: Your Honor, a lawyer's few small points.
15 Number one, the proposition that somehow or another people who
16 later were at Patriot were absent from the scene when all
17 spinoff work and the pre-spinoff work was going is ridiculous.
18 The notion that Peabody did this, Peabody did that -- of
19 course, Peabody was involved. So were the people here who are
20 at Patriot, and who are very well aware of what went on and
21 participated in the process.
22 Secondly, Your Honor, on the issue of custodians. The
23 custodians were not negotiated. The notion that it would be a
24 custodian-based discovery, rather than some kind of a general
25 search, conceptually was negotiated. And so for a long time,

1 the discussion, at least as we saw it, was based upon a
2 custodian-based effort. And we accepted, with one exception,
3 we accepted all of the custodians that they proposed; both the
4 initial fourteen -- and that's where there had been fifteen, it
5 was negotiated down to fourteen -- and then the nine additional
6 ones that they proposed.
7 Thirdly, Your Honor, there still is no rationale
8 whatsoever for a thirty-day backup tape restoration. What it
9 does mean is, I suppose, that as opposed to a sixty-day, there
10 would be one more day of deleted trash versus sixty days. And
11 the sixty days would give you five more days of deleted trash
12 than the one year. But we still suggest that this is -- and
13 you can imagine the quantity of materials, Your Honor, because
14 every day there's a backup, it backs up everything that was
15 backed up the day before, but for one day, 365 days earlier.
16 So it's a monumental quantity of information that has to be
17 processed, initially electronically, and then by eyes. And
18 there would be a modest de-duplication process. But the de-
19 duplication process, which is electronic, is only for very
20 specific identical ones, not ones that have one additional
21 recipient on it and so forth. This is a big quantity of
22 materials.
23 And as far as the search for non-e-mail electronic
24 documents, Your Honor, what has been done is interviews with
25 the people among the custodians that are reachable and still

1 living. A determination as to, because there's not a document
2 management system in the same way that I think most law firms
3 are used to, finding folders that are associated with their
4 name, finding folders where they say they kept and stored
5 materials, and where, for some reason or another, there is --
6 they say they don't remember, then we would go and find once
7 that they had access to. Once we got there, we would then
8 search through and look for folders and subfolders that appear
9 to be associated with one of the five very broad topics -- and
10 I tell you, they are very broad -- that we have negotiated and
11 agreed and then pull those entire folders. So that if someone
12 else, who is a nondesignated custodian, put materials in there,
13 those materials would be drawn out, as well. So in the non-e-
14 mail electronic discovery that we have proposed, it's not just
15 materials that were prepared by the custodians, but others,
16 too, that were putting materials into the places that those
17 custodians were putting them, that are relevant to the five
18 topics.
19 I see I've run out of time. If the Court has
20 additional questions, I'd be happy to respond.
21 THE COURT: No, I have nothing further. Thank you.
22 MR. NEWMAN: Thank you, Your Honor.
23 THE COURT: All right, I will rule on this matter
24 after we come back from our first break that we'll take.
25 All right, next on our list is the adversary, Robin

1 Land v. STB. It's a motion for judgment on the pleadings and
2 the defendant's motion for adequate protection and
3 counterclaims, which we'll take up simultaneously.
4 Again, I have read the various pleadings in this
5 adversary, and summarized the issues as follows: Debtor Robin
6 Land, does not believe the STB override is an executory
7 contract, nor is it made executor by the 1994 asset purchase,
8 the leases, the assignments, and the Magnum PSA. Therefore,
9 Robin Land seeks declaratory judgment that the STB override is
10 not executory as a matter of law and, therefore, not subject to
11 assumption or rejection under 364.
12 Debtor also believes the STB counterclaim should be
13 dismissed as redundant of debtors' claims for declaratory
14 judgment.
15 I believe STB and RH believe that the STB override is
16 an executory contract, and that it is part of an overarching
17 agreement, and is integrated with the Kelly-Hatfield and Lawson
18 Heirs leases, and the asset purchase agreement, among other
19 agreements. They also argue that there is no separate
20 consideration for payment of the STB override, separate from
21 the right to mine the premises under the leases.
22 STB and Arch further argue that Robin Land need not
23 meet the requirements of Section 503(b)(1)(A), and that STB may
24 pursue its counterclaims, particularly it's count for unjust
25 enrichment. And in any event, STB and Arch believe that

1 discovery is required to ascertain the intent of the parties.
2 Also as some background is STB's contention that, if
3 it fails in its pursuit against the debtor, it may pursue
4 recovery against Arch Coal, Ark Land Company, and Ark Land KH,
5 pursuant to the guarantee. And if this occurs, the Arch Coal,
6 Ark Land Company, and Ark Land KH may pursue some recovery from
7 Robin Land pursuant to certain pre-petition contractual
8 indemnities.
9 In light of my familiarity with the pleadings, I will
10 first call upon the debtors to concisely make your complete
11 presentation in support of the motion for judgment on the
12 pleadings, the motion to dismiss defendant's counterclaims, and
13 arguments in opposition to defendant's motion for adequate
14 protection in twenty-five minutes or less.
15 MR. MARTIN: Thank you, Your Honor. And a proper good
16 morning this time.
17 THE COURT: Good morning.
18 MR. MARTIN: Jonathan Martin from Davis Polk for
19 Debtor Robin Land Company.
20 Your Honor, it's clear that you have fully digested
21 the parties' papers, and I think this argument may feel a
22 little bit like the movie Groundhog Day; because we have been
23 here before.
24 THE COURT: Yes.
25 MR. MARTIN: So I will be -- I will be very concise.

1 And where we have ended up, Your Honor, is that there is a
2 single argument from the other side about why the STB override
3 is executory. They claim that the STB override is made
4 executory by the loss in Heirs lease, and the Kelly-Hatfield
5 lease.
6 Now, as Your Honor, know, federal law controls whether
7 a contract is executory or not. A contract is executory only
8 if the failure of one party to complete its performance would
9 constitute a material breach executing the performance of the
10 other party to the contract. So for the defendants to prevail
11 here, they have to convince Your Honor that, if we stop paying
12 the STB override, the landlords can stop performing on the
13 leases. And where we started in their answers was some
14 allegation that other contracts might make the STB override
15 executory. But it is now clear, based on their papers, that
16 they are arguing only that the leases can make that contract
17 executory.
18 Here's why they can't do that, Your Honor. First of
19 all, Lawson Heirs has already said that the STB override is not
20 an obligation of its lease. And why does it say that? Because
21 there is no way to conclude, looking at the plain and
22 unambiguous language of the leases, that we have to pay the
23 override in order to keep the lease. Sections six and seven of
24 both leases set forth the rent obligation. It does not include
25 payment of the STB override.

1 Section 15 of each lease sets for the events of
2 default under the lease, the grounds on which the landlords can
3 terminate the lease. None of them includes nonpayment of the
4 STB override.
5 Section 25 of each lease is an entire agreement clause
6 that says the parties' entire agreement with the landlords is
7 in that lease and nowhere else. That's why Lawson Heirs has
8 already said, in response to our 365(d)(4) motion, that we can
9 assume the Lawson Heirs lease without paying the STB override.
10 That fact is insurmountable for them.
11 Now, you might ask why isn't Kelly-Hatfield here
12 saying the same thing. Well, frankly, Your Honor, I think they
13 would be, if they were still around. But in 2007, they were
14 succeeded as a landlord by Ark Land KH, which is a subsidiary
15 of Arch Coal. As they say, Your Honor, enough said.
16 So in the face of that clear contractual language, in
17 the face of Lawson Heirs saying, "The STB override is not an
18 obligation of our lease," the defendants have three basic
19 arguments. First they say the STB override and the leases
20 should be considered a single contract because they were
21 entered into contemporaneously as part of the same transaction.
22 We've seen that argument before, Your Honor, and it misstates
23 the law. It is black letter law that contracts entered into
24 contemporaneously, like these contracts, can be construed
25 together. That is, they can be interpreted together to

1 understand the meaning of the various contracts. But it is
2 also black letter law in West Virginia, in Missouri, in every
3 other state we're aware of, that those contemporaneous
4 contracts are not considered a single contract, such that the
5 breach of one is the breach of another, unless the parties
6 expressly intend that. And there is no evidence here, Your
7 Honor, that the parties intended that.
8 Now, what I suspect, Your Honor, is that the
9 defendants will get up here and say that, under West Virginia
10 law, contracts can be "integrated" even if the breach of one is
11 not the breach of the other. There is a flavor of that in
12 their papers. Two responses to that. First, they're
13 wrong on West Virginia law. But more important, if they're
14 right, that makes the law irrelevant for your purposes. And
15 here's why: Again, federal law controls whether a contract is
16 executory or not. And a contract is executory, as I've said,
17 only if the failure of one party to perform would be a material
18 breach excusing the performance of the other party. The
19 question under federal law, under Section 365, is is there
20 material performance owed on both sides of the contract. And
21 state law, Your Honor, is the tool for figuring out the answer
22 to that question. State law is what tells you whether the
23 performance remaining on both sides of the contract is
24 material, such that, if one party breaches, the other party's
25 performance will be excused. And then multiple contracts are

1 at issue, as here, bankruptcy courts took to the state law of
2 integration, because that law tells you when the breach of one
3 contract will be the breach of another contract. It tells you
4 when material performance is being exchanged across contracts
5 rather than within a contract.
6 And here's where we'll have to watch the defendants,
7 Your Honor, because what they're going to try to suggest, I
8 anticipate, is that West Virginia integration law doesn't
9 require one contract to be -- the breach of one contract to be
10 the breach of another. And they'll say that means that these
11 contracts can be executory under Section 365. But that misses
12 the very purpose of looking to state law in the first place
13 under Section 365. Section 365 requires a conclusion that
14 there is material performance being exchanged between the
15 contracts. If the West Virginia law, as they articulate it,
16 doesn't answer that question, it will be of no use to you.
17 They cannot avoid federal law here. To prevail, they
18 have to persuade the Court that there is material performance
19 being exchanged between the STB override and the leases.
20 Lawson Heirs has already said there's not.
21 Now, that's why we get to their second argument, Your
22 Honor, which is that they, STB and Ark Land, supposedly
23 intended themselves for the STB override to be an obligation of
24 the leases, even if the landlords didn't intend it.
25 To begin with, that's a legal impossibility. Ark Land

1 and STB could not agree between themselves to make their
2 contract an obligation of somebody else's contract. But even
3 putting aside the legal impossibility of the argument, it's
4 just believable. And it points out the opportunism here,
5 because in 1994, if Ark Land had stopped performing the STB
6 override, it stopped paying it, there's no way STB would say,
7 "You forfeit the leases." That would mean no royalty. What
8 STB would say is, "You have to keep mining the leases, and
9 we'll look to Arch Coal, your parent, to pay us under the
10 guarantee." They never would have wanted what the now claim
11 here. The reason they're arguing something different here is
12 that a bankruptcy has intervened, and bankruptcy law makes
13 things different. So now, to force this under Robin Land, they
14 have to show that the STB override is an obligation of the
15 leases, and they can't do that.
16 The last argument they make, Your Honor, is that
17 somehow they are continuing to provide performance. And what
18 this comes down to is an argument that STB never would have
19 sold the assets to Ark Land in 1994 if it had known it wasn't
20 going to get paid.
21 And just quickly on the facts here, I know you've read
22 the papers, but in substance, what the 1994 agreement was, was
23 STB sold a whole bunch of assets relating to a mining operation
24 to Ark Land; land, mining equipment, the leases at issue here.
25 And in exchange, Ark Land agreed to pay a lump-sum cash

1 payment, assume liabilities, and execute and deliver the STB
2 override. The STB override was a deferred portion of the
3 purchase price for the assets conveyed in 1994. It was a
4 financing arrangement. It was, essentially, an unsecured loan
5 from STB to Ark Land. It is no different from the financing
6 arrangements in In re Union Financial, and In re Craig, the
7 Eighth Circuit cases that we've addressed before.
8 So their final argument is we never would have --
9 never would have sold those assets to Ark Land in 1994 if we'd
10 known we weren't going to get paid. We had this long-term
11 payment obligation in the form of a royalty that was part of
12 the purchase price. If we had known we wouldn't get paid, we
13 never would have sold the assets. That just confirms that the
14 STB override is not an executory contract, because they're
15 saying it was in exchange for past performance. Their past
16 performance was transferring title to all of the assets to Ark
17 Land in 1994. That was completed in 1994. STB had no further
18 performance.
19 Now just briefly, Your Honor, on an argument advanced
20 only by STB, and in their -- here and in their -- on the motion
21 for judgment on the pleadings, and in their motion to compel,
22 STB claims that the STB override became an incorporated
23 condition of the leases when they were assigned by Ark Land to
24 Robin Land. So they're arguing that the assignments made the
25 override an obligation of the leases.

1 Now, to begin with, that's a concession that the
2 override was not previously an obligation of the leases, which
3 we agree with. But they're arguing that the assignments
4 somehow jammed the STB override into the leases, regardless of
5 the lessor's intent. The reason that fails, Your Honor, is
6 that even Arch says that's just not so.
7 In their papers, Arch says -- this is page 7 of their
8 brief -- when the contracts were assigned from Ark Land to
9 Robin Land, the contracts were "unaltered." That's Arch's
10 words.
11 Page 18 it says an assignment does not change the
12 fundamental nature of the assigned contract. We agree with
13 that. In fact, they cite our papers for that point. An
14 assignment -- it is, again, black letter law -- an assignment
15 cannot modify the contract that's being assigned. So STB is
16 dead in the water on this argument. Even Arch thinks they're
17 dead in the water.
18 And just quickly on STB's motion to compel, Your
19 Honor. We addressed all the reasons why the STB override is
20 not an obligation of the lease, which is what they'd have to
21 show to compel payment under 365(b)(3). But more importantly,
22 and more fundamentally, they have no standing to bring that
23 motion. 365(b)(3) protects landlords and landlords alone.
24 Only landlords have standing to bring a motion under that
25 provision.

1 And the motion, frankly, Your Honor, should be denied
2 on that basis alone, but obviously, it can be denied because
3 the STB override is not an obligation of the leases.
4 Now, in conclusion, Your Honor, I'd suggest that one
5 way to look at this is what the result would have been if Ark
6 Land had filed for bankruptcy in 2005 before it assigned the
7 contracts at issue here to Robin Land. The parties agree that
8 Robin Land now stands in the shoes of Ark Land. So the result
9 in 2005 should be the same. And I suggest to you, Your Honor,
10 that if Ark Land had filed for bankruptcy in 2005, it would not
11 be making the arguments that it's making here. And if it did,
12 if it went into bankruptcy court and said, "We'd like to assume
13 the leases. And even though the landlords can't stop
14 performing the leases if we stop paying the STB override, we'd
15 like to keep paying the override. We'd like to assume that,
16 too. And the reason we think we should be able to do it is
17 that we entered into the override at the same time as we
18 entered into the leases with the landlords. Separate
19 contracts, but we entered into them at the same time. And we
20 agreed with STB that we'd do this. And we'd feel really bad if
21 they didn't get paid in full for the assets they sold to us in
22 1994, and so we'd like to assume the override." Bankruptcy
23 court would say, "No way." Getting no benefit to the estate
24 from assuming the override. It would be a pure preference to
25 STB because the STB override was a financing arrangement

1 between Ark Land and STB for the purchase of the assets in
2 1994. It is no different, again, from Union Financial, In re
3 Craig. The only reason they're arguing something different now
4 is that it benefits them.
5 So as you listen to their arguments, ask yourself
6 whether they'd be making the same arguments if they had filed
7 for bankruptcy in 2005, because the results should be the same.
8 And I will sit down, Your Honor, but I will be
9 listening for one thing as the defendants get up, and that is a
10 clear articulation of how our nonpayment of the override would
11 excuse the performance of the landlords. That's the one thing
12 I'm listening for.
13 THE COURT: All right. Thank you.
14 Now I'll call upon the defendant STB to make their
15 concise presentation in opposition to the motion on the
16 judgment -- motion for judgment on the pleadings and in support
17 of the counterclaims and the motion for adequate protection in
18 twenty minutes or less.
19 MR. LUFT: Your Honor, if it's agreeable with the
20 Court, Arch and STB have agreed that we'd prefer for Arch to go
21 first. Is that okay?
22 THE COURT: Yeah; that's fine.
23 MR. LUFT: Terrific.
24 THE COURT: All right.
25 MR. LUFT: Your Honor, I just listened to Mr. Martin

1 speak for about fifteen minutes telling you what my client
2 would have done, what STB would have done, what Kelly-Hatfield
3 would have done. What's amazing is none of that is in their
4 pleadings. None of these arguments are interview their
5 pleadings. If they wanted to know what my client would have
6 done, they could have taken discovery, they could have asked.
7 They have tried to avoid any attempt to find out what the facts
8 of this case. Instead, they have moved for a judgment on the
9 pleadings. So we have to look at what the pleadings actually
10 say. And what they show, quite clearly, is that they are
11 certainly not entitled to judgment on the pleadings. But in
12 fact, what we're talking about is in Robin Land, in 2005 and
13 2007, took an assignment of the identical integrated executory
14 agreement, the STB transaction that Arch and STB entered into
15 in 1994. And what they want to do now is cherry pick, plain
16 and simple. They want to take what is listed as the asset, the
17 leases under the asset purchase agreement, and they don't want
18 to pay a material part of the consideration, which is listed as
19 the consideration for that asset under the asset purchase
20 agreement.
21 Now, we heard about the leases, and we heard about the
22 terms of the leases. And what we did not hear is a single word
23 about the terms in the other agreements. Well, as our papers
24 are clear, as Your Honor quite correctly summarized, these are
25 integrated agreements, and that is our argument. So where we

1 must start is by determining whether these agreements are or
2 are not integrated. If they are as I put forward to you, Your
3 Honor, then we will look at the terms of all the agreements.
4 We do not simply just look at the terms of the leases. That is
5 starting at the end. I would stipulate that, if one only looks
6 at one of the agreements, one can never figure out if a set of
7 agreements is integrated, because you have nothing to know what
8 it is integrated with.
9 Now, as we set out in our papers very clearly, and
10 what is not in dispute, is what is at issue is what was the
11 intent of the parties. So what is the -- how do you determine
12 that? Well, as we list out on page 13 of our opposition brief,
13 there are a series of factors that courts look to to determine
14 if the parties intended to have an integrated agreement. It is
15 not simply a question of whether it is a breach or not,
16 although I will get to the fact that, and Mr. Martin was
17 waiting for this, so I don't want to keep him waiting, it is a
18 breach, and I'll get to that shortly.
19 So let's first look, the first factor is whether
20 separate consideration is given for the promise. Well, Your
21 Honor, I'll ask you to -- if you'd just look at Exhibit B to
22 the asset purchase agreement, and specifically, what I'm
23 pointing to is the section that's title purchase and sale,
24 section 2.01. There is a -- it says purchase and sale of
25 assets, (ii), the acquired assets, that's where the leases are

1 listed. Very next provision, section 2.02, consideration for
2 the acquired assets; (a), the purchase price; (b), additional
3 consideration for the acquired assets; (i) is the STB override
4 agreement; (iv) is the Ark liabilities undertaking agreement,
5 which is the agreement under which Ark assumed the obligations
6 under the leases. So the obligations to comply with the lease,
7 in fact, are part of a separate agreement; the Ark liabilities
8 undertaking agreement, which is an agreement that is in the
9 exact same section as the STB overriding royalty agreement,
10 which is specifically listed as consideration for the asset
11 which is at issue, which is the leases that they want to
12 acquire.
13 Now, the subject matter of the agreements --
14 identical. The relationship between the instruments, well,
15 clearly, they all work as a whole. Just looking at the
16 language makes very clear, the leases were one of the assets
17 that were being given, the override agreement, the undertaking
18 of the liabilities, and the purchase price were the
19 consideration given for that asset, among others.
20 Whether the instruments referenced each other -- all
21 over the place. Each of these agreements has countless cross
22 references which we list out in part on pages 15 and 16 of our
23 opposition brief. But in particular, aside from --
24 THE COURT: Hold on just a minute. Somebody on the
25 phone doesn't have their mute button pressed. We're getting a

1 lot of feedback. Could everybody please check their phones?
2 Sorry to interrupt you, but that's disturbing.
3 MR. LUFT: No, Your Honor. Thank you for --
4 THE COURT: All right. Sounds like we're quiet.
5 MR. LUFT: As I was saying, there are numerous cross
6 references, Your Honor. Whether the various promises were
7 assented to as a whole, the documents made quite clear that
8 they were. They are the consideration for one another. There
9 is no indication otherwise.
10 Whether obligations are due at the same time to the
11 same person; the obligations under the STB override agreement
12 are due at the same time as the royalties under the leases, and
13 it's incurred when the coal is mined. Robin Land's obligation
14 to pay the STB override ends when they stop mining coal under
15 the leases, plain and simple. The parties to the STB
16 transaction were identical; they were Arch and STB.
17 Now, Robin Land points to the fact that the lessors
18 are different. And I will tell you, Your Honor, that is
19 irrelevant. The leases are assets which were being sold
20 pursuant to a larger agreement. If you were to take Robin
21 Land's position, then any time a lease is sold as an asset part
22 of an agreement, you would say you can never have an integrated
23 because the underlying lease has a different name on it. It
24 simply is not relevant.
25 And of course, all the documents are dated October

1 31st, 1994, which my friend points to and says our only
2 argument is contemporaneous. Well, I stipulate to Your Honor,
3 we certainly do have the fact that these agreements were
4 entered into contemporaneously. As I've just pointed out, and
5 was quite clear in my papers, there are seven other reasons
6 that courts look to for why. And while they point to the fact
7 that contemporaneous alone is not determinative, I would say
8 the fact that all eight factors are in our favor should be
9 determinative.
10 Now, Your Honor, the second thing that has been
11 leveled against us is that we are trying to cut the line, that
12 we are trying to get a prepetition claim turned into an
13 administrative claim. Your Honor, this is an administrative
14 claim because it deals with a post-petition liability that they
15 are incurring for their benefit. They were paid up under the
16 STB override agreement as of the time of the bankruptcy. This
17 is all coal this is being mined and sold after the bankruptcy.
18 They are making -- they don't have any obligations to mine.
19 They are making a choice that they wish to mine because they
20 believe it will incur a benefit to them.
21 And Your Honor, I would direct the Court to In re
22 Athens/Alpha Gas Corp., 332 BR 578 (8th Cir. BAP 2005), which
23 is directly on point. There, there was a profit sharing
24 agreement between someone who became a debtor, and a partner,
25 with regard to mining of oil. They had a prepetition agreement

1 as to the splitting of the assets. Post-bankruptcy, the debtor
2 refused to give over the portion of the money that was owed to
3 the other party. The Court determined, "Their claim is against
4 post-petition assets which were derived from the post-petition
5 production and sale of oil and gas." Regardless of whether
6 these are found to be integrated contracts, which they should
7 be, the simple fact is, what they are seeking a claim for is an
8 administrative claim.
9 Now, Your Honor, I'd like to deal quickly with some of
10 the other arguments that were made by Mr. Martin.
11 We've talked about this issue about why one doesn't
12 only look at the leases. And the fact is, once we sit there
13 and, if you look and determine these are integrated contracts,
14 then you look at all the terms of all the agreements and you'll
15 see they are integrated.
16 Similarly, he talked about the breach. Now, the test
17 for integration is intent. And the way to determine intent is
18 to look at the eight factors I spoke to. It is not a simple
19 one-factor test of looking at if a breach of one is a breach of
20 the other. But Your Honor, I would put to you, look at the
21 asset purchase agreement. The STB override was expressed
22 consideration for the asset of the leases.
23 And I'll note, in STB's papers which we have to work
24 from, they note that from 2005 to the present, Patriot paid
25 thirteen million dollars under the STB override. Now, that's

1 not counting the eleven years prior to that when the STB
2 override produced money.
3 Now, they only got eleven as a purchase price.
4 Clearly, not paying far in excess of thirteen million dollars
5 of consideration is a material breach. And if they hadn't paid
6 under it, they would have been in breach of the asset purchase
7 agreement. And of course, we could have gone to court and
8 received a judgment that they owed us money damages. And if
9 they could not comply with money damages then, of course, we
10 would have to seek an additional remedy such as removing them
11 from the land, which is something the leases, in fact, actually
12 contemplate, where they say, where money damages is
13 insufficient, then you can go to further remedies.
14 Now, they mention about the fact that Lawson Heirs
15 said that they don't -- the override is not an element of their
16 contract. Your Honor, Lawson Heirs said nothing about the STB
17 override. They were silent. That does not make it such that
18 they can interpret to mean otherwise. They want to take that
19 discovery, they can. And with regard to what is effectively
20 ninety percent of the land which is owed by my client Kelly-
21 Hatfield, I promise you they absolutely object to this.
22 Now, with regard to the idea that this is a promissory
23 note, Your Honor, it is not. A promissory note is an
24 unconditional promise to pay a sum certain. This is not a sum
25 certain. They owed no money as of the date of bankruptcy.

1 When they mine a piece of coal, that is when they incur a debt.
2 There is nothing about this that looks like a promissory note
3 at all. There is no amount that was owed prior. These are new
4 debts.
5 And with regard to the Union Financial Services Group
6 case which he cites, I would just point out, Your Honor, that
7 is a case about a debt in which it was already subordinated.
8 The bankruptcy was contemplated, and the holder of the debt had
9 agreed that that debt would be subordinate to all other claims.
10 It is completely irrelevant to the facts at hand.
11 The fact is, if you looked at the STB override
12 agreement by itself, there is no consideration for it. We
13 pointed that out in our brief; Your Honor understood that. So
14 what did they say in response in their reply? They said,
15 "Well, look at 1994 under the asset purchase agreement what the
16 consideration was." Well, Your Honor, the consideration under
17 the asset purchase agreement was the leases. That's exactly
18 what it was.
19 Finally, Your Honor, they talk about the fact that the
20 asset purchase agreement is no longer in effect in footnote 2
21 of their reply brief. Your Honor, if that was the case, then
22 not only would their argument about the STB override would have
23 no consideration in their view and, thus, must be void, which
24 we know is not how we should interpret contract so as to make
25 them void, but the same thing would apply to the asset purchase

1 agreement. They said, "Of course we took an assignment of it,
2 but it was complete and there was no obligation." So I guess
3 that was just another contract that didn't mean anything.
4 The fact is, Your Honor, the way we present the case,
5 if you looked at it, it was -- all the pieces fit together. If
6 you look at it as an integrated contract, they all make sense.
7 The way Robin Land presents it, it's like a jigsaw puzzle where
8 you got the six extra pieces on the outside, and you claim
9 they're done.
10 I'll tell them the same thing I tell my four-year old,
11 it's not complete until all the pieces are put together; that's
12 how a puzzle works.
13 Your Honor, at this point, I think STB would like to
14 speak on this issue.
15 THE COURT: All right, thank you.
16 All right, then counsel for STB?
17 MR. MOEDRITZER: Your Honor, Mark Moedritzer on behalf
18 of STB Ventures. I'm actually going to spend ten minutes
19 addressing the motion for judgment on the pleadings, and then
20 Mr. Bunn's going to spend ten on the motion to compel.
21 THE COURT: All right.
22 MR. MOEDRITZER: And Mr. Luft, I'm not going to repeat
23 what he said. In some respects he stole my thunder in terms of
24 the integration between the contracts.
25 I do want to point, Your Honor, obviously as you know

1 we are at the stage of a motion for judgment on the pleadings
2 and courts generally find that whether a contract is integrated
3 is not appropriate for a determination on a motion for judgment
4 on the pleadings and the reason is that you have to consider a
5 lot of factors, and it's fact-based, and if there's any
6 ambiguity at all you have to look at the intent of the parties,
7 and I just want to quote quickly from a New York case. "The
8 factors that weigh in determining whether a contract is
9 integrated are necessarily fact-based and not appropriate for
10 determination on a motion to dismiss." That's All R's
11 Consulting v. Pilgrim's Pride, Southern District of New York,
12 2008. And so that, Your Honor, is the first reason why the
13 motion for judgment on the pleadings should be denied.
14 The second reason is that there is ambiguity. And,
15 actually, I take that back. I would say, at best for RLC
16 there's ambiguity. At worst for them, as Mr. Luft has pointed
17 out, if you look at the eight factors almost -- either all of
18 them or almost all of them favor that these contracts are
19 integrated. There was no severance consideration for the STB
20 override agreement. It's the same subject matter. It deals
21 from leasing the real estate in West Virginia and mining coal
22 from that property. The leases and the STB override agreement
23 both have the same date and there's numerous examples of cross-
24 referencing between the leases and the STB override agreement.
25 Just as an example I'll quote from the STB override

1 agreement. It says that "It shall take effect as of the
2 closing date and shall continue for a period co-extensive with
3 the primary term and any extension or renewal thereof of the
4 leases." So it's clearly and specifically runs concurrently
5 with the leases.
6 And I just want to briefly address RLCs arguments on
7 integration. I think what you'll find, and Mr. Luft mentioned
8 this, is what they've done, they don't like a totality of the
9 circumstances, which is the law under West Virginia, and so
10 they try and pick upon -- they try and seize upon single
11 factors and argue that those are not -- that those are
12 dispositive and therefore they win. And it's clear under West
13 Virginia law that that's not the way to do this. And, for
14 example, their cross-default argument, whether they argue that
15 a breach of the STB override for them has to be a breach -- or,
16 I'm sorry, a failure to perform has to be a breach excusing the
17 performance of the other side to the contract. And if you look
18 in their papers they rely on the Interstate Bakeries case for
19 that.
20 And, Your Honor, that just doesn't apply here. That
21 was when you're looking at a situation where you've got a
22 single contract and the courts say, and the courts agree on
23 this, that if you've got a single contract, if the failure to
24 perform on one side doesn't excuse performance on the other,
25 then it's an executory contract, but that was a single

1 contract. They're trying to take that and apply that to a
2 situation where we've got integrated contracts and that's just
3 not the law, and we know that the law is under West Virginia
4 law you have to look at all these different factors.
5 And, Your Honor, the second thing that they do is that
6 they try and seize upon a single factor, is that they say that
7 there's an entire agreement clause in the STB override
8 agreement and therefore that has to mean that it cannot be
9 integrated with other contracts. Well, if you look at the
10 entire agreement clause it's really not that. It's very
11 limited. And it says that it's only limited to the amount of
12 the overriding royalty payment. It doesn't say that it's an
13 entire agreement irrespective of any other contracts. And, in
14 fact, if you look deeper, Your Honor, the STB override
15 agreement actually references all the other agreements, the
16 leases, and the asset purchase agreement several times.
17 And then finally, Your Honor, I do want to point out
18 that we've talked about the fact that we're at the stage where
19 no discovery has allowed to be taken, and I do want the Court
20 to be aware that STB sent out discovery requests,
21 interrogatories, document requests, and requests for production
22 in February to RLC. We got back the responses. They responded
23 to the request for admission, but there was no response to the
24 interrogatories and the request for production.
25 And, Your Honor, they unilaterally made the

1 determination that it wasn't appropriate until the Court ruled
2 on this motion. And I'll quote from their response. They
3 said, "Discovery will not be necessary in this action unless
4 the Court identifies an ambiguity in the contracts at issue in
5 Robin Land's motion." And so, rather than conferring with Your
6 Honor, they unilaterally made that determination. And we'll
7 have a meet and confer, Your Honor, and we'll address those
8 issues, but I wanted you to be aware of that. Thank you, Your
9 Honor.
10 THE COURT: Thank you.
11 MR. BUNN: Good morning, Your Honor, my name is Joe
12 Bunn. I'm here on behalf of STB Ventures.
13 THE COURT: Good morning.
14 MR. BUNN: If you're disinclined in granting Robin
15 Land Company's motion for judgment on the pleadings, then I'd
16 like to offer you an alternative. The alternative being STB's
17 motion for judgment on the plea -- or motion to compel payment.
18 As you're aware, before Robin Land can meet its burden
19 for motion for judgment on the pleadings it must prove, beyond
20 doubt, that the counterclaims asserted by STB are without
21 merit. So if you deny that, then you are conceding that STB
22 and Arch, for that matter, have made a colorable argument. If
23 that's the case, Your Honor, then they should be entitled to
24 protection under 365(d)(3) until an ultimate resolution of this
25 case.

1 If they are not given protection under 365(d)(3),
2 through the form of ordering Robin Land to pay the STB
3 directly -- the STB override directly to STB or into an escrow
4 fund, then the STB is exposed to a level of risk that is
5 disproportionate to the level of risk exposed to other
6 beneficiaries of nonresidential real property leases. And
7 that's not just a possibility, Your Honor, that is -- there's a
8 substantial likelihood that STB may be exposed to that level of
9 risk.
10 In the 2012 10-K of Robin Land Companies parent,
11 Patriot Coal Corporation, Patriot stated that there is a
12 substantial likelihood that Patriot and its related
13 subsidiaries may default under their debtor-in-possession
14 financing facility on or before the third quarter of this year.
15 If that happens and STB does have a colorable claim, then STB
16 will be hung out to dry, unlike some of the other beneficiaries
17 of nonresidential real property leases.
18 And that's just injustice, Your Honor. We can simply
19 order them to pay the STB override to STB, pending an outcome
20 of this case, and prevent that injustice from happening. Or,
21 alternatively, we can deposit those funds into an escrow fund.
22 And whoever the prevailing party is in this case can receive
23 those funds once that issue is determined.
24 Now, aside from that, Your Honor, STB has provided
25 sufficient evidence, I believe, to determine this issue is

1 proper as a matter of law. As Mr. Luft and Mr. Moedritzer
2 indicated there is no recital of consideration in the STB
3 override agreement. Thus, one must infer that they are taking
4 on something, some kind of responsibility, some kind of benefit
5 or they wouldn't be entering into the contract to begin with.
6 In fact, it would be a voidable contract.
7 So based on that fact, the STB override agreement and
8 both leases, the Lawson Heirs lease and the Kelly-Hatfield land
9 lease are integrated. In addition, the STB override agreement
10 is a covenant running with the land of the Kelly-Hatfield land
11 lease. It meets all the elements, Your Honor, under West
12 Virginia law.
13 Under West Virginia law there must be a privity of
14 estate between the landlord and the holder, there must be a
15 covenant that touches and concerns the land, and the parties
16 must have intended for it to run with the land. The 2007,
17 partial assignment and assumption agreement meets all those
18 elements. Our Ark Land KH, Inc., the landowner was a party to
19 that agreement and so is the current possessor Robert Land
20 Company. Therefore, there is a privity of estate.
21 In that document, the 2007 assignment and assumption
22 agreement, the current holder, Robin Land, promised not only to
23 assume all the obligations under the lease, but to pay the STB
24 override for the duration of the lease. If they're promising
25 to pay an overriding royalty on coal mined from the land, coal

1 is a physical component of the property. Without question it
2 touches and concerns the land.
3 And finally, Your Honor, the parties intended for it
4 to run with the land, because the landowner's consent to the
5 current holder's assumption of the leases was contingent upon
6 them agreeing to pay to the -- pay the overriding royalty.
7 Therefore, the STB overriding agreement is an incorporated
8 condition of the leases.
9 Third, Your Honor, the STB override agreement is a
10 constructive condition of the leases. As you may be aware,
11 under West Virginia law if the holder of real property holds
12 that property in such a manner as to -- as would be deemed
13 unconscientious, then a constructive trust will be imposed on
14 that property until the taint that creates that unconscientious
15 holding is removed.
16 I think you heard earlier from Mr. Martin that the
17 asset purchase agreement required payment of the STB override
18 as consideration. Well, certainly, they are receiving an asset
19 for which they have not paid for. If they are able to reject
20 the STB override agreement and keep the leases, without
21 question that is unconscientious and constructive trust should
22 be imposed on both leases until the STB override agreement is
23 satisfied in full.
24 As to Mr. Martin's standing argument, I would like to
25 just make a couple of observations. He's arguing that unless

1 you're a landlord you cannot move a court to -- of any action
2 under 365(d)(3). That is simply not the case. In STB's reply
3 there were three cases specifically cited In re Three A's
4 Holdings, In re Esmizadeh, and In re Wingspread. In each of
5 those cases, the Court allowed a motion to proceed that was
6 initiated by a nonlandlord party.
7 In fact, in In re Esmizadeh, the claimant was arguing
8 that a constructive trust was imposed on a lease or real
9 property. And the Court determined that the third party
10 certainly had standing, because if they did prevail on that
11 claim, then the debtor would no longer have title to those
12 assets whatsoever. It would not even be a part of the estate.
13 For that reason, Your Honor, STB does have standing.
14 Not only does it have standing, it has provided a colorable
15 case that allows it to receive relief under 365(d)(3).
16 Accordingly, STB specifically and respectfully requests that
17 RLC be ordered to pay the STB override directly to STB or into
18 an escrow fund pending a final outcome of this case, that
19 assumption or rejection of the Lawson Heirs lease or the Kelly-
20 Hatfield lease be stayed until a final outcome of this lease,
21 and such other relief as this Court deems just and necessary
22 under the given circumstances.
23 That being said, thank you much for your time, Your
24 Honor. I wish you well.
25 THE COURT: All right. Thank you. All right. Then

1 the debtors may have fifteen minutes for rebuttal or less. You
2 don't have to use it all up.
3 MR. MARTIN: I'll be much less than that, Your Honor,
4 because --
5 THE COURT: All right.
6 MR. MARTIN: -- I didn't hear anything on the one
7 thing I was listening for, and I know you were too, so I really
8 don't have all that much to say other than to say we are in
9 agreement on a lot here.
10 We agree that the STB override was part of the
11 consideration that Ark Land paid to STB in 1994 for a whole
12 bunch of assets relating to a mining operation including the
13 leases, but that's the nature of the rough justice of
14 bankruptcy. There are a lot of creditors out there who have
15 sent their assets or their services to the debtors, and they're
16 not going to get paid in full.
17 The whole point here is to make sure that all
18 creditors of the same class get paid on par. They don't want
19 to get paid on par with other creditors of their class. They
20 want to jump the line and get paid 100 cents on the dollar.
21 We cite a whole series of cases that are directly
22 analogous to this, where there is a nonexecutory payment
23 obligation in exchange for assets including leases. They're in
24 our papers. In re Plitt, In re Pollock, In re Chesapeake,
25 Union Financial, Craig, all of them are dispositive here. They

1 don't cite a single case where a court has concluded that a
2 debtor can assume a transaction. Debtors can't assume
3 transactions. They can assume contractual obligations and only
4 when there is a material contractual obligation being performed
5 in exchange. We don't have that here.
6 The landlords cannot require us to pay the STB
7 override. That means the landlords cannot stop performing on
8 the leases if we stop paying the STB override. That's the end
9 of the inquiry here. There's no doubt that the STB override
10 and the leases are related. They were entered into as part of
11 the same transaction. The STB override is part of the purchase
12 price for those leases. It references the leases. The coal
13 that is the basis for the royalty is coming from the land
14 covered by the leases.
15 But the question under Section 365 is nonpayment of
16 the STB override, a material breach of the leases such that the
17 landlords could stop performing. The answer to that is no, on
18 the face of the contracts and that's why no discovery is needed
19 here, Your Honor. The answer is clear as a matter of law.
20 I'll sit down. Thank you, Your Honor.
21 THE COURT: All right. Thank you. All right. Arch
22 has two minutes for rebuttal.
23 MR. LUFT: Your Honor, I listened for one thing during
24 Mr. Martin's presentation as well. I listened whether he'd
25 have any answer as to why these contracts are not integrated.

1 He offered none. He told you a lot about how they're all
2 interconnected and how they relate to each other, but then he
3 just stopped his analysis. He didn't say, but here's why even
4 though they're all interrelated you shouldn't view them as
5 integrated. Well, I gave eight factors which the courts look
6 to for why they're integrated. I didn't hear a single response
7 for why any of those is not accurate.
8 Now, he talks about rough justice. Now, I put before
9 the Court that the Bankruptcy Code is not intended to be a
10 stick to just hit people with. There are rules and there are
11 order. He says we should be treated with creditors of our
12 class. We agree. We have an executory contract, and they have
13 the right to assume it or reject it. If they find the terms of
14 the STB override too onerous they may reject the contracts.
15 They don't have to take them. I can't make them take these
16 contracts, but if they want to take on the benefits of the
17 leases, then they need to pay the consideration for the leases.
18 They're asking to take on contracts so that they can pull
19 mine -- pull coal from the ground and mine it. They're asking
20 to do this all post-bankruptcy under the expressed terms of the
21 asset purchase agreement, and the STB override agreement, which
22 made a consideration for that. When they pull coal from the
23 ground and sell it, they immediately owe some of that money
24 back to STB. It couldn't -- so that is who we should be
25 treated like, everyone else who has an executory contract.

1 Moreover, Your Honor, as I said before, we should be
2 treated as though we have an administrative claim because this
3 is all post-petition activity for the benefit of the estate.
4 Thank you, Your Honor.
5 THE COURT: Thank you. All right. STB.
6 MR. BUNN: Thank you, Your Honor, just a couple of
7 quick points. Mr. Martin stated that 365(d)(3) is styled and
8 only regards material breaches of leases -- of nonresidential
9 real property leases. It's all obligations of nonresidential
10 real property leases. And as previously stated, the STB
11 override agreement is an integrated, incorporated, and/or
12 constructive condition of a nonresidential real property lease.
13 For that reason, it should be treated the same as a
14 nonresidential real property lease under 365(d)(3).
15 Now, the other point I want to touch on, very briefly,
16 is the idea of escrow. They're going to claim that they're
17 prejudiced, that we're trying to jump ahead of other creditors.
18 Well, if you put the funds into an escrow, then the money's not
19 going anywhere. All it is doing is going into a dedicated fund
20 to go to whoever the prevailing party is in this case.
21 So I offer that as an alternative that I hope you will
22 consider. Thank you very much.
23 THE COURT: All right. Thank you.
24 MR. MARTIN: Your Honor, I'm sorry, just two seconds.
25 I haven't addressed this escrow point, because I think it's

1 baseless. There is no precedent for that. None. They cite
2 two cases which they suggest can support a conclusion by the
3 Court to require us to pay something that is in dispute. Those
4 case involved leases where the dispute was over whether they
5 were in fact true leases under Section 365(d)(3).
6 In those cases, there was a presumption that the
7 leases were leases, because they said this is a lease on the
8 front of them. And so, the debtors were required to act as if
9 they were leases while that issue was being litigated.
10 There is no presumption that the STB override is an
11 obligation of the leases. None. And that's why this argument
12 about escrow and paying until the litigation is done is
13 unsupportable. So I just wanted to address that point. Thank
14 you, Your Honor.
15 THE COURT: All right. Thank you.
16 All right. Thank you for the presentation. I'll take
17 the matter under submission. I'll also take the objection of
18 Arch Coal and STB of the debtor's motion for authorization to
19 assume or reject unexpired leases on nonresidential real
20 property under submission, and I'll issue written order and
21 findings of facts and conclusions of law on all of those
22 matters.
23 All right. I believe next we have come to the motion
24 to extend exclusivity. Again, I have reviewed the debtors'
25 motion, and reply, and the objections filed by the Committee,

1 U.S. Bank, the UMWA, Aurelius and the Knighthead, and the
2 Wilmington Trust. I will collectively summarize the objections
3 as follows.
4 A path for debtor's emergence from bankruptcy will be
5 best served in the opinion of the objectors if exclusivity is
6 terminated and more parties are therefore permitted to go
7 forward and seek the necessary third party investor and
8 ultimately propose competing plans because this will be
9 inducive of everybody cooperating to ultimately devise a
10 consensual plan.
11 And, moreover, the debtors have not expended enough
12 energy in the interest of most objectors towards searching for
13 the necessary third party investor and, as such, continued
14 exclusivity will be futile, because the key players here,
15 particularly the UMWA, the funds, and the committees object to
16 exclusivity, which increases the likelihood that no plan
17 proposed by debtors will be consensual or will be ultimately
18 confirmed by this plan. There is also some concern that
19 debtors are yet to prepare a draft plan with sufficient
20 background information for key parties to evaluate.
21 Creditor U.S. Bank also makes it clear that if
22 exclusivity is extended and the Chapter 11 trustee is
23 appointed, the skewed consequences will be that only debtors
24 will be able to propose a plan that provides for substantive
25 consolidation of all 99 debtors while other entities will be

1 limited to proposing a plan concerning the nonobligor estates.
2 While it is the debtors' motion I'll first call upon
3 the objectors to provide any comments in addition to those
4 contained in their papers if they deem appropriate. First,
5 I'll hear from the Committee and allow them eight minutes or
6 less for their comments.
7 MR. MEYER: Thank you, Your Honor. For the record,
8 Tom Meyer of Kramer Levin, co-counsel with Carmody MacDonald to
9 the official committee of unsecured creditors. You have well
10 summarized most of what I had all ready to say, so hopefully I
11 can take less than eight minutes.
12 Debtors' reply brief claims that no party has made a
13 plan proposal to them. That is both incorrect and incomplete.
14 The committee's professionals outlined elements of a plan to
15 the debtors' weeks ago, including: One, the offer of stock and
16 reorganized Patriot to the union retirees. If Patriot is to
17 reorganize at all it has to pay the retirees in new stock that
18 can be sold to pay their medical benefits or some portion
19 thereof.
20 Two, the payment of the union's pension plan over time
21 needs to happen, because otherwise the pension claim could be
22 so large that the retirees can't get enough stock to pay any
23 meaningful amount of medical benefits. And it was only after
24 our discussion that the debtors made their last proposal to the
25 union which included these elements, stock for the retirees and

1 payment over time of the pension plan.
2 As Your Honor noted the proposal was incomplete,
3 because it didn't have some critical information. That
4 information was the value of the stock that was offered. The
5 debtors had to put a value on the stock to show that union
6 retirees were getting enough, and the debtors had to put a
7 value on the stock to show that union retirees were not getting
8 too much, and their failure to value the stock produced the
9 creditor objections from every point of the compass that you
10 see in today's hearing. Everybody opposes extension of
11 exclusivity, because nobody know who's getting the short end of
12 the stick, and every objector fears that it's getting the short
13 end of the stick and by the time it finds out it will be too
14 late. The debtors have asked for a 120-day extension. By the
15 time that's up they'll be in default under their DIP and that's
16 why we say, all of us say, that we're all of us being held
17 hostage, not because the debtors have a plan they're insisting
18 on, but because they're delaying plan discussions until it's
19 too late for any party to do anything, but take what the
20 debtors propose.
21 The debtors have chosen this path. They could value
22 stock and file a plan based on that value. As Your Honor has
23 noted, we have complained about the failure to locate a third
24 party investor. The debtors reply states that they have not
25 turned away any interested investor. We don't believe it

1 alleges they have sought any. The only third party investor
2 that we know of is one of our own creditors who surfaced before
3 these Chapter 11 cases were commenced.
4 Second, the debtors could have valued the stock using
5 financial analysis and this is important, because it meant they
6 could have, in our view they should have, valued the union
7 companies and the nonunion companies. And they could have said
8 to the union, look we're offering you what your interest in the
9 union companies is worth, and they could have said to the
10 senior noteholders the unionized debtors are a piece of the
11 puzzle. You need them to refinance the DIP, the Coal Act
12 claims, the environmental claims, the pension claims.
13 So Patriot has to stay together and the union has to
14 get value from Patriot as a whole, but so long as the union
15 doesn't get more than the value of its interest in the union
16 debtors you, senior noteholders, don't have a beef. The
17 debtors could have done that, but they didn't, because as far
18 as we know they don't have a value for the union and the
19 nonunion debtors.
20 We actually have a valuation and process. Our
21 financial advisor Houlihan has generated ranges of indicative
22 values for the union and the nonunion debtors, and preliminary
23 ranges, and I stress the phrase preliminary, ranges of
24 recoveries for the union retirees, the union pension plan, the
25 trade, senior noteholders, and the parent company noteholders.

1 Now, the committee is a real diverse bunch. We got
2 the union, we got the union pension plan, we got a trade
3 creditor, we've got the senior noteholders indentured trustee,
4 and we've got the parent company noteholders indentured
5 trustee. And I will not tell you that we have consensus for a
6 plan inside the committee room, because we don't. And we also
7 don't have exit financing lined up to take out the DIP. But
8 with respect to consensus, I think we're a lot closer than the
9 debtors are, because we are actually talking about value, and
10 allocations, and real plan issues based on the assumptions and
11 projections we get from the debtors. The debtors could be
12 talking about that with the relevant different constituencies.
13 As far as we know there hasn't been much of that.
14 With respect to exit financing, it's tough for any
15 party to get attention of lenders or investors if the party
16 can't file a plan. It's better to have multiple parties
17 looking for lenders and investors than no one.
18 So in closing I submit that the debtors have failed to
19 carry their burden, and I want to stress that. I think
20 sometimes it's carelessly said we're talking about termination
21 of exclusivity. That's not what's happening here. It's the
22 debtors' burden to justify extension of exclusivity. It's
23 their burden to make a record. We ask that the Court not take
24 as evidence statements that are merely argument.
25 For example, the debtors argue the termination of

1 exclusivity will damage the debtors and cause market and
2 creditor confusion, but they offer no evidence or even any
3 particulars. I suspect that phrase appears in every
4 exclusivity pleading that Davis Polk every writes.
5 The debtors argue that no third party will agree to
6 invest or lend before the 1113, 14 proceedings are resolved.
7 They offer no evidence that this is true, and we disagree with
8 it. The debtors say they haven't turned away any investor,
9 they fail even to allege that they've looked for one. The
10 debtors describe their relations with the committee as cordial,
11 and they are. We've had productive discussions with the
12 debtors, and we hope those discussions will continue.
13 Cordiality doesn't mean that we agree on everything, and it
14 shouldn't. We disagree on exclusivity. Our previous
15 agreements are not justifications for granting the debtor
16 relief.
17 Finally, the debtors describe a list of
18 accomplishments, and we don't deny them, but we don't think
19 that's a sufficient record. Much of what the debtors referred
20 to is frankly ordinary course, schedules, rejection contracts,
21 analysis of claims, and many of them are operational which is
22 no criticism, we do not criticize operating management for
23 getting the savings. Management has had an operation plan for
24 the savings and management is implementing that plan and
25 there's nothing in the debtors papers that shows why a Chapter

1 11 plan could not have been done concurrently.

2 The Court should allow exclusivity to lapse so that
3 parties other than the debtors, the committee, the senior
4 noteholders, the union could look for money without the
5 impediment of exclusivity. Thank you.

6 THE COURT: Thank you. All right. Now I'll call upon
7 the UMWA. Mr. Perillo, you have four minutes to tell me any
8 additional comments if you deem it appropriate.

9 MR. PERILLO: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. PERILLO: I want to identify myself as the party
12 getting the short end of the stick, so I alleviate Mr. Meyer's
13 confusion in that regard. Like Mr. Meyer, my client did
14 propose a term sheet to the debtors in negotiations a couple of
15 months ago. They rejected it, but it did happen.

16 Regarding the debtors point on certainty, I simply
17 want to say to Your Honor that the 1113, 1114 proceedings are
18 not what is causing uncertainty. What's causing uncertainty is
19 the parties want to know what the labor deal is and there is
20 not labor deal yet. Regardless of how the Court rules on
21 Friday next or whatever day that the Court does rule, that
22 uncertainty will not be alleviated. The parties will still
23 want to know the terms of the labor deal and while the Court
24 can reject an agreement, the Court cannot impose new terms.

25 If the debtor achieves what it is asking for next

1 Friday, the uncertainty will get worse rather than better, and
2 lenders will be more reluctant, not less reluctant, because
3 there will no longer be a no-strike obligation and the union is
4 not obligated to strike that day, or that week, or even that
5 month. The union could time the strike to fall in the middle
6 of exit financing negotiations. So the certainty issue is no
7 reason to extend exclusivity.
8 The last thing I will say, Your Honor, is the parties
9 have made some positive steps in recent days, which causes me
10 great optimism. All of those steps have been made on or after
11 April 10th. What happened on April 10th? That was the day the
12 committee told the debtor that it wouldn't support its request
13 for extension of exclusivity.
14 So life is more interesting when both parties are
15 riding on outside of the rollercoaster, rather than just one.
16 The union is on the outside of the rollercoaster hanging on for
17 dear life, and if the debtor was on the outside with us hanging
18 on for dear life we might actually achieve a deal sooner.
19 Thank you.
20 THE COURT: Thank you. All right. Now I'll call upon
21 Aurelius and Knighthead to make any additional comments for
22 four minutes or less, if you all deem that appropriate.
23 MR. STRASSER: Good afternoon, Your Honor.
24 THE COURT: Good afternoon.
25 MR. STRASSER: I'm Alan Strasser on behalf of Aurelius

1 and Knighthead.
2 It is important to know that what's at issue here is
3 not whether the debtors should be prevented from offering a
4 plan, but whether someone else should have the chance to
5 present one also. I took Mr. Perillo's point about the
6 rollercoaster to illustrate something that I think the debtors
7 have underplayed in their motion and that is the urgency with
8 which someone has to find a suitable exit strategy for this
9 company.
10 The debtors acknowledged that their business condition
11 is fragile; they have reported publicly that they may default
12 on their DIP as early as the beginning of July, only -- not
13 much more than two months from now. Everything about the pace
14 at which they're proceeding suggests that the company is
15 stumbling to a position from which the rest of us will not be
16 able to recover.
17 And so, rather than have the debtor be preoccupied
18 with the many activities that it describes in its motion, and
19 we see the crowd here, we see the number of lawyers here, we
20 look at the docket and see that we're closing on 3,800 entries
21 and that suggests to me maybe the debtors need some help.
22 Maybe they need someone else to be looking for exit financing,
23 because they have so much to do. But even the quantity of
24 activities that the debtors are pursuing I think does not
25 address what is the central issue and that is the most

1 important thing that the debtors have to do is to straighten
2 out, by their own admission, their labor and retiree issues and
3 until they do that it is hard to understand how we'll progress.
4 So it is well and good to say that we're very busy,
5 but if you don't address the most important issue, then it's
6 hard to think that there's going to be a confirmable plan.
7 When the debtors finally did make proposals to the union about
8 to resolve these issues they made them in such a way that they
9 have provoked the union to the position Mr. Perillo just
10 expressed, which is that the union is threatening a strike,
11 perhaps strategically timed, but that to me suggests that
12 there's not going to be a consensual plan.
13 I would add to that that the initial -- not the
14 initial, the fourth proposal that the debtors made to the union
15 was one that threatened to give away the property of the senior
16 noteholders. And that hardly made us more interested to agree
17 to a plan either. That suggested that the debtors were not
18 interested to pursue their fiduciary duties.
19 So in terms of the ultimate question for the Court,
20 which is are the debtors more likely, if they are granted
21 exclusivity, to come up with a confirmable plan, I don't think
22 the Court can have any confidence that that is going to happen.
23 So with that, Your Honor, unless the Court has questions I have
24 nothing to add.
25 THE COURT: All right. Thank you. All right. Now I

1 will call on Wilmington Trust to make any additional comments.
2 MR. SILVERSTEIN: Thank you, Your Honor. Paul
3 Silverstein, Andrews Kurth, Wilmington Trust, the senior note
4 trustee. I'll be very brief, Your Honor.
5 The senior notes, as you know, are unconditionally
6 guarantied by each and every debtor in this case. They're
7 obligations of the principal debtor. First, I need -- and this
8 applies to all matters that are on today. I need to correct
9 the statement in the debtors' pleading that Wilmington is being
10 directed by Aurelius. And that's not accurate as we made clear
11 in footnote 2 of our pleadings. Wilmington is acting in its
12 capacity under its indenture to protect the interest, if you
13 will, of all senior note holders.
14 Wilmington believes that permitting other parties-in-
15 interest to propose a plan will move the process forward.
16 Allowing the debtors exclusive period to expire would create
17 the "positive tension", as case law talks about, and will move
18 these cases, we believe, towards a successful resolution sooner
19 than later.
20 The debtors argue that allowing exclusivity to elapse
21 will create chaos. There's no factual basis or predicate for
22 such allegation. The debtors don't have an entitlement
23 exclusivity. The debtors have a burden to extend it which they
24 have not met. Further, and finally, the suggestion that the
25 recent Code amendment limiting exclusivity in all circumstances

1 to eighteen months does not suggest the eighteen months is the
2 entitlement. There is no entitlement here.
3 Merely because the debtors' exclusivity is not
4 extended does not follow that the debtor cannot actively
5 participate in the plan process. And again, Wilmington
6 believes that the tension by not extending exclusivity will be
7 positive for these cases. Thank you, Your Honor.
8 THE COURT: All right. Thank you. Now I'll permit
9 U.S. Bank to make any comments, two minutes or less.
10 MR. SCHNABEL: Thank you, Your Honor.
11 THE COURT: Thank you.
12 MR. SCHNABEL: Good afternoon. For the record, Eric
13 Lopez Schnabel, Dorsey & Whitney, on behalf of U.S. Bank as
14 indenture trustee to the Holdco notes.
15 Your Honor, you did correctly characterize our what I
16 may call a conditional objection to exclusivity which, in
17 essence, that if Your Honor were to grant at any time the
18 trustee motion, that would per se, with regard to those
19 estates, terminate exclusivity and we think it should be an all
20 or nothing situation with that. But our papers say what
21 they're saying. Your Honor has that argument.
22 I only rise to add with respect to the debtors'
23 response that U.S. Bank as trustee is trying to guard against
24 nonconsolidation. We don't take a position at this time with
25 respect to consolidation of all ninety-nine estates or a non-

1 con plan, if you will. That's an issue that really should be
2 for another day. And so, we're not trying to guard against one
3 outcome or the other. We're trying to keep all options open.
4 And at this time, the debtor has the ability to propose a plan,
5 consolidated or not consolidated, for all ninety-nine estates.
6 The trustees appointed, that creates a division and that skews
7 the process. Hence, our conditional objection. And, Your
8 Honor, that's all we have.
9 THE COURT: All right.
10 MR. SCHNABEL: Thank you.
11 THE COURT: Thank you. All right. Now I call upon
12 the U.S. trustee to make any comments.
13 MS. LONG: Thank you, Your Honor. Leonora Long on
14 behalf of the United States trustee. As this Court's aware,
15 any exclusive period within which to file and confirm a plan is
16 a really important aspect of Chapter 11. It's very important
17 that the parties give the debtor the opportunity to negotiate
18 fairly with all the constituent groups. And it's for this
19 manner that we don't object to the motion.
20 But this doesn't mean we expect the debtor to linger.
21 If we thought that the debtor was not acting in good faith to
22 attempt to negotiate, we would bring the matter before the
23 Court in a variety of ways or perhaps even object to this
24 motion or request a shortening. But at this time, we don't
25 object to the motion and we feel the debtor needs this

1 opportunity to negotiate what it needs to negotiate.
2 There's sufficient tension in this case already. I
3 believe that the parties are aware -- I believe the parties are
4 aware of what they need to get done. And we look for them to
5 act. Thank you.
6 THE COURT: All right. Thank you.
7 All right. Now, Mr. Huebner, you've heard what
8 everybody has to say. You have twenty minutes to tell me what
9 you want me to know.
10 MR. HUEBNER: Okay, Your Honor. Thank you very much.
11 I'll see what I can do.
12 Your Honor, in essence, there are three objections to
13 our exclusivity request. One is from the official committee,
14 one is from the UMWA and one is from the senior noteholders.
15 They sort of style it as two but, of course, the 2019 belatedly
16 filed tells us that Aurelius and Knighthead had already a
17 majority of the senior notes and then we have their trustee
18 separately saying, well, I'm not technically controlled, so
19 sort of count us twice. I don't. I count them once. So there
20 are three objections.
21 U.S. Bank says just good for the goose, good for the
22 gander because 1121 automatically will lift exclusivity if
23 their trustee motion were granted. Our only request is if you
24 do that, it should be open for everybody.
25 Let's first take a step back and set the context

1 because I am really -- I'm going to be hitting, frankly, pretty
2 hard at some of the things that you just heard because I think
3 they really do not match either reality or communications to
4 the debtor or our experience to date.
5 First of all, we've had only one prior exclusivity
6 request. This is our second request in the entire case. We're
7 asking for 120 days more which, as we put in our papers, is
8 absolutely typical for a mega case of this size. You did not
9 hear anybody come back with any examples of cases of this size
10 or nature where exclusivity was terminated anywhere near nine
11 months into a multi-billion dollar case.
12 But, you know what, Your Honor? We didn't want you to
13 take our word for it. So we went back. And we looked at every
14 single case in the last five years with more than two billion
15 dollars of assets. The number of cases in which exclusivity
16 was terminated or not extended in less than a year, zero.
17 Every case ever where the debtor requested, of this size, in
18 modern history a request of a year or more, it was granted.
19 Now, this isn't a precedent thing, Your Honor. It's not like
20 the other case where we say they did it so you should do it.
21 Of course not. It's not controlling law. What it is, it's an
22 acknowledgment by all courts that when you have an ultra mega
23 case of this size and complexity, a lot of stuff has to get
24 done before you can talk intelligently about a plan.
25 In math, you can't solve an equation that has six

1 variables in it. You need to get it down to a manageable
2 number so that it is then solvable. And what you don't hear
3 from anybody which I'll discuss in a few minutes is that we
4 have rebut anybody's request to address issues because, in
5 fact, there's nothing timely that has not yet been addressed.
6 That is why the Code grants exclusivity to the debtors
7 from the beginning and why the case law is very consistent that
8 unless there is a pretty good reason to do so, extensions are
9 routinely granted.
10 And, Your Honor, by the way, looking back at those
11 cases, I just want to be clear, most of those are not labor
12 cases. And labor cases are even more complicated: a, because
13 the human issues are so painful and so real and require a deft
14 and thoughtful hand on multiple sides; but, two, because 1113
15 and 1114 set forth a really complicated statutory set of
16 requirements that stretch the time periods out extensively. If
17 you don't negotiate enough, you'll lose. If you don't provide
18 sufficient data, you'll lose. So labor cases are always
19 longer.
20 Your Honor, the objectors ask that they terminate
21 exclusivity so that they can start proposing a plan and seeking
22 financing. These requests would, in fact, greatly damage the
23 estate. It's just not that complicated to figure out why.
24 There are creditors who have wide and divergent views. There's
25 no certainty as to exit cash flows. There is no certainty as

1 to the labor situation. Mr. Perillo is telling you, and he has
2 lost no opportunity to do so, the union could strike and kill
3 the company. What credible investor that's going to talk about
4 putting hundreds of millions of dollars to work and spend
5 millions of dollars to do diligence, to apply legal analysis,
6 financial analysis, opportunity costs, would have months ago,
7 when there was complete uncertainty into Patriot's future, done
8 any of those things?
9 Your Honor, if it would help the Court, totally
10 unprepared, I will put Flip Huffard on the stand right now, the
11 totally senior brilliant, wonderful Blackstone banker guy in
12 this company to give you sworn testimony that market chaos,
13 market turmoil, market confusion, incredibly escalating
14 professional fees and serious risk to this estate would be the
15 absolute result of the objections being granted.
16 And you know what? I might even offer to put Mr.
17 Mazzucchi on the stand because I'm guessing that if I put
18 Houlihan up there and said, really? Really? You really think
19 that we should have already gone out? And with what business
20 plan? With what exit cash flows? And then I would say, Mr.
21 Mazzucchi, how many times did you tell the debtors that you
22 thought they were behind? Can you give me any examples of
23 people you brought that we refused to talk to? Can you give me
24 any examples of people you think we should be talking to and we
25 said no?

1 Your Honor, this exclusivity objection came as a total
2 surprise. As an officer of the court, I'm telling you, we
3 never heard from any party: please do X right now. You're
4 behind schedule on a plan. They talk about giving you draft
5 plans, giving us plan proposals. It's not true.
6 When Mr. Mayer described his plan proposal, he
7 described 1113 provisions. He's given a plan proposal that
8 said give the union equity, not a claim, and try to stay in the
9 pension plan. Well, first of all, we were just about ready to
10 do that because those are obviously good ideas and we've been
11 thinking about them for a long time. But what he doesn't tell
12 you is that it was a plan proposal for all the classes and the
13 intercreditor issues and the senior notes versus the converts
14 and how we come out on substantive consolidation and how we
15 settle those issues and how we come out settling the tens of
16 billions of dollars of intercompany claims where the analysis
17 about recharacterization and what the actual value and balance
18 sheets of these companies look like is still underway both by
19 the debtors and the committee.
20 So let me tell you what's actually happening. What's
21 actually happening is that there's no hostage situation here.
22 I'm sure Your Honor has read the cases in the twenty-four hour
23 a day/seven day a week month that you and your chambers must
24 have had. Hostage taking means the debtor is dug in on a
25 position, it's not going to move, negotiations are no longer

1 going to bear fruit, creditors disagree and something has to
2 break the logjam. The words are "log jam", the words are
3 "impasse", the words are "hostage taking".
4 What you don't see in anyone's papers are any
5 allegations that we're at an impasse because we're not; any
6 allegations that they're hostage taking because there isn't;
7 any allegations that there's a log jam because there isn't.
8 Somebody talked before -- they called us a four-year old. I
9 know, for the record, we're five and a half. We were very hurt
10 by that. Patriot is not only four years old. Right? They
11 talked about the jigsaw puzzle pieces. The analogy was not
12 very good there but it's actually pretty good here. You have
13 to have a storyline, Your Honor, to go to market. You have to
14 say here is the company we want you to put hundreds of millions
15 of dollars into.
16 The great news, Your Honor, is that we're actually not
17 that far right now from having that storyline. We're not that
18 far from the pieces being put together that actually enable us
19 to go to market in a more focused way.
20 But let me be clear. I don't want the record to
21 mislead in any way. We have been talking to financing sources.
22 We have made it clear to all parties that we will talk to
23 anybody that they identify. There has been no limitation on
24 any party to bring us financing sources. And, by the way,
25 shame on the committee because two and a half weeks ago, they

1 called me and said, you know, we'd like to loosen the confi so
2 that we can provide information more freely to potential
3 financing sources. I said great. Bring it on. Send me a
4 draft. We'll turn it immediately. I don't even have a draft
5 yet.
6 So all their statements -- you know, what they put in
7 their little footnote in their pleading is the issue is being
8 discussed. It's not being discussed. They asked. We said
9 yes, great, please send a markup of your confi. We're
10 delighted to talk to any financing sources you bring us. I
11 guess they were just too busy with other stuff. But the
12 logical link between exclusivity being lifted and exit
13 financing just isn't there. We need a company with a story
14 line and cash flows.
15 And, by the way, the most important thing that you
16 probably heard at this hearing so far actually came from Mr.
17 Perillo who said that he is very optimistic about where things
18 are now going with the union and the debtors. That's a huge
19 point, Your Honor. You know, a lot of times at hearings like
20 this, you only see the bad stuff because the good stuff flies
21 by in all the certifications of counsel for uncontested entry
22 of orders that Your Honor graciously continues entering.
23 Right?
24 Every one of those is a building block that builds a
25 story and an edifice that can be taken to the market. So

1 today, you heard in the space of a month and a half, we cut an
2 1114 deal with all the nonunion retirees. Another huge plank
3 of certainty that is needed to have a plan. You heard optimism
4 and there are going to be around-the-clock negotiation sessions
5 in the coming days. Our CEO literally said, I won't even leave
6 the room. I'll sleep there; I'll eat there. Let's try to get
7 a deal done before Monday. So we could actually be on the
8 brink of a phenomenal step forward in Patriot's case which the
9 objectors simply refuse to acknowledge.
10 Your Honor, I'm not going to go through the list of
11 tangible achievements which are pretty shockingly belittled by
12 the objectors. You can't have a company without a thousand
13 leases that you know you're keeping because they're your cash
14 flow. You can't have a company without some certainty as to
15 your cash flows on the royalty agreement. You can't have a
16 company without some certainty as to claims of administrative
17 and secureds' claims status. You can't have a company without
18 certainty as to 1114. And most assuredly, you can't have a
19 financeable company without the multi-billion dollars between
20 us and the union resolved.
21 So when people tell you exclusivity is the reason that
22 we don't yet have a financing source, it's just hogwash. It's
23 that simple. And I don't even believe that people saying it
24 from the podium actually believe it themselves.
25 We will talk to anyone, anyone brings us. No one has

1 brought us anyone. We are absolutely making all the steps we
2 need to in the market to do so.
3 And, Your Honor, there's a reason why there's only one
4 fiduciary that is a fiduciary for truly everybody, somebody who
5 needs to be above the fray but in the middle of all the issues
6 because we don't have an ax to grind. You know, our committee
7 went from seven to five and, frankly, I think it's kind of a
8 very unusual committee and that's kind of manifest by the fact
9 that most of the objectors to exclusivity on the committee
10 itself are committee members who have really specific
11 perspectives and their own sort of huge axes to grind. You
12 know, one and a half of them want a trustee. You have two of
13 them are union and the pension funds. So, you know, you got to
14 take a little bit of a step back because this is not a case
15 where the committee is really full spectrum. These are huge
16 players that each have their own chess game going on with us.
17 They're certainly doing their duties; I'm not alleging to the
18 contrary. But I'm just saying it's a little bit more complex
19 picture. In a mega-case like this, you might see nine; you
20 might be seven. We started with seven; now we're down to five.
21 And each one is a mega player in its own right but, yet, they
22 also are on the committee.
23 Your Honor, there are nine factors that the case law
24 lays out for exclusivity. I think that I will probably spare
25 the Court having to track through every single one of them.

1 They are laid out on page 7 and 8 of our brief.
2 Let me tell you what else the objectors don't have.
3 They don't have an answer to the fact that all nine factors in
4 fact favor the debtor. It's clearly a mega-case. We're
5 clearly working cooperatively with the creditors' committee.
6 We're clearly making great faith progress towards
7 reorganization. We're slaying dragons left and right and
8 moving forward assiduously on issue after issue.
9 There is an unresolved contingency, a huge one. But
10 luckily, Your Honor, the statute tells us that one way or the
11 other, we will have more certainty as to our union and pension
12 situation by the end of May and then it will be resolved. The
13 union has a right to strike; we get that. But again, as
14 fiduciaries, we will do everything we can to avert that,
15 including there are post-hearing options as well as pre and
16 during hearing options. The length of previous extensions.
17 Not one mega-case ever -- and we could have gone back ten
18 years. There was no -- probably it would have been the same.
19 This is on the extreme conservative side.
20 You know, for better or for worse, Your Honor, this is
21 my fifth mega-case as debtors' counsel. Labor mega-case. I
22 don't know what I did in my past life that it enables me to
23 make that statement, but here I am. And every one of those
24 companies survived despite several of them, lots of punsters
25 and prognosticators saying they weren't going to make it. And

1 in my experience, Your Honor -- and there's a fair amount of
2 experience, hopefully, that I can put behind this statement --
3 these cases are proceeding exactly as they should be. You
4 file; hopefully you get a big DIP. We got a really good one.
5 You then attack the medium and low hanging fruit. You reject
6 lots of bad contracts right away. You attack the 365(d)(4)
7 stuff. You look at adversary proceedings. You analyze claims
8 against the company. You begin the talks with the union. You
9 look at your legacy situation. You look at core versus noncore
10 assets. Check, check, check.
11 You bring an ever-increasing level of focus to the
12 tough nuts to crack: the mega issues of the case, the central
13 dramas. Check, check, check. Optimism, progress, good faith
14 offers, trial next week. Might even be obviated. Who knows?
15 Then you look at some mega issues that the objectors
16 don't much talk about. But let me be very clear at how key
17 they are to any plan. Will this estate be substantively
18 consolidated? Will it be nonconsolidated? Will there be a
19 settlement of the sub-con issue as there is in many of the
20 cases that you know about and that were cited by the objectors?
21 What will happen with the billions of dollars in intercompany
22 claims? We're going to talk a lot when we get to the trustee
23 motion about sort of value and inter-debtors.
24 That's a big sort of whirl of things under the surface
25 that's being discussed right now with the company. And,

1 frankly, I'm not actually sure that we really see things
2 particularly differently. And then once you know your cost
3 structure and you fixed a lot of what's broken and you have
4 viable cash flows, then you ramp up substantially your
5 conversations with the financing market.
6 And, by the way, Your Honor, let me also be clear. We
7 have a draft plan underway. Let there be no mistake about
8 that. One of the counsel timely suggested we were just too
9 busy to do a plan and maybe we need help. Let me leave no
10 doubt. I don't need help. We're doing just fine and we're
11 doing what we should be doing. Okay?
12 The unions' objection mostly just insult us. And
13 that's okay because we start trial in a week and, you know,
14 they have a style and an approach and I respect that.
15 Everybody lawyers differently. The only thing they really say
16 is that we're not seeking financing. Well, you know, Your
17 Honor, that's kind of funny. I wish that, by coincidence, we
18 had had depositions of everybody's financial advisors this
19 week, but we didn't. We only had the union's financial advisor
20 because we have the 1113 trial next week. And happily, we
21 actually asked them, and it's in our reply brief, and it almost
22 just speaks totally for itself. Could we get exit financing
23 now with 1113 and 14 open and hanging over us? Answer: "No."
24 So when the objectors are actually under oath and they're being
25 asked under penalty of perjury whether we could get financing

1 now, the answer is no. But yet, in their papers, they say,
2 ahh, those shameful debtors, why don't we have exit financing
3 yet. Maybe we should put everybody under oath and see what
4 their answers are going to be.
5 Then there's Aurelius and Knighthead. Your Honor,
6 what do they really want? Well, they tell us and we'll be
7 discussing that in a few minutes. They really want this thing
8 of ripping the debtors in half and this fantasy that the
9 eighty-six of them will just tra-la-tra-la their way out to the
10 bankruptcy. I'm not going to argue that now, but suffice it to
11 say we'll address that at the time. Because their trustee
12 motion, I believe, fails profoundly, so their exclusivity
13 motion, which is essentially seeking the same relief -- in
14 other words, lift exclusivity so that we can do this -- clearly
15 fails as well.
16 And their notion that there's hostage taking when --
17 no. You know, I'm just going to leave it at that.
18 So then there is the impasse issue which I touched on
19 briefly before. Your Honor, I'd like you to ask each one of
20 the objectors -- actually, I wouldn't 'cause never ask a
21 question you don't know the answer to. I retract that. I'll
22 speak for them. I know what they would say. Have we
23 negotiated some core issue to the bitter end and refused to
24 show flexibility? Have we said, we're doing x and we don't
25 care what your views are? We're dug in on y. We're a peer

1 sub-con, we're a peer non-con. This is our view on
2 recharacterization. Absolutely not. And if anyone comes up
3 and says that, I will say it this strongly: they're lying to
4 you. Okay? Because those things are being discussed now and
5 they need to be discussed.
6 Finally, let's look at the great analogies that they
7 bring up: Tribune, Lehman. Look, flexible tension in the
8 case. Yeah? Okay. I lived those cases. In Tribune, there
9 was a full eighteen months of exclusivity and then there were
10 four competing plans. And it took four and a half years to
11 resolve the bankruptcy and I think over a hundred million
12 dollars in incremental legal expense was spent.
13 In Lehman, there was no need for exit financing. It
14 was a liquidation. There was a full eighteen months of
15 exclusivity. Three years later, people began to file competing
16 plans. No possible relevance to this case.
17 Your Honor, finally, let me just turn to the committee
18 for a minute. The committee's statements in their pleadings
19 and then today that they just don't know enough about value and
20 they have a matrix, it's just -- let me just say it's not what
21 I expected. And let me be very clear about this as well. We
22 have a recovery matrix that shows what different people get
23 under different legal assumptions. And there are lots of
24 complex things that go into the grid. The committee has a
25 recovery matrix that Mr. Mayer alluded to that does similar

1 things. Our sets of financial advisors have had full open,
2 complete dialogue and sharing of those matrices. There is no
3 information gap. And there certainly is no failure to
4 cooperate with the committee on any of these issues including
5 this issue.
6 Your Honor, may I just take two more minutes, if I
7 may?
8 THE COURT: You may.
9 MR. HUEBNER: Thank you.
10 So, you know, I just think that you really need to
11 take with a grain of salt the facts that they say are true but,
12 more importantly, there's law. And if you look at all the fact
13 patterns, what they actually should be alleging is just not the
14 fact pattern here. There's no hostage taking. There's no
15 failure to compromise. There's no jamming. There's nothing.
16 We are proceeding along. We're in month 9. For a mega-case,
17 it's really where we should be. We will have a lot more
18 certainty very soon. And, by the way, these allegations that I
19 saw for the first time in their papers that we're moving too
20 slowly, we're meandering, never said to us before. No party
21 ever said where's the plan, where's the financing, you're way
22 behind, I'm very dissatisfied. Just like the trustee motion
23 came as a complete surprise to us with not a phone call, not an
24 e-mail, no notice, nothing, so, too, the exclusivity objection.
25 That's not the fact patterns. The fact patterns are what

1 people know there have been clashes and they appear to be
2 irreconcilable. Nine months into the case, all you're going to
3 have is total chaos. We need a plan; we need a company. We
4 need exit financing. We're moving very appropriately. In
5 fact, we're ahead of schedule. You know, we had a big footnote
6 in our, I think, reply brief with a lot of the other labor
7 cases at how soon they made their 1113 proposals and what their
8 plan schedule looked like. You know, the notion that we're
9 sort of way behind here is not true.
10 And, by the way, we'll talk more about the DIP default
11 in a few minutes, but again, that's a covenant default. We
12 don't minimize it. It's an absolutely real default. But as we
13 said on the trustee motion, Your Honor, banks need to grapple
14 with covenant defaults not infrequently, both in court and out
15 of court. You know, all the lawyers here can talk about
16 Amendment 13, Amendment 14, Amendment 15. That's the real
17 world.
18 We are, in fact, ahead of budget on cash and liquidity
19 compared to both the original DIP forecast and the October
20 amended bank plan. So the notion that, like, the house is on
21 fire, the debtors are asleep at the switch, there's no truth to
22 it. There's just none.
23 Simply stated, Your Honor, I believe very strongly
24 that the debtors are appropriately shepherding these cases,
25 that we are exactly where we should be. But you know what?

1 Scratch that. Let me make it easy. I'm going to try to make
2 it even easier for Your Honor. We don't want 120 days. You
3 know what? People think that's a little too long. They want
4 to prove that we're going to work wicked fast. So you know
5 what? Here's an offer, Your Honor, that hopefully will make
6 this decision even easier than I'm hoping it will be. We would
7 amend our request to seek the exclusivity term made on the
8 earliest of the following three dates: one, 120 days from the
9 current expiration date; or two, sixty days after either Your
10 Honor rules on 1113; or we reach a deal and the Court enters an
11 order approving the deal with the union on 1113. We'll put our
12 money where our mouth is. We are ready to move for the exits
13 with extreme speed and get the financing we need if it's
14 available in the market once we have certainty on our labor.
15 And everybody that wants to is welcome to sign a confi and come
16 along for the ride.
17 THE COURT: All right. Thank you. All right. Mr.
18 Mayer, if you have anything else, briefly, you have two
19 minutes.
20 MR. MAYER: I won't need two.
21 THE COURT: All right.
22 MR. MAYER: Your Honor, with respect to the
23 confidentiality agreement aforementioned by Mr. Huebner, first,
24 the previous discussions on confidentiality agreements with
25 respect to third parties generally were tied to whether or not

1 the committee would consent to an extension of exclusivity.
2 And since we never reached agreement on that, there seemed to
3 be no point. And burdening Mr. Huebner on negotiating and
4 agreement of that sort, we welcome his invitation and we will
5 provide him with one.
6 Second, there is, as I said, one third party that we
7 wanted to be able to talk to. And we only got their
8 nondisclosure agreement on Friday because the debtors needed to
9 consent to them giving us a copy of their NDA. And our
10 comments to that NDA which would allow us to be co-signators
11 were sent to Mr. Resnick, Mr. Huebner's partners, I believe
12 this morning. So I think the comment that the committee has
13 been dilatory and we should feel ashamed is misplaced.
14 We continue to believe that there are parties out
15 there who need to be sought after. And if the debtor the
16 extension of exclusivity, it's its burden to seek them. It's
17 not its burden -- it's not the committee's burden to find them.
18 Thank you.
19 THE COURT: Thank you. All right. Mr. Perillo,
20 anything else from the UMWA?
21 MR. PERILLO: No, thank you, Your Honor.
22 THE COURT: All right. Thank you. Anything else from
23 Aurelius and Knighthead?
24 MR. STRASSER: Your Honor, I don't agree with the
25 comment --

1 THE COURT: We need you at the podium. Sorry. One,
2 so we can get you on the record. And somebody might be looking
3 downstairs in 5 South.
4 MR. STRASSER: Your Honor, I don't want to suggest
5 that I agree with all the comments made about whether the
6 debtors are cooperatively negotiating. But I don't think
7 there's more that I can say about that without getting into the
8 nitty gritty about court discussions. And I don't think that's
9 helpful to the Court.
10 THE COURT: All right. Thank you. All right.
11 Anything else from the Wilmington Trust?
12 MR. SILVERSTEIN: No, Your Honor. Thank you, though.
13 THE COURT: All right. Thank you. Anything else from
14 U.S. Bank?
15 MR. SCHNABEL: No, Your Honor. Thank you.
16 THE COURT: All right. Thank you. Mrs. Long,
17 anything else?
18 MS. LONG: No, Your Honor. Thanks a lot.
19 THE COURT: All right. Thank you. Then I will now
20 call up Mr. Huebner. Did you have anything else? You have
21 about three minutes left.
22 MR. HUEBNER: Your Honor, I guess that I ended up at
23 my passion for the cause of helping save these estates. I
24 ended up going rather off of my outline.
25 The one other thing that I forgot to mention that I

1 think I'd probably like to mention is that the Borders case is
2 also -- with respect to the committee objection which is
3 actually the one that, because they are a fiduciary, not quite
4 as broad as us, I do take rather more seriously and found,
5 frankly, rather the more frustrating because it came as such a
6 surprise. There's actually case law even on that point. And I
7 think that's actually very important and we cite that in our
8 reply brief.
9 In the Borders case, the judge was faced with a
10 situation where from everything they saw of the entire case,
11 the debtors and the committee had worked out every issue and
12 were proceeding kind of arm-in-arm on stuff. And then lo and
13 behold, like kind of from nowhere from the judge's perspective,
14 the committee came in with a list of complaints on exclusivity.
15 And the judge said, you know, I don't really agree. And
16 there's been no signal of this. And the fact that it was kind
17 of a surprise objection actually was given weight by the court.
18 And I think that that probably has at least some relevance
19 here.
20 But, you know, to the extent that it's helpful, I
21 think that it's not only what's happened so far that I think so
22 very strongly supports our absolutely typical, sort of never-
23 been-denied type request. I think it's also what I'm talking
24 about with respect to the go-forward which is you might
25 remember -- you probably don't 'cause why would you -- that on

1 the very first day of the case both in New York and here, I
2 said, let me be very clear. We like to run totally consensual
3 cases. We're always open to making a deal. Our voicemail is
4 twenty-four hours. Please e-mail us; please call us. The
5 issues that the objectors are really talking about which is we
6 want to have some plan negotiations. We want exit financing to
7 be sought. The linkage they don't really make successfully at
8 all, neither law nor logic nor precedent, is that you need to
9 blow exclusivity open. Right? I think it's pretty clear that
10 if we have many different parties running around talking to
11 same financing sources with their different versions of a plan,
12 you're going to get mass market confusion and chaos. And as I
13 said, I'll put almost anybody on the stand who's in the room
14 right now because I think that they're going to testify that
15 way.
16 But I want to be clear about the go-forwards that that
17 was not lost in the fact that I was advocating a motion because
18 the substance actually matters just as much. The debtors stand
19 ready, willing and able to confi up and begin conversations
20 with all credible financing sources for the company. You
21 didn't hear anybody say they didn't talk to mine because they
22 don't like me. You didn't hear anybody say they brought one.
23 Nobody's brought one. But we're not judgmental that way.
24 Truth comes from all places. Financing comes from all places.
25 We are ready, willing and able to cooperate and nobody has

1 never alleged that we have not. So I think in terms of the go-
2 forward, I think it's actually as important as the look-
3 backwards. I amended our proposal to make it clear that we're
4 willing to move lickety split towards the plan, that people
5 suddenly profess they so desperately need to seal but I don't
6 think the pieces are there just yet. And I also want to make
7 it clear that we are open to talk to all responsible financing
8 sources and that we are ready to serve our job as fiduciaries
9 for the next nine months or six months or four months, as
10 little as we can possibly get away with, as we have for the
11 last nine.
12 THE COURT: All right. Thank you. All right. Then I
13 will rule on this motion when we come back from the first break
14 as well.
15 All right. Moving down the docket, the next matter is
16 the motion to expedite motion to compel Aurelius and Knighthead
17 to comply with Rule 2019. It appears to me on the docket now
18 that counsel and local counsel for Aurelius and Knighthead have
19 filed verified statements under 2019. Therefore, I'd be
20 inclined to grant the motion to expedite and grant the motion
21 to compel unless there's something else.
22 MR. HUEBNER: No. We're satis -- their disclosure was
23 very, very late. But now that it's on the docket, it's fine.
24 THE COURT: All right.
25 MR. HUEBNER: So, frankly, we don't even feel a need

1 to see the motion granted at this point.
2 THE COURT: All right.
3 MR. HUEBNER: You've already -- it's been mooted.
4 However, the easiest way to dispose of it is, they filed what
5 they should have and we're done.
6 THE COURT: All right. Then I'll deny it as moot.
7 Thank you.
8 All right. Then next, that brings us to the motion to
9 appoint the Chapter 11 trustee. Again, I have reviewed the
10 motion, the joinder of Wilmington Trust in support of the
11 motion, the debtors' objection, the joinder of Citibank to
12 debtors' objection, the joinder of Bank of America to debtors'
13 objection, the committee's objection, the 1974 Pension Trust
14 response, the objection of the UMWA and the limited objection
15 of U.S. Bank. In light of the fact that I am well aware of
16 everyone's position, I will first call upon the noteholders,
17 Aurelius and Knighthead, to make their presentation in support
18 of their motion in ten minutes.
19 MR. ROBBINS: Thank you, Your Honor. Again, I'm Larry
20 Robbins from Robbins Russell for Aurelius and Knighthead in
21 support of the motion.
22 I want to thank the Court for scheduling the argument
23 on this motion today because the Court may recall that if the
24 debtors, who are supposedly our fiduciaries, had had their way,
25 this motion would have been postponed until after the hearing

1 on the 1113 and 1114 motions at which point it would do us no
2 good.
3 And not only that, Your Honor. Had the debtors gotten
4 their way, we would have been silenced at that 1113 and 1114
5 hearing notwithstanding the fact that the very subject matter
6 of that hearing is whether a proposal advanced by the debtors
7 to obtain the 1113 and 1114 relief would, in our view, have
8 siphoned assets from the nonobligor debtors in which we have
9 claims to satisfy claims only owed by the obligor debtors all
10 of which was, to our clients, prejudice.
11 That, I think, is not conduct, respectfully, that is
12 consistent with the duties of a fiduciary. Mr. Huebner says
13 that his clients are uniquely above the fray. We respectfully
14 suggest that they are not and that they have, in fact, chosen
15 sides.
16 Now, they are admittedly burdened by unavoidable
17 conflicting interests. They have duties to constituents and to
18 entities with very different positions. And the proposals that
19 they've submitted on the 1113 and 1114, we respectfully
20 suggest, would, if approved, siphon assets from the nonobligor
21 debtors to discharge obligations which they do not have to the
22 unions.
23 And that is precisely what brings us here today.
24 Because of these proposals, because the very hearing today
25 was -- had they had their way on this would have been postponed

1 until it would have done us no good and we would have been
2 silenced at that hearing had our supposed fiduciaries had their
3 way. We thought it was time to appoint a trustee under
4 1104(a)(1) and (a)(2).
5 In the time available, Your Honor, I'd like to make
6 three points beyond those -- to amplify on the points made in
7 our papers. First, we seek a trustee because, as we noted in
8 our papers, the debtors have breached their fiduciary duties to
9 the senior noteholders I represent. The proposals to the union
10 I want to emphasize would, in fact, siphon assets from the
11 nonobligors to satisfy union claims owed only by the obligor
12 debtors.
13 Now, you got a lot of objections from all the sources
14 you would expect to object to this: parties that do not have
15 an undifferentiated fiduciary duty to our clients. But what is
16 striking about the objections that you got, Your Honor, is that
17 none of them dispute the fundamental premise of our motion for
18 a trustee which is, in fact, that the proposal that the debtors
19 have promulgated, the one they promulgated before we filed our
20 motion and the one they promulgated the day after we filed our
21 motion, what no one disputes is that at the heart of these
22 proposals is an asset transfer from the nonobligors to
23 discharge obligations owed only by the obligors to the unions.
24 And they don't dispute that this is impermissible
25 under ordinary laws regarding corporate formalities. To the

1 contrary, what is most striking about the debtors' submission
2 is that they embrace as entirely appropriate, if they choose
3 to, exactly the transfer that we are objecting to. And they
4 make this audacious claim, Your Honor, as far as I can tell,
5 utterly bereft of support in the case law. They tell you that
6 if, in fact, they end up pushing this proposal to Your Honor at
7 the hearing that it's okay, in essence, to strip assets from
8 one debtor to satisfy the obligations of another. That, we
9 respectfully submit, is absolutely legally unsupportable.
10 There are no cases that justify it outside the very narrow
11 ambit of sub-con for which we submit there is no factual
12 predicate in this case.
13 So you have proposals that come entirely at our
14 expense being promulgated by the debtors that are supposedly
15 our fiduciaries and to compound matters, they had wanted to
16 silence us, to not let us speak at the hearing and to push the
17 hearing until after a point at which it would do us no good.
18 Your Honor, that doesn't sound like a fiduciary to me. With
19 fiduciaries like these, who needs adversaries? That's point
20 one.
21 Point two. The objectors give you a series of
22 downsides that they tell you will occur if the trustee motion
23 is granted. It's sort of a parade of horribles. All these
24 things that are going to go wrong if you grant the motion. Two
25 points to be made about that. The first is that, under the

1 statute, these are not legally cognizable arguments at all
2 because if as we submit is the case, if we have shown you that
3 the predicates for cause are presented under (a)(1), the duty
4 to appoint a trustee is mandatory without regard to all the
5 supposedly sky-is-falling-downsides that our opponents,
6 objectors, have identified.
7 But even putting aside the fact that the appointment
8 is mandatory if we've shown that the predicates are satisfied,
9 this parade of horribles that has been advanced to the Court
10 is, in fact, a parade of red herrings. Let me tick off the red
11 herrings one by one.
12 The DIP default. They say you can't appoint a
13 trustee, Judge, because this will be an event of default and
14 the sky will fall. Well, you've heard already this morning
15 that they're going to breach a covenant anyway in the third
16 quarter of this year and so whoever is running this bankruptcy,
17 whether it's the debtors or whether it's somebody that actually
18 serves as our fiduciary, they're going to have to contend with
19 the DIP default. They're going to have to negotiate with the
20 DIP lenders either way.
21 The second argument you hear is that our proposal, as
22 Mr. Huebner put it a few minutes ago, is ripping the debtors in
23 half. That is an utter canard. We are not asking to rip
24 anything in half. What we are asking for is to have an actual
25 fiduciary at the table who isn't looking to compromise our

1 claims or silence our voices. That, I think, is the least we
2 are entitled to under the statute.
3 We are not asking for somebody to run the company.
4 The trustee can leave management doing its job. All we want is
5 somebody at the table with the authority to act as a true
6 fiduciary with an undifferentiated loyalty to his charges.
7 The third argument is, well, gosh, if you appoint a
8 trustee and he brings one or more of the nonobligor debtors out
9 of bankruptcy, suddenly that obligor or obligor that comes out
10 of bankruptcy early is going to be hit with joint and several
11 liability either on the pension fund or on other claims to the
12 DIP lenders.
13 Well, I suggest to you, Your Honor, that if that is
14 true, the trustee won't do it because his charge will be to act
15 responsibly, consult with people he ought to consult with. And
16 if it's really true that it will be an economic calamity to
17 bring one or more of the nonobligor debtors out of bankruptcy,
18 we can count on the fact that the trustee will not act that
19 foolishly.
20 But the question is should we have somebody at the
21 table who's actually acting like a fiduciary. Not compromising
22 our position by shifting assets from nonobligor debtors to
23 obligor debtors with no benefit to the nonobligors and, at the
24 same time, silencing our voices. I think the answer is, yes,
25 we ought to have a real fiduciary at the table and trust him or

1 her to do their job and not bring out debtors -- the
2 nonobligors from bankruptcy precipitously.
3 Finally, and here's the last point, the objectors tell
4 the Court, citing Adelphia and WorldCom, that interdebtor
5 conflicts of this sort are common and they don't result in the
6 appointment of trustees. Respectfully, that just simply
7 mischaracterizes our argument. Our argument, Your Honor, is
8 not simply that our alleged fiduciaries labor under conflicts.
9 Our argument is that they have acted on the conflicts, that
10 they've chosen sides, that they've decided that they're going
11 to cast their lot because of business conditions, because of
12 union issues, because their eye is on the ball that it's on,
13 they have cast lot with the principle that they can move assets
14 from the nonobligors to the obligors.
15 It is not simply that they labor under a conflict. It
16 is that they have, in fact, acted on the conflict. And acted
17 to our detriment. And, You Honor, that is what separates this
18 case from Adelphia and WorldCom -- makes those precedents not
19 particularly illuminating and leaves us where we are today with
20 a need for our own voice, our own trustee with an
21 undifferentiated fiduciary duty to our clients.
22 Your Honor, unless the Court has questions, I'm
23 grateful that I've been reserved four minutes of rebuttal.
24 THE COURT: All right. Thank you. All right. Then
25 now I would hear debtors' arguments in opposition. Yes?

1 MR. SILVERSTEIN: Wilmington, Your Honor? We joined
2 in the motion.
3 THE COURT: Don't worry. We're going to get to it.
4 MR. SILVERSTEIN: Thank you.
5 THE COURT: I want to hear from the debtors now and
6 then I'll go through all the other parties.
7 MR. SILVERSTEIN: Thank you, Your Honor.
8 THE COURT: Thank you.
9 MR. SILVERSTEIN: I apologize.
10 THE COURT: No problem.
11 MR. HUEBNER: Candidly, Your Honor, this is the first
12 motion in this entire case out of 3800 docket entries that
13 borders on sanctionable and frivolous. The debtors made a
14 proposal to one creditor to settle a massive litigation. That
15 proposal is the subject of a one-week trial beginning next week
16 in which many parties, including the noteholders, will be able
17 to participate.
18 And, by the way, while we're on the topic of the
19 debtors robbing of due process, let me just remind him because
20 maybe he wasn't on the case yet, the Court largely granted our
21 1113 process motion with respect to the noteholders who wanted
22 to interfere in all aspects of the trial which is basically
23 without precedent and the Court cabined them in almost exactly
24 the way that we and some other core parties have agreed. So
25 his talk about disenfranchising and not being their fiduciary,

1 you know, what he's trying to tell you is any time the debtor
2 doesn't agree to anything any creditor wants of it no matter
3 how inappropriate or violent it may be for the estates, they're
4 not being a good fiduciary. That, in fact, is a canard.
5 Your Honor, with respect to our proposal for thirty-
6 five percent, either we will settle and there will be a 9019 or
7 363 motion on notice where people can say their piece or Your
8 Honor will rule and either our proposal will be found
9 acceptable or not.
10 The notion that a proposal that they don't even
11 remotely understand and have no evidence about is the basis for
12 one of the most extraordinary types of relief in Chapter 11 is
13 actually shocking. Even worse, Your Honor, they filed their
14 motion after they (sic) made our first proposal -- or our first
15 relevant proposal. I think it was either number 3 or number 4.
16 They didn't even understand it. They took a guess about what
17 they thought it meant. They simply interpolated that in their
18 guess with no facts and no dialogue, it must mean that we're
19 giving the union a claim against all the debtors and they filed
20 their motion as officers of the court saying that. Shame on
21 them because it's not what it said. They misunderstood it.
22 And, by the way, they didn't even call. This motion
23 hit the docket like a bolt out of the blue. Had they just
24 called us and said, are you proposing a claim against all the
25 debtors, we would have said no. But they couldn't be bothered.

1 Instead, they signed a pleading just stating it.
2 And now, it gets worse because now we filed a revised
3 proposal that offers thirty-five percent. All their words,
4 "siphoning", "stealing", "taking", "transferring assets" --
5 absolutely false. They have a burden of proof which is
6 extraordinary. It's on them and it's evidentiary. Your Honor,
7 where is there proof that we are taking value from nondebtors?
8 Where is there evidence that we are taking value from
9 nondebtors? What asset transfer -- he used that phrase about
10 twenty times -- is he talking about? There's none. In fact,
11 the thirty-five percent can be arrived at in a pure non-con
12 world where even if I accept his client's assumption, and we'll
13 talk about those in a few minutes, that every debtor is totally
14 separate, every intercompany claim is totally valid, the union
15 only has claims against debtors A, B, C and D, guess what, Your
16 Honor? There are still fact patterns and mathematical analyses
17 that support thirty-five percent to them even on every huge
18 legal assumption and there are many of them that the
19 noteholders asked us to make.
20 I love the fact that he "submits to this Court that
21 there's no factual predicate for sub-con". Whoopie. Here's a
22 guy who doesn't have any confidential information, has no
23 knowledge of our sub-con analysis, hasn't been through the
24 factors with us, probably doesn't know the committee's
25 factors -- he has the temerity to get up and say, I submit, as

1 a lawyer, that there is no factual basis for sub-con? Your
2 Honor, he had a burden today. The case law is totally clear.
3 The burden is "very high". Some courts say "very, very high".
4 Some courts say "extraordinarily high". Most trustee motions
5 are, like, four day trials where the movants put on multiple
6 witnesses to prove the debtors are stealing, robbing, shell
7 game, Ponzi scheme, lying to the court. What does this guy
8 have? You offered a creditor something that I think might
9 damage me. And I have no proof, no evidence, no affidavit, no
10 documents, no discovery. But I'm just going to say, 'cause I
11 guess it's okay where he comes from, that that means you're
12 stealing from eighty-six of the debtors and so I want a
13 trustee. Well, guess what? You can't just say stuff in a
14 court of law. You need to prove it with evidence. And they
15 have none.
16 Moreover, Your Honor, not only that, their whole
17 request rests on the assumption that this is a non-con case and
18 that all intercompany claims are valid. Right? In other
19 words, they're also asking you to take two other giant steps,
20 that there is such a thing as an obligor debtor and a
21 nonobligor debtor. They may be right; they may be wrong. But
22 it's an assumption. And, in fact, WorldCom is exactly on
23 point. It's terrifyingly on point for that because there, the
24 debtors had, in fact, made an assumption that sub-con was
25 appropriate which had the effect of transferring a lot of value

1 out of the moving noteholders. So a bunch of bondholders said
2 we don't like the legal conclusion because it gives value from
3 our debtors to other people's debtors and we get a lower
4 recovery, so we want to throw the bums out. The court all but
5 laughed in their face and said no way. The fact that a
6 fiduciary is making decisions about how to manage estates that
7 you don't like is never ever a cause for a trustee. You
8 express your views at the appropriate time, but unless you can
9 show that a trustee motion is in the interest of all creditors,
10 not you and your little parochial slice of a case and your hope
11 for a better recovery, no dice.
12 We'll talk in a few minutes about the Adelphia case
13 which is just as devastating.
14 So, Your Honor, let's look at a lineup on this one.
15 Basically, if the entire world versus these two noteholders and
16 the indenture trustee that they don't really control, they
17 just, like, sort of probably control 'cause they're more than
18 half of the issuance and they're certainly speaking loudly with
19 a big stick.
20 So first, let's contextualize it. The senior bonds
21 are 250 million dollars in face amount. That's likely to be a
22 single digit percent of the claims pooled in this case. And
23 not even a particularly high single digit necessarily. We just
24 don't know yet because among the lots of things we're making
25 progress on is looking at the gazillions of dollars of filed

1 claims. So don't think for a second that, like, thirty
2 percent, forty percent, fifty percent -- no. They're like this
3 big in a bowl that's about this big of creditors and those are
4 the people who are moving whereas we have pretty much everyone
5 else -- and, you know, I was going to make a joke like if we
6 and the union and sort of the funds and the committee all agree
7 on something, we don't even need oral argument because it has
8 to be right. But then I decided, you know, it's just too
9 serious and kind of upsetting a matter to just make like a cute
10 little thirty second oral argument and sit down.
11 So the black letter law is really pretty
12 straightforward. Now, let's look at the facts that their
13 lawyer decides to provide as testimony. One, and I'm quoting -
14 - these are going to be quotes: "Since the filing, the cases
15 have focused almost exclusively on the dispute between the
16 Debtors and the UMWA over obligations that some Debtors have to
17 current and retired members." You know, Your Honor, it's just
18 offensive. You're right. We've done nothing in the whole
19 case. The 3800 docket entries, the tens and hundreds of
20 millions of dollars of savings, the millions of deals we've
21 cut, the thousand leases, I mean, we apologize. We're right.
22 All we've done is talked to the union for the last nine months.
23 What's their support for that? Zero. If there were testimony,
24 it would be perjury and a lawyer shouldn't be allowed to say
25 it.

1 Two, and I quote: "[T]he Debtors' recent proposals to
2 the UMWA are built on a plan to satisfy union liabilities with
3 the assets of the Non-Obligor Debtors." Where's their proof?
4 None. It's not true. They keep saying it again and again with
5 different catch phrases but it doesn't make it any more
6 truthful and there is no evidence of any kind that supports
7 their outrageous claim that the nondebtors are being stolen
8 from -- or that the "nonobligor" debtors, their legal contra,
9 are having their assets siphoned.
10 Three, the profit-sharing proposal improperly siphons
11 assets. Your Honor, with all due respect, give me a break.
12 Every corporate family in America has compensation for
13 employees that to some extent or another for some employees is
14 determined on a company-wide basis. I'd like you to ask my
15 adversary if any of his compensation is determined on a firm-
16 wide basis. Does that mean he's stealing from his partners?
17 Look at every company. There's always company-wide profit
18 sharing. And Patriot has had it since its inception for
19 different categories of employees. And, by the way, they
20 almost kind of mislead the Court because they also complain
21 about the royalty payments but they forget to mention to the
22 Court that our proposal is crystal clear. Only the obligor
23 debtors are responsible for the royalty payments. We've been
24 very clear and very careful and the committee has been awesome
25 in helping us remain focused on this -- not that we needed it

1 but because we're aligned, it's been great -- that obligations
2 stay with debtors. You heard it before actually on the 1114
3 deal. Mr. Resnick was very careful to point it out. We don't
4 blend. We don't mix and match. We're really very careful
5 about who owes what.
6 Next. "Patriot is moving so slowly through bankruptcy
7 that the entire company will soon need to be liquidated if
8 drastic action is not taken." This is so totally
9 irresponsible, it's really outrageous. Really so slowly?
10 Well, that's funny because I gave the Court a chart of twenty-
11 five mega-cases every one of which was much more slowly than
12 this. We gave you footnotes in our brief about all the labor
13 timings in many of the mega-cases. You have, I think, and can
14 take notice of our incredible accomplishments to date. We're
15 not moving slowly at all nor, God forbid, will be soon be
16 liquidated if drastic action is not taken.
17 You know, distressed bondholders think it's, like,
18 funny to, like, drop really big media savvy bombs into their
19 pleadings without really thinking how they might actually
20 affect a living, breathing company with thousands of people.
21 This unsupported and unsupportable statement is shameful,
22 period.
23 Next. "Patriot has been hemorrhaging cash" and moving
24 "inexorably towards liquidation". Really? That's interesting
25 because, as I said on the other motion, as of the end of March,

1 we had both more cash and more liquidity available than was
2 forecasted either in our original DIP model or in our October
3 bank plan update. So again, if this were an affidavit, there
4 would be really serious consequences for these endless
5 statements that their lawyer, with no evidence, just dropped
6 into a pleading to get attention.
7 What are the real and relevant facts? That's where
8 all of a sudden he minimizes. Right? The real facts are this
9 isn't media DIP default. And you know what, Your Honor? You
10 know how often you see DIP lenders objecting to motions in a
11 case? Like about as often as you see flamingos in Alaska in
12 February. So we got both DIP lenders to come off of Olympus
13 and what do they say? "Appointment of a Trustee would be an
14 extraordinary change in circumstance from those agreed to by
15 the DIP lenders...It is unreasonable to assume that the
16 requisite DIP lenders would waive this event of default and
17 continue to provide financing under such unanticipated and
18 unworkable circumstances." They're telling you, this is a
19 deadly serious unexpected rare default. What's his answer?
20 Hakuna matata. Don't worry. It'll all be okay. Don't worry.
21 I do worry. My job is to make sure that 4,000 people
22 and a lot of retirees have a company to come home to, help pay
23 their benefits and give them jobs.
24 I'll finish in under a minute, Your Honor.
25 THE COURT: All right.

1 MR. HUEBNER: May I?
2 THE COURT: You may.
3 MR. HUEBNER: Operational chaos. You know, again, he
4 just makes stuff up. In his first pleading, he says, the
5 debtors are terrible because they didn't bring the eighty-six
6 nonobligors out of bankruptcy by now. Then we say, what planet
7 are you from? It's a DIP default. It accelerates the
8 facility, the pension trust -- oh, no. I didn't really --
9 really? I invite anybody to go reread his first pleading.
10 It's exactly what he said. All of a sudden, he just didn't
11 bother to read the documents first or learn the facts and
12 realize that it was impossible. Then operational chaos. At
13 first, he says, we need a trustee to take over. And then we
14 say, you know, that would actually destroy the companies. And
15 we provide lots of really concrete examples of how the union
16 and the nonunion debtors are totally intertwined and integrated
17 and how union operations often provide logistical support value
18 for nonunion. Then he just makes up more stuff. Oh, no, no,
19 no. I didn't really mean take over. They won't be a super
20 CEO. They'll just be like a bankruptcy plan -- really? I've
21 never heard of that before and I've been doing this for a
22 pretty long time. So they just say whatever they need to, Your
23 Honor, to sort of dance away when we keep nailing them again
24 and again to what they're asking for is totally unreasonable,
25 impossible and not supported.

1 Your Honor, I'm not going to belabor because I'm out
2 of time and it would not be fair. Adelphia and WorldCom --
3 they're in our pleadings. They are so closely on point, it's
4 just unbelievable.
5 And I would also respectfully -- I had a long list I
6 was going to go through. I read every single case they cited
7 for any proposition, big or small. I am ready, but I won't
8 because everybody would hate me and I'm out of time, to go down
9 every single case of theirs: shell games, Ponzi schemes,
10 fraud, family businesses, lying to courts, et cetera, et
11 cetera, et cetera. Never in the history of Chapter 11 has a
12 trustee been appointed over the objection of the creditors'
13 committee. And we looked at every case. Never to my knowledge
14 in the history of Chapter 11 has a trustee ever been appointed
15 for actual resolution of intercreditor/interdebtor issues that
16 one of the creditors didn't like, let alone an allegation that
17 is totally false and has not one peppercorn of admissible
18 evidence on a motion seeking extraordinary and dramatic relief.
19 It's not a motion I ever would have filed.
20 THE COURT: Thank you. All right. Now I'll call upon
21 the committee to make comments if necessary. Let me summarize
22 the committee's objection. The noteholders do not account for
23 Section 901 of the DIP facility which calls for immediate
24 default if the motion is granted. There is no gross management
25 by the debtors. The motion does not explain how debtors could

1 have reorganized separately. And finally, that an
2 interdebtor/intercreditor conflict is insufficient for
3 appointment of a Chapter 11 trustee.
4 Mr. Willard, if there's anything additionally that the
5 committee would like for me to know, I'll give you about three
6 minutes.
7 MR. WILLARD: Thank you, Your Honor.
8 THE COURT: Thank you.
9 MR. WILLARD: Greg Willard for the committee.
10 Two points of clarification. First, the committee
11 concurs with the debtors. We do not believe that the unionized
12 debtors are holding the nonunionized debtors hostage in the
13 negotiations with the UMWA.
14 Secondly, all of the debtors, Your Honor, appear to be
15 liable for the hundreds of millions of dollars in claims to the
16 1974 Fund. And therefore, any consensual plan must involve all
17 the debtors. This is not, as we heard a moment ago, a going-
18 to-be claim. It's here. It's now. And it's real and it's
19 big.
20 To the motion. Judge Baratta (ph.) used to remind us,
21 Judge, that Chapter 11 often involves balancing. And I think
22 this motion is a good example of what Judge Baratta used to
23 talk about. If this motion is denied, which we submit it
24 should be, there's no prejudice to the noteholders. There's no
25 harm to the noteholders. None. But if the motion is granted,

1 Your Honor, the consequences to my constituents, to the
2 committee's constituents, could be catastrophic. Every one
3 agrees -- I would echo Mr. Huebner's comment, remarkable when
4 we can get agreement in this case -- but everyone agrees that
5 appointment of a trustee will be an immediate default. And as
6 we in this district know all too well, Section 364(e) of the
7 Code precludes anyone in this courtroom from unilaterally
8 changing that. That also is real.
9 Your Honor, put yourself in the shoes of the DIP
10 lenders that Mr. Huebner just quoted from their papers. Put
11 yourself in their shoes if a trustee is appointed. Why should
12 they take the risks that will inevitably arise with a new
13 trustee? Your Honor, this is not a covenant default. This is
14 a new borrower. That's why these covenants -- that's why these
15 provisions for defaults for the appointment of an operating
16 trustee and DIP financings, as you will recall when you were in
17 practice, they are such a hot button. This is not a mere
18 covenant default. Why shouldn't they simply seize their
19 collateral then, liquidate the assets and go on their way?
20 Your Honor, the appointment of a trustee will leave
21 that question solely -- solely -- up to Citibank and Bank of
22 America. That's not a red herring. That's real.
23 Your Honor, the employees of Patriot Coal -- if I may
24 finish.
25 THE COURT: You may.

1 MR. WILLARD: -- they have enough challenges already.
2 The creditors of Patriot Coal have enough challenges already.
3 The employees of this company and the creditors of this company
4 were wrestling with some very daunting financial and legal
5 issues. And you've been overseeing that entire process. Then
6 why should the economic lifelines of the employees of Patriot
7 Coal and the recoveries of its creditors be turned over to the
8 bankers of Citibank and Bank of America? That result is not
9 supported by the facts. It's not supported by any evidence,
10 none that you heard this morning. And that result is not
11 supported by the law. And, by golly, Judge, it's not right.
12 The employees of Patriot Coal deserve better. The
13 creditors of Patriot Coal deserve better. Your Honor, it's
14 about balance. We ask that the motion be denied. Thank you.
15 THE COURT: Thank you. All right. Now I'll call upon
16 the 1974 Pension Trust for additional comments if necessary.
17 And let me summarize that objection to the motion -- is that
18 the motion does not consider the potential withdrawal liability
19 against all debtors, jointly and severally, which would be due
20 and owing immediately. Therefore, a division of the debtor and
21 the "to who" is impractical.
22 Mr. Goodchild, anything else? You have about two
23 minutes.
24 MR. GOODCHILD: Your Honor has accurately summarized
25 our position. The only thing I would add, Your Honor, is that

1 we believe the Court should decide the motion based upon the
2 facts rather than upon speculation. And we felt that it was
3 important to provide the facts. And the two facts we've
4 provided we believe to be extraordinarily important. Thank
5 you.
6 THE COURT: Thank you. All right. Now I'll call upon
7 the UMWA. Mr. Perillo, if you have any comments -- your
8 objection is essentially that --
9 MR. PERILLO: Your Honor, there's no need to summarize
10 and I have no comments. Thank you.
11 THE COURT: All right. Thank you. All right.
12 Citibank and Bank of America joined in the debtors' objection
13 and highlighted the potential default of the DIP facility. Is
14 there anything else Citibank or Bank of America would like to
15 say briefly?
16 MR. SMOLINSKY: Good afternoon, Your Honor. Joe
17 Smolinsky of Weil, Gotshal & Manges for Citibank in its
18 capacity as agent.
19 We do join in the debtors' objection, perhaps not with
20 the same emotional exuberance as Mr. Huebner, but -- and
21 there's been a lot of speculation about what the lenders would
22 or would not do in the face of a trustee motion. We certainly
23 do agree that it would cause a default under our facility. We
24 have not canvassed the lenders. I can only say that we do
25 believe that this motion seeks extraordinary relief under the

1 facts and circumstances of these cases. Intercreditor disputes
2 is nothing new here. We have two fiduciaries, not only the
3 debtor but the creditors' committee that could look out to the
4 interests of the creditors of each and every entity that is a
5 debtor in these cases.
6 And ultimately, we can't imagine the chaos, delay and
7 additional cost that would ensue if this motion were granted.
8 Thank you, Your Honor.
9 THE COURT: Thank you. And, Ms. Alfonso, on behalf of
10 Bank of America?
11 MS. ALFONSO: Yes. Thank you, Your Honor. Obviously,
12 we filed papers. I don't want to repeat myself but I just want
13 to make it very clear that nobody should count on the DIP
14 lenders waiving a trustee default. They have no obligation to
15 do so. No matter how optimistic the movants are that they
16 could get a waiver in that scenario and no matter how much they
17 try to equate it to other defaults that we may be asked to
18 waive down the road, it's not the same thing. And we have no
19 obligation to waive it. Thank you.
20 THE COURT: All right. Thank you. All right. The
21 U.S. Bank's objection was the same as its objection to the
22 debtors' motion to extend exclusivity. Does U.S. Bank have
23 anything else to add?
24 MR. SCHNABEL: Nothing to add, Your Honor.
25 THE COURT: All right. Thank you. All right. Now

1 I'll hear from Wilmington Trust for their comments in addition
2 to those made by Aurelius and Knighthead. You've got a small
3 window of opportunity.
4 MR. SILVERSTEIN: I just need a small window, Your
5 Honor.
6 THE COURT: Great.
7 MR. SILVERSTEIN: For the record, Paul Silverstein,
8 Andrews Kurth, for Wilmington as senior note trustee.
9 Your Honor, Wilmington does have duties under the
10 governing indenture to Mr. Robbins' clients, Aurelius and
11 Knighthead, as well as to all other senior noteholders.
12 Wilmington joined in the motion for a trustee for a very simple
13 reason. And despite Mr. Huebner's passion and the pleasure of
14 listening to him, how did this start, Your Honor? This started
15 with the debtor making a proposal to the union under which all
16 debtors would be liable for the UMWA's claim. And the terms
17 "obligor debtor" and "nonobligor debtor" have become, I guess,
18 defined terms in this case.
19 The senior notes have claims against each and every
20 debtor in these cases. The union does not. The debtor appears
21 not to really care who gets the equity of the reorganized
22 debtors because the debtors seem to care principally about
23 getting out of Chapter 11 which is a laudable goal. But the
24 problem, Your Honor, is that the nonobligor debtors are not and
25 should not be liable for liabilities or obligations of the

1 obligor debtors, i.e., the union's claims. That's the basis
2 that the motion was filed upon.
3 A trustee here and the concept of a trustee as set
4 forth in the motion made by Knighthead and Aurelius and joined
5 in by Wilmington was not a trustee to take operational control
6 of the nonobligor debtors. The purpose was to ensure that the
7 nonobligor debtors were not prejudiced by these actions and
8 that the 1113/1114 proceedings would not be used effectively to
9 substantively consolidate the debtors. No legal or factual
10 basis exists for such relief and certainly not in the context
11 of that proceeding. So I think for the debtors to say that
12 it's a shameful reaction by the senior noteholders is, frankly,
13 to us a bit over the top. It's not shameful at all. In fact,
14 it's an attempt to protect legitimate interest of the senior
15 notes who have claims against each and every debtor whereas the
16 union, the mineworkers, do not have claims against each and
17 every debtor. They have claims against solely the obligor
18 debtors.
19 My only final comment, Your Honor, is that we think
20 it's incumbent upon this Court to ensure that the nonobligor
21 debtors do not become liable for obligations that they have no
22 liability for. And it's really that simple. You know, all the
23 emotion aside -- and again, we all appreciate the emotion
24 because passion is good. It moves cases along. But the
25 nonobligor debtors -- they are not liable for that debt.

1 That's simply why they need an independent fiduciary, not an
2 operational trustee, but an independent fiduciary to ensure
3 that they don't get stuck with those liabilities. Thank you.
4 THE COURT: Thank you. Ms. Long, does the U.S.
5 trustee have any comments on this motion?
6 MS. LONG: Your Honor, if directed, the United States
7 trustee would consult with the parties as required under the
8 statute and look for an appropriate trustee. But we take no
9 further position. We feel you've had a full and fair airing of
10 this matter. Thank you.
11 THE COURT: All right. Thank you. All right. Now
12 Aurelius and Knighthead, if you have any rebuttal, come up to
13 the podium. You have about four minutes.
14 MR. ROBBINS: Thank you, Your Honor.
15 THE COURT: Thank you.
16 MR. ROBBINS: Let me say, first, Your Honor, and I say
17 this advisedly, I have found after thirty-three years in this
18 business that in the course of an argument where I get and my
19 client get called sanctionable, frivolous, perjury, lying,
20 shameful, he just makes stuff up and what planet are you from,
21 I usually find that I'm probably right. But if you need a test
22 to separate out the purple pros from reality, let's just talk
23 about what it is said that I am "shame on them" -- let's just
24 talk about what it is supposedly is shameful. And, by the way,
25 that's a phrase that Mr. Huebner seems to throw out every time

1 he steps up to the lectern about somebody.
2 So let's find out what's shameful. We made the
3 argument that the 1113/1114 proposal purported to give claims
4 to the union on the so-called VEBA transaction, a claim that
5 every single debtor, not just the obligors that actually had
6 obligations to the unions but also to the nonobligors. He says
7 shame on you for just speculating that that's what we were
8 doing. If you'd only called us up, we would have told you that
9 that's not what we're doing. Shame on you, he said. And he
10 said it louder than I just quoted him, as I recall.
11 Well, let's just -- as -- I grew up in New York, by
12 the way, which is probably where Mr. Huebner is from, too. So
13 the statement, you know, where is this guy from, I'm happy to
14 tell you where I'm from. There used to be a sportscaster named
15 Warner Wolf and he used to say, well, let's go to the
16 videotape. So let's go to the videotape here, Your Honor, and
17 see if I was just making it up when I characterized their
18 proposal the way I did.
19 On page 52 of their memorandum in support of their
20 1113/1114 motion, they tell us what the VEBA claim will be.
21 And they say, "The UMWA will be entitled to an unsecured claim
22 against 'Patriot's estate'." Now, we read that to mean all of
23 the debtors, whether nonobligor debtors or obligor debtors.
24 That's how we read it. He says shame on you for reading it
25 that way. Well, let's go to the videotape, Judge.

1 On page 1, footnote 1, where we might all expect to
2 find defined terms, Mr. Huebner and his colleagues wrote the
3 following sentence: "For convenience, this memorandum of law
4 uses the term 'Patriot' to refer to both the Debtors and the
5 Obligor Companies." That is to say, everybody.
6 So when he wrote, fifty-one pages later, that the
7 claims that he proposes -- the way he proposed to fund the VEBA
8 claim is by having a claim against Patriot's estate, what we
9 took him to mean, what we take him to mean and what he surely
10 meant until about a half an hour ago when he stood up to yell
11 epithets for twenty minutes, what he meant was claims at every
12 box, every debtor, nonobligor and obligor alike.
13 For the reasons that my colleague from Wilmington
14 Trust made clear, that is impermissible unless there is a
15 foundation for sub-con which, respectfully, there is not.
16 The suggestion made by the more temperate arguments
17 given by the other counsel today that there is no prejudice
18 because, after all, the Court won't ultimately approve any
19 proposal that is unlawful -- we recognize that the Court will
20 have an opportunity to reject any proposal such as the ones
21 that the debtors have submitted thus far if it tries to siphon
22 assets from the nonobligor debtors to satisfy claims owed only
23 by the obligor debtors. We understand the Court will have that
24 authority and we would urge the Court to exercise that
25 authority.

1 But respectfully, Your Honor, that's just not why we
2 need the trustee. We understand the Court is always a
3 backstop. But we need the trustee because we're entitled to
4 have someone at the table looking out for our interests with an
5 undifferentiated fiduciary responsibility. That's why we ask
6 for a trustee.
7 We think that we've satisfied the burden which is only
8 a preponderance of the evidence. And when you put together two
9 successive proposals, each of which I think, fairly understood,
10 would, in fact, move assets from the nonobligor debtors to the
11 obligor debtors and when you couple it with the requests to
12 silence us from arguing at the hearing and from moving the
13 hearing until after it's too late, I think you put all those
14 together, Your Honor, and you have more than sufficient
15 predicate under both (a)(1) and (a)(2) for the appointment of a
16 trustee.
17 Unless the Court has questions, I thank the Court for
18 its time.
19 THE COURT: All right. Thank you. Mr. Huebner?
20 Briefly, because I think we've almost beat this dead horse.
21 MR. HUEBNER: Yep. The good news is, Your Honor, I'm
22 all out of passion. Now, it's just the cold hard facts.
23 Number one, the allegation that Patriot does not care
24 about the "nonobligor debtors", first of all, it's totally
25 untrue. And today's docket shows it perfectly. STB, Arch,

1 Royalty Coal, 1114 nonunion. We have docket entries all day
2 long that show us killing ourselves as fiduciaries for the
3 nonobligor debtors. Let the record be clear. We love the
4 nonobligor debtors.
5 Two, the very notion that they're nonobligor debtors,
6 which he keeps stating as a fact, is a legal assumption that is
7 yet to be proven or resolved. So he can keep saying it just
8 like he can keep saying transfer of assets.
9 But now let's talk about I used words like "borders on
10 sanctionable", because when I file a motion and I have the
11 burden of proof and it's an extraordinary motion and the burden
12 is "very high" or "extraordinarily high", to file that motion
13 with no evidence, not an affidavit, not a declaration, not a
14 deposition, a set of lawyers' statements that I went through --
15 you know, he says it was all drama. Wrong. I methodically
16 quoted statement after statement after statement after
17 statement after statement in his brief and showed them all to
18 be not only without foundation but false. Those are false
19 statements to the Court that I believe I proved as such.
20 Two, we didn't actually cover it in the first and I'll
21 do it very quickly now. Another harm to the motion is
22 potentially swift and devastating reactions from our customers.
23 Again, they take it for granted that the news comes out that
24 the debtors have lost control of a good part of their estate,
25 then we're back to sort of "Don't worry, be happy", we don't

1 agree. Customers sign long-term contracts that are critical to
2 their operations. I think employees, vendors -- it's risk to
3 everybody.
4 The cost and delay, Your Honor, of a trustee are very
5 heavily focused on in the cases that are actually relevant.
6 And now let's talk about his last point because I'm
7 actually delighted he raised it.
8 May I have forty more seconds, Your Honor?
9 THE COURT: You may.
10 MR. HUEBNER: Let's go to the videotape. I agree.
11 Let's look at the Huffard declaration which, right after it
12 lays out the proposal to the union, says -- and I quote --
13 "Actual recoveries will depend on a large number of factors
14 including, but not limited to...negotiations of an actual Plan
15 of Reorganization among the various creditor groups of the
16 Company resolving complex issues regarding the size, nature and
17 effective priority of various claims, among other things."
18 We could not have been more clear to both the offer of
19 a claim and the offer of equity, the value in part was based on
20 other things exactly what he's talking about: sub-con, non-con
21 recharacterization that are not yet known.
22 And, by the way, here's the last thing you need to
23 know. Had he been concerned that the little definition of
24 "Patriot" in footnote 1 meant the debtors have just decided to
25 give joint and several claims against every single debtor to

1 the union which would have been a radical, dramatic, huge thing
2 that would have been there in technicolor, not in some, like,
3 little -- if you look back at the footnote and hold it
4 sidewise -- he could have called.
5 Like the committee did call and they said, you know,
6 we just wanted to verify, because this could be read as being
7 that, and we said, absolutely not. We absolutely did not
8 decide that. As we say in the footnote, it's for convenience
9 because we talk about the company and its operations all
10 throughout this motion. And, in fact, that was, in part, what
11 led us to productive negotiations to go to where we were just
12 about there already, which is to offer a flat percentage of
13 equity precisely like American Airlines, General Motors. I
14 mean, in almost all cases, pretty much all cases, the union
15 ends up with the specified percentage of the equity of the
16 reorganized parent. The question is just do you get there by
17 giving them a big claim or an appropriate claim or do you get
18 there by giving them a straight offer of equity. Both paths
19 work. They've both been done a lot. But again, at base, Your
20 Honor, the reason their motion is, in fact, genuinely
21 offensive, is because they took a proposal subject to court
22 approval, they totally misread it, the couldn't be bothered
23 calling, they made a bunch of outrageous salacious claims about
24 the estates. And then when we called them on it, they sort of
25 changed it all in their reply brief and said we didn't mean any

1 of that. But, of course, they have no fact and they have no
2 law. Thank you.
3 THE COURT: All right. Thank you. All right. I will
4 rule on this motion after our first break which we have arrived
5 at. So we'll be in recess -- how much time? Hour? Hour and
6 fifteen minutes? 3:15. We'll be in temporary recess until
7 3:15. Thank you.
8 (Recess from 1:56 p.m. until 3:36 p.m.)
9 THE CLERK: Please rise. Your Honor, we are back on
10 the record.
11 THE COURT: All right. Thank you. Be seated, please.
12 All right. Before we get on to the remaining motions, first of
13 all, I'm supposed to let you all know, we will take up the
14 adversary first. Then on Monday morning at the hearing, that
15 seems to make the most sense.
16 All right. Then I have some rulings on the motion for
17 the 2004 exam. Based on my consideration of the pleadings and
18 the arguments of the parties here today, I'll grant the motion
19 in part. I will require that Peabody provide fifteen backup
20 tape dates to be restored. The debtors and the committee are
21 to pick those fifteen dates.
22 As far as the search on the non e-mail documents, that
23 should include search for documents prepared by the custodians
24 that were ID'd and search for the documents that the custodians
25 also had access to.

1 As far as the confidentiality issue, although I am
2 extremely familiar with the sensitivity of this issue, as Mr.
3 Perillo noted, he does not sit on the creditors' committee and
4 he must have a client to confer with on these matters. So I
5 will allow Mr. Krandell (ph.) to receive the information from
6 the 2004 exam subject to a court order that he is prohibited
7 from sharing or using the materials with any other persons,
8 specifically those involved in any way with the West Virginia
9 litigation.
10 Mr. Huebner, can I ask the debtors to provide a
11 proposed order on that after circulating it with Peabody's
12 counsel?
13 MR. HUEBNER: Absolutely, Your Honor, and the
14 committee as well, of course.
15 THE COURT: All right. Thank you.
16 MR. HUEBNER: And the UMWA.
17 THE COURT: All right. Then that brings us to the
18 motion to extend exclusivity. Again, I have considered the
19 pleadings and the arguments presented here today. I have
20 reviewed the nine factors that courts are to consider and they
21 all lean in the debtors' favor. Therefore, I will grant the
22 motion and extend exclusivity for 120 days.
23 Again, Mr. Huebner, I know you all are busy but I'd
24 like a proposed order from you all as well.
25 MR. HUEBNER: Thank you, Your Honor. We will, of

1 course, prepare one.
2 THE COURT: All right. Thank you. Then on the motion
3 to appoint the Chapter 11 trustee, again, I have considered the
4 motion, the objections and responses as well as the arguments
5 that were presented here today and I rule as follows:
6 The motion first calls for a Chapter 11 trustee to be
7 appointed for cause pursuant to 1104(a)(1). Here, there is no
8 evidence of fraud, dishonesty, incompetence or gross
9 mismanagement of the affairs of the debtors by current
10 management or counsel for debtors. Interdebtors are present in
11 most large multi-debtor cases and such disputes do not by
12 themselves evidence or establish fraud or mismanagement or
13 misconduct of the type that constitutes cause under Section
14 1104(a)(1).
15 Pursuant to 1104(a)(2), this Court does not conclude
16 that appointment of a Chapter 11 trustee is in the interest of
17 all creditors of the estate, particularly because appointment
18 of a Chapter 11 trustee will cause a default under the current
19 DIP facility and it is not yet to be determined that there are
20 nonobligor debtors. There's no dispute that there is joint and
21 severable liability of all debtors with respect to the 1974
22 Pension Trust.
23 Further, the Court has reviewed the four factors
24 regarding whether a Chapter 11 trustee should be appointed
25 under Section 1104(a)(2) all of which this Court concludes

1 waive in favor of the debtors.
2 Particularly, the confidence of the business community
3 and of creditors and the debtors, it is not lost on the Court
4 that was demonstrated in part by the various objections to the
5 motions that were filed. As such, the motion will be denied
6 because the record before me is devoid of any proof required
7 and the noteholders have not met their burden.
8 I'll prepare that order in chambers.
9 I believe that takes care of everything from our -- I
10 want to say this morning -- from this morning and earlier in
11 the afternoon. So I believe that leaves us with the motion of
12 the interested shareholders for appointment of an official
13 committee.
14 All right. I have reviewed the shareholders' motion
15 and reply, the debtors' objection, the joinder of Bank of
16 America and Citibank in debtors' objection, the committee's
17 objection and the joinder of U.S. Bank in the committee's
18 objection, the objection of the Wilmington Trust Company, the
19 response of Peabody and the objection of the U.S. trustee and
20 of the U.S. trustee in New York.
21 I have also reviewed the declarations of Christopher
22 Wu and Jeffrey Stufsky as well as the declarations of Paul
23 Huffard and Seth Schwartz.
24 I will allow the shareholders and the debtors seventy-
25 five minutes each for their presentation to be used as each

1 side deems appropriate. It's the shareholders -- since it is
2 your motion, you may proceed.
3 MR. GOODMAN: Your Honor, Peter Goodman on behalf of
4 the interested shareholders. As we were in route from New York
5 City to St. Louis, yesterday afternoon flying over
6 Pennsylvania, due to the wonders of WiFi and communication
7 today, we received an e-mail from our coal expert, Mr. Jeff
8 Stufsky. He had been diagnosed with a serious enough medical
9 condition that required him to stay in New York for further
10 testing today. We immediately notified via e-mail Ms. Amy
11 Starr, counsel for the debtors, and then we notified the Court
12 and cc'd Mrs. Starr.
13 When we landed, we spoke with Ms. Starr and we worked
14 out what we think is a satisfactory arrangement subject to Your
15 Honor's approval on how we might move forward today without Mr.
16 Stufsky.
17 What we're planning to do today, again with Your
18 Honor's blessing, is move forward with the witnesses that we
19 have here today and then at the conclusion of the hearing or
20 conclusion of the witnesses, both sides would have the
21 opportunity to make their arguments. Clearly, the debtors are
22 entitled to cross-examine Mr. Stufsky. And we both agreed that
23 when Mr. Stufsky becomes available and based upon Your Honor's
24 calendar, we would set up another date for the debtors to have
25 the opportunity to cross-examine Mr. Stufsky.

1 So that is how we would like to proceed today. And if
2 Your Honor has any questions or concerns, we're here to address
3 it.
4 THE COURT: All right. Yes, sir -- ma'am?
5 MS. STARR: Good morning, Your Honor. For the record,
6 my name is Amelia Starr from the law firm of Davis Polk &
7 Wardwell representing the debtors today. I think what Mr.
8 Goodman is, for the most part, accurate. The only point I will
9 make is that Mr. Stufsky is not here today. We will not agree
10 to the admission of Mr. Stufsky's declaration today given that
11 he's not here, he's not available to be cross-examined and
12 we're not able to test the credibility of the statements in
13 this new declaration.
14 Mr. Goodman is also correct that if the Court agrees
15 we would be willing to schedule an additional date for Mr.
16 Stufsky to come and be made available for cross by the parties
17 including the debtor and at which point if the Court determined
18 his testimony was admissible that it could be considered. But
19 I just wanted to be clear that, for today, we would oppose the
20 admissibility of his testimony given that he's not here to be
21 tested or cross-examined.
22 THE COURT: All right. Thank you.
23 MR. O'NEILL: Your Honor, Brad O'Neill on behalf of
24 the committee.
25 Nobody consulted me about this and I wasn't notified

1 about it although I did hear about indirectly through the
2 debtors. This is sort of the culmination of a long process,
3 Your Honor. This motion was filed back in April. It was
4 premised on the notion that positive book equity value rendered
5 the debtor solvent and justified the appointment of an equity
6 committee. That position was abandoned. We were introduced to
7 a bunch of new experts. And we've been through a very
8 expensive process in which those experts prepared reports.
9 They were deposed. The debtors and the committee advanced
10 their own experts. Those experts were deposed. And then a
11 week ago, we got testimony from the putative equity committee's
12 experts which changed what their initial reports had said.
13 Essentially, sandbagging. And now today, we find out that
14 their principal witness -- and make no mistake. Mr. Stufsky --
15 to the extent they have a case, it's based on what Mr. Stufsky
16 says. He's not here.
17 Your Honor, this has been a very long and very
18 expensive process. And we don't believe Your Honor should be
19 as indulgent as Ms. Starr proposes you to be. This is a waste
20 of everybody's time. This date has been set for a very long
21 time and it was Mr. Goodman's obligation to produce his
22 witnesses today. And we would suggest not merely that you
23 don't hear -- you don't accept Mr. Stufsky's testimony today.
24 We would suggest that you don't accept it at all. Thank you.
25 THE COURT: All right. Thank you. Well, here's what

1 I'll do. I guess I'm somewhat inclined to go along with Mr.
2 O'Neill because I am prepared after the presentation today to
3 rule on this motion today. So although there is an agreement,
4 I have to agree with Mr. O'Neill. I think this is the kind of
5 motion (1) it's been pending for a while; and (2) that needs to
6 be resolved sooner, like today, rather than later as the case
7 progresses. So Mr. Goodman, I'm not inclined to agree to
8 another day for Mr. Stufsky to be presented. You can present
9 what other witnesses you have today and I'll be prepared to
10 rule on this motion at the close of the presentation today.
11 MR. GOODMAN: Your Honor, I understand. And although
12 we object to proceeding on that basis, we're prepared to move
13 forward.
14 THE COURT: All right.
15 MS. STARR: Your Honor, based upon agreement with Mr.
16 Goodman, what we would propose to do is to go straight to the
17 cross-examinations of the witnesses. We'll forgo opening
18 statements for the sake of timeliness. And since the
19 declarations have gone in as their directs, there's no need for
20 that.
21 So the debtors call Mr. Wu to the stand --
22 THE COURT: All right.
23 MS. STARR: -- for his cross-examination.
24 THE COURT: All right. Mr. Wu, would you step up to
25 the podium first, please, to be sworn.

1 THE CLERK: Please raise your right hand, please.
2 (Witness sworn)
3 THE CLERK: Please have a seat in the witness box,
4 sir. There's a step up.
5 MS. STARR: Your Honor -- sorry.
6 THE COURT: Just make sure I've got --
7 MS. STARR: You want to give one to Mr. Wu and one to
8 the clerk?
9 THE COURT: -- what I'm supposed to have. Okay.
10 MS. STARR: Your Honor, the -- just first, a piece of
11 logistics. We have a binder which includes the exhibits that
12 we intend to use for Mr. Wu's cross-examination.
13 THE COURT: Oh, all --
14 MS. STARR: We have consulted with the shareholders'
15 counsel. They have no objection to any of these exhibits so we
16 can skip having to have a formal process for entry. So with
17 your consent, we would provide a copy of this binder to Mr. Wu,
18 a copy for the Court, a copy for the interested shareholders'
19 counsel.
20 THE COURT: All right.
21 MS. STARR: Another binder.
22 MR. O'NEILL: Your Honor, just one point of
23 clarification as I understand Ms. Starr. The direct testimony
24 hasn't gone in yet. It's subject to voir dire.
25 THE COURT: Yes.

1 MR. O'NEILL: And the testing of qualifications, which
2 I understand is consistent with the order you entered in that.
3 THE COURT: Yes.
4 MS. STARR: Mr. O'Neill has stolen my thunder. What I
5 was about to say, Your Honor, is that we believe that there is
6 a basis to object to the admissibility of Mr. Wu's testimony
7 and consistent with your order I would ask permission to do a
8 brief voir dire on Mr. Wu and his qualifications and his work
9 to determine whether the Court should admit his testimony.
10 THE COURT: All right. You may proceed.
11 VOIR DIRE EXAMINATION
12 BY MS. STARR:
13 Q. Good afternoon, Mr. Wu. Let's begin by briefly discussing
14 your engagement in these cases. You became aware of this case
15 when you saw press releases concerning the interested
16 shareholders role. Is that correct?
17 A. Yes.
18 Q. As a result of seeing those press releases, is it correct,
19 Mr. Wu that you reached out to Mr. Ray at McKool Smith?
20 A. That's correct.
21 Q. And Mr. Ray is a counsel to the interested shareholders?
22 A. Yes.
23 Q. As well as Mr. Goodman and Mr. Carney who are here today?
24 A. Yes.
25 Q. And then at that point you and Mr. Ray discussed what

1 services you would provide, or could provide, in connection
2 with the interested shareholders' motion in this matter. Is
3 that correct?
4 A. Correct.
5 Q. And now at the time that you contacted Mr. Ray had you
6 also agreed that you would work with a Mr. Jeffrey Stufsky in
7 connection with the interested shareholders' motion?
8 A. Right.
9 Q. Did you partner up or did you make this agreement, I
10 should say, Mr. Stufsky prior to reaching out to Mr. Ray about
11 providing your services?
12 A. No. But we had discussed collaboration informally
13 beforehand. So once I had conversations with Mr. Ray it was
14 natural for me to revisit with Mr. Stufsky.
15 Q. And after revisiting with Mr. Stufsky did you agree with
16 Mr. Stufsky that you would work together on this assignment?
17 A. We had agreed that afterwards, yes.
18 Q. Have you been compensated for your work on this assignment
19 to date?
20 A. I have not.
21 Q. And has Carl Marks, your employer, been compensated for
22 your -- its work on this assignment to date?
23 A. No.
24 Q. So your services, at least so far, have been rendered
25 without compensation and at your own expense?

1 A. That is true.
2 Q. Mr. Wu, if you could look at your binder and look at
3 Exhibit 42, please? Are you there, Mr. Wu?
4 A. Yes.
5 Q. Mr. Wu, have you seen this document before?
6 A. I have.
7 Q. Is this the financial advisory agreement between counsel
8 for shareholders, McKool Smith and Carl Marks?
9 A. Yes.
10 Q. Does this agreement reflect the full terms of your
11 engagement in this matter?
12 A. It does.
13 Q. If you would look at paragraph 3 of the agreement, the
14 paragraph entitled compensation?
15 A. Yes.
16 Q. You'll see, if you turn to the second page, the last
17 sentence that reads MS, which I believe stands for McKool
18 Smith, agrees that if it is retained by the committee it will
19 request that the committee retain CMAG. Do you see that?
20 A. Yes, I do.
21 Q. And CMAG is an abbreviation for Carl Marks, your employer?
22 A. Yes.
23 Q. It is -- is it your understanding that if the committee is
24 successful in obtaining appointment of the -- I should say
25 counsel is successful in obtaining appointment of an equity

1 committee, that subject to the court's approval and that of the
2 committee's approval, you will be retained as the financial
3 advisor?
4 A. Yes, so there's two things that would be required. In
5 fact, three, which is the appointment of an equity committee,
6 which obviously US Trustee and the court here would need to
7 appoint. Number 2, McKool Smith would need to be itself
8 appointed. And then the committee would be formed, no doubt,
9 by the US Trustee's recommendations. And finally we would like
10 anybody else who had the qualifications probably be interviewed
11 but if those -- all those factors were considered and came to
12 pass, then there would be a chance that we would get retained.
13 Q. Mr. Wu, the documents state that McKool Smith agrees that
14 if it's retained by the committee, it will request the
15 committee to retain Carl Marks. So you have an assurance that
16 you will indeed be recommended to the committee by McKool Smith
17 if an equity committee is indeed formed. Is that correct?
18 A. I think the assurance is that McKool Smith will make sure
19 that we have an opportunity to be considered by the committee.
20 That's my interpretation of that sentence.
21 Q. By the way, you talk about the US Trustee. Is it your
22 understanding that the US Trustee has already been approached
23 by counsel for the interested shareholders to seek appointment
24 of a equity committee?
25 A. I don't have direct knowledge of that. But my assumption

1 would be that there might have been conversations. I don't
2 know.
3 Q. So you don't know whether the US Trustee has already been
4 asked to form an equity committee and has already said no?
5 A. I have read letters by the US Trustee at -- as part of a
6 prior binder that said she doesn't recommend at this time. I
7 think that was in the past.
8 Q. Returning to the question of your retention, is it correct
9 that your only opportunity to be compensated for your work for
10 the interested shareholders will be if you are hired as the
11 financial advisor to the shareholders committee?
12 A. That's my understanding.
13 Q. Okay. And if you can't get hired -- let me, strike that.
14 If a committee's not appointed, then you'll have no opportunity
15 to be hired. Is that correct?
16 A. As far as I know.
17 Q. And you won't receive any compensation whatsoever?
18 A. Correct.
19 Q. So your only prospect for being compensated for your work
20 is if an equity committee is indeed granted in this case. Is
21 that right?
22 A. Well, you know, it's possible that the shareholders could
23 separately retain me. Obviously there has been no
24 conversations to date, so there might be other opportunities
25 for me get compensated with respect to this case. I don't

1 know. I don't have knowledge of that.
2 Q. But isn't it correct, at least pursuant to the terms of
3 the engagement that is in force at the moment, that you've
4 agreed to provide your services without compensation?
5 A. That is correct.
6 Q. Mr. Wu, do you recall that you submitted two separate
7 declarations in connection with this matter?
8 A. Yes.
9 Q. And the first declaration was submitted on -- or right
10 around February 27th, 2013?
11 A. That sounds right.
12 Q. If we could take a look at that declaration? If you look
13 in your binder at tab 35. Just so that we can be clear, Mr.
14 Wu, is this indeed the first declaration that you submitted in
15 connection with the interested shareholders' motion?
16 A. Yes.
17 Q. Mr. Wu, if you'd look at paragraph 3 of your declaration
18 on page 2? So it's the second half of paragraph 3. And it
19 says that based on my experience and on my review of the report
20 of the interested shareholders, coal industry expert KLR Group
21 attached as Exhibit A and then it goes on to talk about the
22 Roth letter also. Is it correct that you relied in connection
23 with your first report on the report of the KLR Group?
24 A. Yes.
25 Q. If you will turn and look at Exhibit 36, the next tab? If

1 you can confirm for me that this indeed is the February 2013
2 report of KLR Group that you relied upon in connection with
3 your first declaration?
4 A. I'm sure it is.
5 Q. As of the date of your first declaration had you reviewed
6 any of the data underlying the KLR Group report?
7 A. You mean following the submission?
8 Q. No. As of the date that you submitted your declaration,
9 the February declaration, where you said that you relied on
10 this KLR Report --
11 A. Right.
12 Q. Had you reviewed any of the data underlying the KLR
13 Report?
14 A. I have reviewed data underlying.
15 Q. Mr. Wu, do you recall that you were deposed --
16 A. I do.
17 Q. -- on March 15th?
18 A. Yes, I do.
19 Q. I want to just refresh you of some of the testimony that
20 you gave during that deposition. Do you have a copy?
21 MS. STARR: Can I approach the bench?
22 THE COURT: You may.
23 MS. STARR: Here's a copy of Mr. Wu's testimony for
24 the Court. Mr. Wu, I'm going to provide you a copy of the
25 testimony also, in case you wish to follow along.

1 Q. Now Mr. Wu, do you recall that I asked you during your
2 deposition on March 14th -- I'm sorry, March 15th, whether you
3 had reviewed any of the data underlying Mr. Stufsky's report?
4 A. I do recall that question.
5 Q. Okay. If you look on page 40 of your deposition starting
6 on line 24? Now I'll just read it aloud. Question, did you
7 review any of the data underlying Mr. Stufsky's report?
8 Answer, and that's on page 41 at line 2, answer, no. Does that
9 refresh your recollection that as of the date of your first
10 declaration you had not reviewed any of the data underlying Mr.
11 Stufsky's report?
12 A. Other than what I'm thinking about right now which is some
13 of the public filings, 10-K, 10-Q, which is part of the
14 underlying data for this report.
15 Q. So when you told me on March 15th that you hadn't reviewed
16 any of the data, you testified incorrectly?
17 A. I think it actually comes up later on in the deposition
18 that in fact I had pointed Mr. Stufsky to those public filings
19 and so I think that it was misstated.
20 Q. So other than the 10-Ks, did you review any other data
21 underlying Mr. Stufsky's report?
22 A. No.
23 Q. Did you do anything, again at the time of the declaration,
24 to verify the factual assumptions included in Mr. Stufsky's
25 report?

1 A. I did not.
2 Q. As of the date of your first declaration, had you formed
3 any view of the value of Patriot independent of that expressed
4 in the KLR report?
5 A. I had not.
6 Q. And as of the date of your first declaration had you
7 conducted any independent study or analysis to support your
8 conclusions aside from simply relying on the KLR report?
9 A. No.
10 Q. Now, if you'll look back at your declaration, so that's
11 back to Exhibit 35 for a second? In that same paragraph,
12 paragraph 3 that we were discussing before, you also state that
13 you relied on an analysis in the letter of the pension and
14 benefits firm Roth Companies. Is that correct?
15 A. That's correct.
16 Q. If you will look at Exhibit 37, please, Mr. Wu.
17 A. There.
18 Q. Can you confirm for me that Exhibit 37 is indeed the
19 letter from Roth Companies that you relied upon in connection
20 with your first declaration?
21 A. I believe it is.
22 Q. Okay. Did you provide any input into the drafting of the
23 Roth Company's declaration?
24 A. As I testified in the deposition, I did not provide input
25 on it.

1 Q. And did you provide any suggested changes or additions to
2 the Roth Company's letter that's here attached to Exhibit 37?
3 A. We had conversations but nothing is reflected based on my
4 conversations and so those were conversations with counsel.
5 And those were just part of my understanding of the letter.
6 Also, those comments did not in any way influence, alter or
7 change or provide input into Mr. Foyt's (ph.) letter.
8 Q. Prior to the date of your first declaration had you
9 reviewed Mr. Foyt's CV?
10 A. I had not seen Mr. Foyt's CV, so I was relying on counsel
11 as to Mr. Foyt's credentials.
12 Q. So aside from relying on counsel you had conducted no
13 investigation or inquiry as to Mr. Foyt's qualifications?
14 A. That's correct.
15 Q. Did you do anything to verify the data included in Mr.
16 Foyt's letter?
17 A. No.
18 Q. What did you do to analyze the Foyt letter and understand
19 it?
20 A. I reviewed it. I spoke with my staff, who had had
21 conversations with Mr. Foyt. And that was the extent of it.
22 Q. So aside from reading it did you do anything else?
23 A. No.
24 MR. GOODMAN: Objection. Mischaracterizes the
25 testimony.

1 THE COURT: I will agree with the objection.
2 Q. So as of the date of your first declaration had you
3 conducted any independent studies or analysis to support your
4 conclusions with respect to the Roth letter?
5 A. Not independently.
6 Q. Now, Mr. Wu, it is correct that you have submitted a
7 second declaration in this matter, is that right?
8 A. Yes.
9 Q. That's a declaration dated April 16th, 2013?
10 A. Yes.
11 Q. If you'll turn to Exhibit 3 in the binder, Mr. Wu?
12 A. There.
13 Q. And can you confirm that this is indeed the second
14 declaration that you submitted in this case?
15 A. Yes.
16 Q. And this declaration was submitted on April 16th?
17 A. Yes.
18 Q. Have you been deposed with respect to the content of this
19 declaration?
20 A. No.
21 Q. Now, if you look on page 2 of your declaration, it's
22 entitled paragraph C.
23 A. Okay.
24 Q. It says in the last sentence that you rely upon, again, a
25 report of KLR as well as a report of Roth Companies. Is that

1 correct?
2 A. Yes.
3 Q. If you'll look at Exhibit 5 in your binder?
4 A. Yes.
5 Q. You'll see that this is a report of KLR. Although it
6 bears the date February 2013 I believe that this is the version
7 of the report that was actually attached to your April
8 declaration. Is that correct?
9 A. I would presume so although I'd need to compare and
10 contrast. But I would presume that it is.
11 Q. Okay. Have you reviewed the underlying data for this KLR
12 report? And any additional data aside from the 10-Ks you
13 referenced before?
14 A. 10-Qs.
15 Q. Sorry. 10-Qs, my apologies.
16 A. No.
17 Q. Have you done anything to verify the other factual
18 assumptions included in Mr. Stufsky's new report?
19 A. No.
20 Q. Have you done anything -- have you or any of your
21 collogues at Carl Marks performed a valuation of Patriot?
22 A. They have not.
23 Q. And have you conducted any independent study or analysis
24 to support your conclusions to the extent you rely on the KLR
25 report?

1 A. No, I have not.
2 Q. And do you have any independent view as to the value of
3 Patriot aside from that derived from reviewing the KLR report?
4 A. No.
5 Q. Mr. Wu, I'd also like you to take a look at Exhibit 6.
6 Exhibit 6 is a letter from the Roth Companies written by Mr.
7 Foyt addressed to Mr. Peter Goodman dated April 16, 2013. Is
8 this the letter that you relied upon in your Feb -- I should
9 say in your April declaration?
10 A. Yes.
11 Q. Have you discussed this letter with Mr. Foyt, whether in
12 person or by telephone?
13 A. No, but my staff has.
14 Q. But you haven't?
15 A. I have not.
16 Q. Have you done anything to verify the data and assumptions
17 that are included in the Roth letter?
18 A. No.
19 Q. Have you done anything to analyze the Roth letter aside
20 from reading it?
21 A. I had discussions with my staff and I reviewed it.
22 Q. Have you conducted any independent studies or analysis to
23 support your conclusions to the extent that they rely on the
24 Roth letter?
25 A. No, I have not.

1 Q. And do you have any independent view as to the conclusions
2 expressed in the Roth letter -- I should say the Foyt letter,
3 aside from simply reading the letter?
4 A. No.
5 MS. STARR: Your Honor, based on this voir dire we
6 would move to exclude the testimony of Mr. Wu. Under rule of
7 evidence 702, expert testimony has to be based on sufficient
8 facts and data. It has to be the product of reliable
9 principles and it has to be applied reliably to the facts of
10 this case. So what has to happen is an expert has to actually
11 do work. Do an analysis. And he has to use a reliable
12 analysis that can be tested by -- you know, according to peer
13 standards.
14 Mr. Wu hasn't done anything. Mr. Wu has read the KLR
15 letter. I should say the KLR report. And Mr. Wu has read the
16 letter from Roth. But Mr. Wu hasn't analyzed those documents.
17 He hasn't reviewed the underlying data except for one 10-Q. He
18 hasn't verified the factual assumptions. He has not tested
19 those analyses, compared them to peer standards to determine
20 whether they're reliable. He simply read them. He thought
21 they sounded good. And he adopted them and he gave an opinion
22 that is purely cumulative of those two documents. Now there is
23 an argument that appears in the papers of Mr. Goodman, well,
24 it's okay for one expert to rely on the work of another expert.
25 And there are certainly instances where an expert for example

1 does evaluation but perhaps there's a distinct tax issue. And
2 they get an expert opinion from another expert to rely upon for
3 that. But there, again, you have a situation where an expert
4 has actually done an analysis. A reliable, factually based
5 analysis that can be tested against peer standards. Here he's
6 done nothing. He's just read the reports, accepted them and
7 given an opinion that this company is hopelessly insolvent
8 based on purely derivative testimony.
9 In addition, you have to look at the question of bias
10 here. Mr. Wu has not been paid. And Mr. Wu will not get paid,
11 and has no prospect of being paid, unless and until an equity
12 committee is appointed and he gets retained. So Mr. Wu has a
13 financial stake in this litigation and he has an incentive to
14 give only one opinion, which is somehow that there's going to
15 be recovery for the shareholders here. And while I think the
16 merit to that we will get to after we finish this voir dire,
17 that's clearly an impermissible financial stake and courts have
18 stricken experts simply on the basis of having a financial
19 stake in a litigation.
20 There are cases in the -- I should say the Eastern
21 District of Missouri here where expert testimony as to alleged
22 damages was rejected because the expert had a financial stake
23 in the litigation. In that case a personal stake. There are
24 cases in the first circuit that recite the majority rule where
25 an expert cannot collect compensation which by agreement was

1 contingent on the outcome of a controversy. So here I think we
2 have a situation where there is a bias to his testimony. Not
3 only did he do know work but whatever opinion he's given is
4 inherently unreliable because he's incentivized to give only
5 one opinion.
6 Your Honor, to the extent that you're not inclined to
7 strike Mr. Wu as a witness, I would ask you to consider
8 striking in particular those portions of Mr. Wu's testimony
9 which rely on the Foyt letter. The Foyt letter is a new
10 opinion. It was submitted on April 16, well after the
11 discovery period was done. I have had no opportunity to depose
12 Mr. Foyt. I've had no opportunity to get discovery from Mr.
13 Foyt. I have no idea what Mr. Foyt relied on. They have
14 provided not a single page of back up. What we have is a
15 letter that makes a barefaced opinion that somehow Patriot's
16 health care liabilities are thirty percent overstated with
17 nothing listed. I have no ability to question him. I have no
18 ability to attack his credibility. I have no ability to
19 analyze what he did. And so we have Mr. Wu here who's the only
20 person who can speak for Mr. Foyt. But Mr. Wu doesn't know
21 either. He read the letter. But that's it. He doesn't know
22 what Mr. Foyt relied on. He doesn't know how Mr. Foyt got
23 these analyses.
24 So to allow Mr. Wu to testify, particularly based on
25 this Foyt letter where we've had no opportunity to cross-exam

1 Mr. Foyt, would be inequitable. Would be, frankly, unfair.
2 And it would be damaging to this process because it would be
3 allowing in testimony which has no basis and which Your Honor
4 will have no ability to analyze the credibility or the accuracy
5 of. So I would ask Your Honor to strike the testimony of Mr.
6 Wu, not to permit it, and at the very least, if Your Honor is
7 inclined to let Mr. Wu testify, to strike that portion of the
8 testimony which relies on the Foyt letter.
9 THE COURT: Mr. Goodman?
10 MR. O'NEILL: Your Honor, if I may add my voice to Ms.
11 Starr's.
12 MS. STARR: Here, let me get out of your way.
13 MR. O'NEILL: One brief point first on the issue of an
14 interest in the proceedings, I think the cross demonstrated
15 that Mr. Wu's project from the outset here was to get himself a
16 gig in this case. And so he clearly has an interest in having
17 this motion granted and that's more than enough for Your Honor
18 to discredit him and not to accept his testimony.
19 In addition to what Ms. Starr said, I would also point
20 out that Mr. Wu's opinion is essentially an attempt to backdoor
21 presenting other experts. He's essentially a conduit by which
22 Mr. Stufsky's report and Mr. Foyt's letter come in, even though
23 neither one of them is testifying, Your Honor. Both of those
24 documents are naked hearsay. They are not admissible. Even if
25 he is allowed to rely on it, under the rules, it doesn't come

1 in unless it's more probative than prejudicial. And here, Your
2 Honor, we would argue that it is highly prejudicial because one
3 of these two people was never offered as a witness in any case
4 and therefore was not available for cross-examination. And the
5 second one was promised and then not delivered.
6 So Your Honor, we would suggest that even if you're
7 prepared to accept Mr. Wu as an expert, and we believe you
8 should not, you should not allow admission of either one of the
9 two attachments to his opinion, which would be the KLR report
10 and the Foyt letter. Thank you.
11 THE COURT: All right. Mr. Goodman.
12 MR. GOODMAN: May I respond, Your Honor?
13 THE COURT: You may.
14 MR. GOODMAN: Your Honor, just to clarify one point
15 and that is there's been a clear misstatement. Mr. Foyt was
16 scheduled to be deposed by the debtors. A date was set. And
17 the debtors did not depose that witness.
18 VOIR DIRE CROSS-EXAMINATION
19 BY MR. GOODMAN:
20 Q. Now, Mr. Wu, can you explain to the Court what your area
21 of expertise is?
22 A. I have seventeen years of financial advisory experience as
23 an investment banker. I've worked on numerous, numerous
24 bankruptcies and insolvencies. I offer my expertise in
25 business reorganization and restructuring.

1 Q. And as part of that expertise do you provide valuation
2 work for clients from time to time?
3 A. I do, yes.
4 Q. For committees and debtors?
5 A. For committees and for debtors, yes. And for secured
6 lenders.
7 Q. Can you name some cases that you've provided that service
8 for?
9 A. I provided valuation for Trans National Communications,
10 Inc. as the unsecured creditors committee. I've provided
11 valuations for Northern Berkshire as well as Holley
12 Performance, both Chapter 11 debtors. And certainly in other
13 situations as well. In court, out of court.
14 Q. But your work doesn't merely -- the purpose of your work
15 is not merely to put a value on the company, is that correct?
16 A. I'm not narrowly defined as a valuation expert in the
17 context of bankruptcy, no. I mean, it encompasses negotiation,
18 it encompasses serving as an advocate for my clients in Chapter
19 11 and being part of a bankruptcy process.
20 Q. Being a financial advisor?
21 A. Being a financial advisor in a bankruptcy proceeding.
22 Q. And negotiating with creditor constituencies, correct?
23 A. That's correct.
24 Q. And you've been doing that, again, for how long?
25 A. I've been a banker for seventeen years, ten of which has

1 been with Carl Marks and the majority of my work at Carl Marks
2 is with distressed companies. Companies going through change.
3 Q. But you are not an expert in each and every industry that
4 you might be engaged in, is that correct?
5 A. That's correct. I mean, I have expertise -- definable
6 expertise in certain industries. But when an expert opinion is
7 required with a very specific industry with its own nuances and
8 experience required, I don't believe I have that experience in
9 the coal industry.
10 Q. And what do you do in those circumstances where you don't
11 have that expertise?
12 A. It's common for us to rely on other experts.
13 Q. So you just hire an expert and that's it? What does the
14 expert do for you?
15 A. Well, we obviously need to be reasonably comfortable with
16 the expert's credentials.
17 Q. Um-hum.
18 A. And also we have to be comfortable that we would have a
19 working relationship together. And we have to be comfortable
20 that they're bringing that which we don't have, which is a
21 specific expertise --
22 Q. And does that expert supplant you for all purposes in the
23 work you do as a financial advisor for creditors and debtors?
24 A. Yeah, obviously not. Clients are looking to me for my
25 general understanding as a generalist. Also as my experience

1 as a banker and participant in the Chapter 11 process.
2 Q. So you've hired KLR for a specific purpose, correct?
3 A. Their specific purpose is to provide their experience and
4 insight into the coal industry from a valuation perspective.
5 Q. And once you've received that valuation, what was your
6 role?
7 A. My role was then to evaluate their preliminary estimate of
8 value and evaluate it from the lens of the bankruptcy process
9 to ascertain whether there is a presence and possibility of
10 equity.
11 Q. And KLR is not an expert in bankruptcy, is that correct?
12 A. I don't think they are.
13 Q. Yeah. And did Mr. Stufsky ever advise you that he was an
14 expert in bankruptcy?
15 A. He never said he was a bankruptcy expert, no.
16 Q. An expert, did he ever say he was an expert negotiating
17 plans and how plans may translate into value for equity
18 security holders?
19 A. No, he was -- he's none of those.
20 Q. And that's your role, correct?
21 A. That's my role.
22 Q. Now, you weren't the only one from Carl Marks that had
23 contact with KLR, isn't that correct?
24 A. I have team members who work under my supervision who have
25 contact with KLR as well as others at KLR.

1 Q. And you're --
2 A. I have met other principals at KLR as well.
3 Q. And it's your understanding that they were communicating
4 with KLR. Is that correct?
5 MR. O'NEILL: Objection, Your Honor.
6 THE COURT: Just a second, Mr. Wu.
7 MR. O'NEILL: This is his --
8 THE COURT: I need you at the podium, I'm sorry.
9 MR. O'NEILL: This is Mr. Goodman's witness, Your
10 Honor, and he's leading him around like a pony.
11 MR. GOODMAN: Your Honor, first of all, this is a
12 response to a voir dire and second off all, you know, with
13 respect to the federal rules of evidence, I am allowed to lead
14 the witness on preliminary questions. These are preliminary
15 questions.
16 THE COURT: All right. I'll overrule the objection
17 but let's move along.
18 MR. GOODMAN: Okay, thank you, Your Honor.
19 Q. Now, there came a time, correct, where KLR filed a report?
20 A. Yes.
21 Q. And that was attached to a declaration you signed,
22 correct?
23 A. Yes.
24 Q. Now, do you know whether KLR has any understanding of how
25 to apply enterprise value under the Bankruptcy Code using the

1 absolute priority rule?
2 MS. STARR: Objection, Your Honor. He's now asking
3 what KLR thinks and how it might do it. I don't understand how
4 he's --
5 MR. GOODMAN: No, I'm not.
6 MS. STARR: -- able to speak to what KLR --
7 THE COURT: Let Ms. Starr finish her objection first.
8 MR. GOODMAN: Yes, I'm sorry. Your Honor, the purpose
9 of the question is really to establish his expertise. I'm
10 not -- he wouldn't know what KLR knows. He communicated with
11 KLR.
12 THE COURT: I tend to agree with Ms. Starr --
13 MR. GOODMAN: Okay.
14 THE COURT: I'll sustain the objection.
15 Q. Now, with respect to Mr. Foyt, is it your understanding
16 that part of your staff was in communication with Mr. Foyt?
17 A. It is.
18 Q. Okay. And do you know why that was?
19 A. They had communications. Just like they had
20 communications with KLR.
21 Q. What was your understanding of the communications?
22 A. That they were having discussions on some of the
23 assumptions that Mr. Foyt utilized.
24 Q. And did they report back to you on those conversations?
25 A. They reported to me that they had conversations and that

1 they had had substantive discussions.
2 Q. Now, you don't have at your firm any expertise in retiree
3 health care claims, correct?
4 A. That's correct.
5 Q. Or pension plan claims, is that correct?
6 A. We do not have that expertise.
7 Q. And did you have an opportunity as part of this proceeding
8 to review the declaration of Mr. Huffard, for example, the
9 financial advisors for the debtor?
10 A. I have reviewed it.
11 Q. And do you know whether Mr. Huffard has expertise on
12 pension plans or actuarial valuation based upon what you read?
13 A. Based upon --
14 THE COURT: Just a second, Mr. Wu.
15 MR. O'NEILL: Objection, Your Honor. I mean, this is
16 just more leading. They're not just transitional. It's
17 substantive. It's again and again.
18 THE COURT: Yes. Mr. Goodman, I'm not sure where
19 we're going with what he knows about what Mr. Hufferman (sic)
20 knows and things like that.
21 MR. GOODMAN: That's fine. Okay. Your Honor, just a
22 few more questions.
23 Q. Will you be paid for the hours that you've spent in
24 providing the work that you've done in this case in your
25 testimony here today?

1 A. I will not be paid.
2 Q. And why is that?
3 A. Because I agreed that there would be no payment for
4 services rendered as far as providing my testimony or analysis,
5 my staff's time, certainly through this hearing and beyond.
6 There was no agreement to be paid.
7 Q. Okay. Now, Mr. Wu, in terms of your declaration, can you
8 explain to the Court what you provided, what your independent
9 thought in your declaration was?
10 A. The second or first?
11 A. Let's start with the first.
12 MS. STARR: I mean, Your Honor, the declaration --
13 both declarations are in evidence already. They've been
14 submitted to the Court. Having him testify what it is that he
15 thinks now maybe was independent of his reliance on the KLR
16 report and on the Foyt letter is totally inappropriate.
17 MR. GOODMAN: That's the exact issue that she's raised
18 on voir dire. And she's questioning whether he had any
19 independent input into his own declaration. So that's really
20 what I'm asking him, Your Honor.
21 MS. STARR: He just testified he didn't do anything
22 independent of reading the KLR report and the Foyt letter and
23 to --
24 MR. GOODMAN: Not with respect to his declaration.
25 THE COURT: Mr. O'Neill?

1 MR. O'NEILL: His declaration is his direct testimony.
2 It's what he said. He's now being asked to explain what he
3 said, right? The testimony is the testimony.
4 THE COURT: Right. It is what it is. It's already
5 been admitted as the direct testimony. Here, let me just make
6 it easy for you. I will sustain Ms. Starr's objection in part.
7 The Foyt letter dated April 16th will not be admitted. It's
8 new. They haven't seen it. Mr. Wu can testify as to the
9 other -- the first declaration and the letter that was attached
10 to that. And the second declaration and the -- not the Foyt
11 letter but I think the other attachment which is the same as
12 the attachment that was to the first declaration, is that my
13 understanding?
14 MS. STARR: No, Your Honor, I think that the -- if I
15 understand you correctly, Your Honor, there's one version of
16 the Foyt letter that's attached to his first declaration and
17 then a second version of the Foyt letter that's attached to the
18 second declaration.
19 THE COURT: Correct. What about the KLR --
20 MS. STARR: I'm sorry, I'm confused.
21 THE COURT: And the KLR reports? Are there two
22 different ones or is that the same KLR?
23 MS. STARR: There are two. Two different ones.
24 THE COURT: And when did you get that KLR report?
25 MS. STARR: I received the second KLR also on April

1 16th. That one I had originally thought Mr. Stufsky was going
2 to come and I was going to have a chance to cross-exam Mr.
3 Stufsky on all the new things that are in his report. And
4 there are many new things, including he has an entirely new
5 opinion. Unfortunately, I'm not going to have that opportunity
6 now because of Mr. Stufsky's illness.
7 THE COURT: Okay.
8 MS. STARR: And so I think we will want to address
9 that issue separately.
10 THE COURT: Okay. Mr. Goodman, was there something
11 else you wanted me to know?
12 MR. GOODMAN: Your Honor, Your Honor provided an
13 opportunity for us to file objections. They had the
14 opportunity to depose Mr. Stufsky at KLR and they raised
15 certain questions and there were certain mistakes in his
16 report. All Mr. Stufsky did was, based upon the issues that
17 were raised at the depositions and mistakes was he merely made
18 clarifications and modifications to fix those errors and if I
19 can, I could on response to the voir dire, I could address
20 those issues with Mr. Wu.
21 THE COURT: But that's Mr. Stufsky and unfortunately
22 he's not here. It's not Mr. Wu --
23 MR. GOODMAN: I understand that, Your Honor.
24 THE COURT: I guess at this point, here's what I'll
25 do.

1 MR. GOODMAN: Um-hum.
2 THE COURT: Mr. Wu can -- we can take the first
3 declaration -- I'm not inclined to look at the second
4 declaration at all because it has attachments that the other
5 side has only seen recently and hasn't had an opportunity to
6 cross-exam about. So I think we ought to operate off the first
7 declaration.
8 MR. GOODMAN: Okay, that's fine, Your Honor.
9 MS. STARR: Thank you, Your Honor.
10 THE COURT: Thank you.
11 MR. GOODMAN: Just note my objection for the record.
12 THE COURT: All right. So noted.
13 MS. STARR: So just to make sure that we're clear,
14 you're striking Mr. Wu's April 16 declaration and the
15 attachments thereto. You will allow Mr. Wu to testify but only
16 with respect to his first declaration in February and the
17 version of the KLR report that is attached to that declaration?
18 THE COURT: Correct.
19 MS. STARR: Thank you, Your Honor.
20 MR. O'NEILL: Your Honor, I would renew my objection
21 to the admission of the two attachments to the earlier
22 declaration because, see, the problem is not cured by going
23 back to Mr. Wu's earlier declaration. The earlier Foyt letter
24 is, again, still, naked hearsay. It's an out-of-court
25 statement being admitted for its truth. It's prejudicial to

1 us. And, in fact, Mr. Wu has not established any basis on
2 which it was reasonable for him to rely on. He never talked to
3 Mr. Foyt. He doesn't know Mr. Foyt's credentials. Mr. Foyt
4 only communicated with counsel and Mr. Wu attached it to his
5 declaration because counsel told him to. That's not reasonable
6 reliance by an expert. That's obedience. And that's not a
7 basis for getting something admitted into evidence through Mr.
8 Wu. And similarly, Your Honor, with respect to the KLR report,
9 look, that's Mr. Stufsky's report. If anyone was going to
10 testify to that, or that was going to come in through somebody,
11 it should come in through Mr. Stufsky. He's not here. It's
12 inappropriate in our view, Your Honor, the view of the
13 committee, to have that admitted through Mr. Wu, who's already
14 admitted -- who's acknowledged to you in the voir dire that he
15 didn't do anything in respect to that. Didn't look at the
16 assumptions. Didn't verify any of the assumptions. Hasn't
17 himself done a valuation. He's just accepting what's in that
18 report.
19 THE COURT: Correct --
20 MR. O'NEILL: Your Honor, we would object to the
21 admission. He can testify but -- we would say that okay, he
22 can testify as to what he says in his first declaration, but
23 the attachment to that declaration should not come in. Either
24 one.
25 MR. GOODMAN: Your Honor, under rule 703, Mr. Wu is

1 allowed to rely on documents, treatises, testimony, reports by
2 others if that's what he does in the normal course of his
3 business. He said he does. He testified specifically, okay,
4 that what Mr. Stufsky did was a valuation where his expertise
5 has to do with plan negotiations, advisory, understanding
6 claims and claims negotiation. Likewise, with respect to Mr.
7 Foyt, Mr. Foyt is a pension benefits expert. He is relying on
8 Mr. Foyt. They had the opportunity to depose him. They had a
9 date set to depose him and they decided not. So it seems to me
10 the fault lies on this side of the table. If they wanted to
11 raise that issue, then they should have deposed him.
12 THE COURT: All right.
13 MR. GOODMAN: Now, I would just also say, Your Honor,
14 that the debtors here, and their financial advisors, are
15 relying on actuarial information, that their expert has not
16 been produced, so what's sauce for the goose is sauce for the
17 gander.
18 MS. STARR: Your Honor, it was represented to counsel
19 that Mr. Foyt was not going to be brought to this hearing.
20 That was represented to us quite a number of weeks ago. So we
21 did not take his deposition with respect to the first opinion
22 because they told us he wouldn't be coming. And in our view
23 that makes it inadmissible hearsay.
24 In any event, the real problem here is -- is exactly
25 that. It's not that Mr. Wu couldn't do a valuation if he

1 tried. I'm sure Mr. Wu could do a valuation if he tried. He
2 just didn't. He didn't do anything. And if we look now at
3 this first -- if we look at his first opinion, that's
4 paragraph -- I'm sorry, that's Exhibit 35, which is this nice,
5 six-page opinion, the first page is his name and where he
6 works. The second page gives his conclusion and what he relied
7 upon. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 are
8 his qualifications. And then he's got two paragraphs. One
9 about the KLR report where he says that based on his experience
10 he -- and based on his review of the report, he thinks there's
11 a likelihood of value for Patriot Coal's current equity
12 holders. So he clearly says he hasn't done anything, he just
13 has experience in the area. And that he read the report.
14 And then for the Roth letter paragraph 16 he says
15 based on the analysis of the Roth letter, he didn't even
16 mention his experience because I guess he doesn't have any, he
17 thinks that the legacy liabilities are going to be lower. And
18 then in paragraph 17 he just summarizes. He says based on that
19 I conclude that there's a likelihood of value for Patriot's
20 equity holders. There's -- at this point, without Foyt,
21 without KLR, there's nothing here. There's no point in having
22 Mr. Wu testify.
23 MR. GOODMAN: Your Honor, and we cite this in our
24 brief. In CBS Broadcasting v. EchoStar, there, the court
25 established that an expert need not have obtained the basis for

1 his opinion from personal perception and expert testimony was
2 admissible regardless of the admissibility of the underlying
3 third-party analysis on which the expert relied.
4 Now, Your Honor, this isn't a jury. Okay? Your Honor
5 has obviously tremendous amount of experience on bankruptcy
6 issues. Your Honor could weigh the arguments that clients
7 made -- excuse me, that debtors made and weigh our arguments
8 and you'll give it whatever weight you want. But this is my
9 one witness I have here today through no fault of my own and
10 issues out of my control.
11 THE COURT: All right, Mr. O'Neill?
12 MR. O'NEILL: Just under Rule 703, Your Honor, it's
13 not anything an expert relies on is not necessarily admissible.
14 He has to reasonably rely on it. And Your Honor, relying on
15 someone you know nothing about simply because counsel told you
16 to do it is not reasonable reliance. And with respect to KLR,
17 it's just back -- I mean, the guy's not here. We don't have an
18 opportunity to cross him. It can't come in through Mr. Wu when
19 Mr. Stufsky's not here to testify to his own opinion
20 MR. GOODMAN: Your Honor, that's just
21 mischaracterization of the record with respect to Foyt and KLR.
22 Mr. Wu just testified that his staff was in communication with
23 both of those firms.
24 THE COURT: All right, I'm going to stick with my
25 original ruling. The first declaration can come in with the

1 attachment. I know what appropriate weight; I know what Mr.
2 Wu's told me what he's done with those attachments. His
3 deposition was taken, I assume, based on that declaration that
4 was out there, so I will allow him to testify as to the first
5 declaration and attachments only.
6 MS. STARR: Thank you, Your Honor.
7 THE COURT: Thank you.
8 DIRECT EXAMINATION
9 BY MS. STARR:
10 Q. So Mr. Wu, if you'll stay with para -- I should say
11 Exhibit 35; that's your original declaration.
12 A. Okay.
13 Q. My first question to you is, is it still your opinion --
14 and I'm looking here at paragraph 17, which is on page 6 of
15 your declaration -- the question is, is it your opinion that
16 there is a likelihood of value for Patriot's current equity
17 holders?
18 A. Yes.
19 Q. Is it your opinion that there is a substantial likelihood
20 that there will be a meaningful recovery for the equity
21 holders?
22 MR. GOODMAN: Objection. It calls for a legal
23 conclusion, Your Honor.
24 MS. STARR: I'm simply asking him whether that is his
25 opinion.

1 THE COURT: I'll overrule the objection. You can ask
2 the question as to his opinion.
3 A. Could you just repeat that?
4 Q. Sure. Sure. Is it your opinion that there is not just a
5 likelihood but a substantial likelihood that there will be a
6 meaningful recovery for the equity holders after application of
7 the absolute priority rule?
8 A. I believe that there will be a meaningful recovery to the
9 equity holders after application of the absolute priority rule.
10 Obviously, there are a lot of factors that go into that, much
11 of which this Court and all the players here are involved in,
12 and there are huge variables which could dramatically impact
13 some of these legacy liabilities, and therefore, small changes
14 in some of these assumptions could have a very significant
15 impact on whether equity's recovery is meaningful or very
16 significant. I think there's just a lot of different degrees
17 to that. So that's my response.
18 Q. Now, are you opining as to how much value there will be in
19 your view for the equity holders in this reorganization?
20 A. I don't think I've done that, Ms. Starr.
21 Q. So you have no view as to what -- on how much value there
22 would be in any such distribution, is that correct?
23 A. Not specifically. If you're asking for a specific
24 recovery, I don't have that answer.
25 Q. If you -- we talked a little bit about your deposition,

1 but why don't you turn -- do you still have the deposition in
2 front of you?
3 A. Yes.
4 Q. Why don't you turn to page 92.
5 A. Okay.
6 Q. If you'll look, starting with line 4,
7 "Q. What is it that you're opining that the equity holders
8 will receive of value?"
9 You answer,
10 "A. No, I'm not. I am opining that they will receive value,
11 whether cash, equity consideration, something of value."
12 And then we'll skip down to line 14. So you say -- I ask,
13 "Q. So you have no opinion as to how much value they might
14 receive?"
15 You answer,
16 "A. Not how much."
17 And then I ask -- the next question is line 17:
18 "Q. Do you have an opinion as to whether it will be a material
19 amount?"
20 There's an objection, and then you answer:
21 "A. I guess I'm opining that they're not going to receive one
22 penny."
23 So I'm opining that there's a likelihood of value, and I'm
24 not opining --
25 MR. GOODMAN: Objection, Your Honor. That --

1 MS. STARR: I'm reading his testimony, Your Honor.
2 MR. GOODMAN: We sent an errata sheet.
3 THE COURT: I need you at the podium, Mr. Goodman, so
4 we can get you on the record.
5 MS. STARR: If there's an errata sheet, we're happy to
6 look at it. I'm sorry --
7 MR. GOODMAN: Objection, Your Honor. We sent the
8 debtors' counsel an errata sheet in respect to this transcript.
9 MS. STARR: Do you have a copy of the errata sheet
10 available?
11 What is it you believe is incorrect about what I'm
12 reading? I believe that this is his correct testimony. If
13 there's something that you believe is incorrect, we're happy to
14 look at the errata sheet.
15 THE WITNESS: Well, I can testify --
16 THE COURT: Just a minute, Mr. Wu.
17 THE WITNESS: Okay.
18 MS. STARR: Okay, now, the -- I've been notified and I
19 haven't seen the errata sheet, but I have no reason to doubt
20 the representation that the change was, "I guess I'm opining
21 that they are not going to receive just one penny." So let me
22 read it back.
23 BY MS. STARR:
24 Q. "I guess I'm opining that they are not going to
25 receive" -- and then the errata supposedly says "just one

1 penny, so I'm opining that there's a likelihood of value, and
2 I'm not opining on how much value that is." Do you see that?
3 A. Yes.
4 Q. So when I deposed you in March, you didn't have a view
5 that there was going to be a material recovery. The most you
6 were willing to say was that it wasn't going to be just one
7 penny. Have you changed your mind? Have you developed a new
8 opinion different that that expressed in the deposition, Mr.
9 Wu?
10 A. Well, it's funny. My daughter's name is Penny, and I had
11 it in my mind that "just one penny". So I don't necessarily
12 believe that "just one penny" means that it's -- that's what
13 I'm really saying is I'm not saying that the recovery is just
14 going to be like this one smidgen of one dollar, one penny,
15 what have you, that there's likely to be more than just one
16 penny. That's -- that's what I said?
17 Q. Two pennies?
18 MS. STARR: I'll strike that. It's not a question.
19 Q. Okay. Now, you rely -- we discussed to a great extent
20 your reliance on the KLR report. So why don't we just take a
21 quick look at KLR report.
22 MS. STARR: I need a copy of the prior version.
23 Q. Actually, I think if you look at Exhibit 36, that's the --
24 this is the old version of the KLR report, so that's the one
25 we're going to focus on for the purposes of this -- these

1 questions. And what I'm going to ask you to do, Mr. Wu, is
2 take a look at page 10. Are you there? It's entitled "Equity
3 Value". It's got a chart.
4 A. Yes.
5 Q. All right, now, this chart is summarizing Mr. Stufsky's
6 analyses of various enterprise values, and it includes a series
7 of liabilities. Do you see that?
8 A. Yes.
9 Q. How did Mr. Stufsky arrive at the decision as to which
10 liability should be deducted from the enterprise value?
11 A. I believe he looked at the company's latest 10-Q to
12 determine what were liabilities that were known from his
13 perspective. I believe he excluded many of the liabilities
14 subject to compromise because they were part of a
15 reorganization process in which the debtors were working on
16 restructuring.
17 Q. So why don't we look at Patriot's 10-K for the year 2012
18 which has got the most up-to-date information that Mr. Stufsky,
19 you say, looked at. If you look at your tab 41, and it might
20 be helpful if you can keep Mr. Stufsky's page 10 in front of
21 you so you can kind of look at them at once.
22 MR. GOODMAN: Your Honor, I mean, I would just object
23 here.
24 THE COURT: Mr. Goodman, I need you at the podium.
25 MR. GOODMAN: The 10-K was not -- this 10-K that she's

1 going to ask the witness question of was not even available at
2 the time he issued his initial declaration.
3 MS. STARR: I don't believe that's correct, Your
4 Honor. The 10-K was available at the time of his declaration.
5 So he could --
6 UNIDENTIFIED SPEAKER: At the time of his
7 deposition --
8 THE COURT: Is there a date on the 10-K? It's through
9 the period ending December 31st, 2012.
10 MS. STARR: It was certainly available at the time of
11 his deposition because we showed the 10-K to Mr. Stufsky and
12 questioned him extensively about it. I believe it was also
13 available at the time of his declaration, but it was certainly
14 available at the time that we discussed it with Mr. Stufsky on
15 March, whatever it was, 13th.
16 MR. GOODMAN: I have no problem, Your Honor, with them
17 asking him questions about the 10-K. I just merely wanted to
18 point out that it either came out at the time or after his
19 declaration, just to clarify the record.
20 THE COURT: Okay.
21 BY MS. STARR:
22 Q. So have you got the 10-K, Mr. Wu?
23 A. Yes.
24 Q. All right, why don't we start with page 11. Just let me
25 know when you're on page 11 of the 10-K.

1 A. I'm there.
2 Q. Okay, and you'll say page 11 and going into page 12,
3 there's a heading that says, "Liability Subject to Compromise".
4 Do you see that?
5 A. Yes.
6 Q. And based on your understanding, liabilities subject to
7 compromise are defined in the 10-K as liabilities that are,
8 quote -- and this is the last sentence of that first paragraph,
9 they represent amounts "expected to be allowed on known or
10 potential claims to be resolved through the Chapter 11 process
11 and remain subject to future adjustments arising from
12 negotiated settlements, et cetera." Do you see that?
13 A. I do.
14 Q. Now, did Mr. Stufsky include the liabilities subject to
15 compromise that were disclosed by Patriot in its 2012 10-K?
16 A. He either included some of these from the 10-Q, I believe,
17 as -- as we just discussed, this was either being published or
18 just becoming made available. Generally speaking, there
19 probably aren't very significant discrepancies between the Q
20 and the K. Obviously, you know, three months have transpired
21 between those public filings, but why don't we proceed and
22 discuss what you want to ask.
23 Q. But we agree that while there might be slight differences
24 in the numbers, the categories of liabilities subject to
25 compromise --

1 A. Agreed, yup.
2 Q. -- would be the same between the Q and the K?
3 A. Yup.
4 Q. Okay. So if we look at the first category of liabilities
5 subject to compromise that Patriot is reporting in its audited
6 financials, that first category is post-retirement benefit
7 obligations excluding Coal Act (ph.).
8 A. I see that.
9 Q. And you'll see that that's 1.5 billion dollars in
10 liabilities; do you see that?
11 A. I do.
12 Q. Did Mr. Stufsky include that liability when he was trying
13 to determine what the equity value of the company was?
14 A. He did not.
15 Q. Did you instruct him not to include it?
16 A. I did not instruct him not to include it.
17 Q. So why -- if it's listed as a liability of the company,
18 albeit one that is subject to compromise, why was this not
19 reflected when Mr. Stufsky was attempting to determine the
20 current equity value of the company?
21 A. I believe it's because Mr. Stufsky took the position that
22 those liabilities may or may not result in an unsecured claim,
23 and that would be known or part of this bankruptcy, and
24 therefore, because it was unknown, he did not include them in
25 his equity calculations.

1 Q. So because Mr. Stufsky didn't know what the claim for
2 retiree healthcare benefits might be that will result from the
3 1113 and 1114 process which is going to be going on next week,
4 Mr. Stufsky valued them at zero for the purposes of his
5 analysis?
6 A. Well, first of all, I think the analysis and my
7 understanding of the KLR report is an estimate of value based
8 on information that was available to him, and therefore, you
9 know, in some of these instances, we certainly do know that the
10 debtor has taken positions where there would be no unsecured
11 claim related to active, you know, union healthcare claims, for
12 example. And so much of this 1.5 -- and I believe the debtors
13 have informed us that it's approximately 500 million -- such a
14 claim, if the debtors reject it, would result in no unsecured
15 claim. And so that's just an example of how dynamic this
16 process could be. And therefore, Mr. Stufsky, I understand,
17 did not have a lot of experience in evaluating these
18 liabilities subject to compromise, and therefore, did not
19 include that in the analysis.
20 Q. Mr. Wu, where did the equity holders rank in terms of
21 receiving a payout as a result of this reorganization?
22 A. Well, the absolute priority has them behind, you know, DIP
23 lenders, bondholders, trade -- trade claims, as well as any
24 other unsecured claims, administrative claims, priority claims.
25 And therefore, any residual value after those claims would

1 inure to the benefit of the equity holders.
2 Q. So in order to determine whether or not there's going to
3 be a return for the equity holders, you have to deduct all of
4 those claims for the DIP lenders, the secured creditors, the
5 unsecured creditors, the administrative claims, the priority
6 claims, the trade claims, you name it. Is that right?
7 A. That's correct.
8 Q. So Mr. Stufsky has a disclosure here that the company's
9 best estimate, at least as of the 2012 10-K for post-retirement
10 benefit obligations, is 1.5 million -- I'm sorry, billion
11 dollars. And his approach was to say because that's uncertain,
12 I'm going to deduct zero. That's what his approach was; wasn't
13 that right, Mr. Wu?
14 A. I think he -- he also reserved the right to supplement it
15 based on more information became known.
16 Q. Well, the report we have today, and the only report we're
17 going to have for the purposes of this motion is the one we're
18 looking at today. And when we look at the equity value here on
19 this page, the amount that he's attributed to a potential claim
20 relating to healthcare liabilities is zero; isn't that right?
21 A. That's correct.
22 Q. Yes.
23 A. However --
24 Q. So you're expecting that somehow the company is going to
25 get a remedy from the Court to be able to reduce its labor

1 obligations, its 1114 obligations. The workers are going to be
2 required to give up their healthcare benefits and suffer
3 serious damage and they're going to get no claim on the estate?
4 They're going to have no claim and all the money from the
5 workers is going to go to the equity holders? Is that the
6 position?
7 A. That's not the position. I mean, the position --
8 Q. That's the position in Mr. Stufsky's report.
9 A. Well --
10 MR. GOODMAN: Your Honor, can he finish his answer?
11 MS. STARR: My apologies, please. I apologize for
12 interrupting.
13 A. There certainly is instances in which debtors and
14 claimants agree to be paid in full, assume -- have the debtor
15 assume liability subject to a dynamic negotiation process. And
16 if those claims believe that those obligations, because their
17 very nature is that they will be serviced over a long period of
18 time, and the debtor is solvent; therefore, those claims, in
19 fact, can be assumed, and in fact, have the presence of equity
20 at the same time. They're not, you know, mutually exclusive.
21 Q. But at the moment, the best estimate we have is the
22 estimate of the company's 10-K and that's 1.5 billion.
23 A. Well --
24 Q. You know, it could change, is your testimony, but right
25 now it's 1.5 billion.

1 A. Yeah, but everything that I've read as part of your
2 experts, as well as, you know, what's disclosed here, doesn't
3 have anything dispositive as to whether or not that would be,
4 indeed, 1.5, 1.4, 1.1. It's -- you, yourself, don't know that
5 answer and, therefore, there huge variables based on my
6 understanding of Mr. Foyt's letter that there are significant
7 assumptions that go into these discussions, as well as
8 negotiations with a pension, you know, PBGC and others. And so
9 nobody's assuming that it's zero. But at the same time, we
10 don't know whether that's going to be 1.5, either. And the
11 debtors certainly have said that at least 500 million would
12 result in no claim, and so there again, we might be dealing
13 with a billion, which is a lot of value.
14 Q. So your position is, because it's not certain, you aren't
15 going to recognize any value for these claims. Then how is it
16 that you're going to reach a conclusion as to whether there
17 will be a distribution for the equity, when you assign no value
18 to any claim that you deem to be uncertain?
19 A. Well, what we're saying -- what I'm saying is that,
20 certainly, there's a lot of discussion, lot of negotiation
21 going on, a lot of these factors have an immense impact in
22 terms of whether or not and how meaningful an equity
23 stakeholder's recovery could be. And it really makes sense,
24 from my perspective, for equity to have -- be part of the
25 process. A lot of the assumptions and discussions between the

1 debtors and the retirees, for example, in terms of what those
2 claims are, and whether an unsecured claim would result, a lot
3 of that has a direct impact on the equity stakeholders.
4 Q. Mr. Wu, you're not here to give an opinion on what might
5 be preferable for the equity holders or for the debtor. But
6 what I take it, from what you're saying, is it's really
7 premature for you to have a view as to the likelihood of a
8 recovery for the equity holders, because one of the main
9 drivers of that view, the labor issues, isn't resolved. You're
10 not really ready to reach an opinion, are you? Because you
11 can't put a number on that.
12 A. Based on the information that I reviewed, based on the
13 reports that I have evaluated, there's a sufficient cause with
14 some level of rationality -- it's not implausible, based on the
15 information that I have to suggest that there would be an
16 equity recovery. And that a lot of variables, within a range,
17 will be determined, will be subject to compromise, will be
18 restructured in the coming months. And that is what I'm
19 saying, is that those discussions and those negotiations could
20 have a big impact on equity value.
21 Q. But right now, you're uncertain, and you don’t know, do
22 you?
23 A. That's actually the same position that the debtors have in
24 terms of what those liabilities could be.
25 Q. I want to look at a couple of the other liabilities here

1 that are the contingent liabilities. If you can look back at
2 the 10-K.
3 A. Okay.
4 Q. You'll note the next category is unsecured debt. That was
5 included in Mr. Stufsky's report, is that correct?
6 A. Yes.
7 Q. The next category is interest payable. Did Mr. Stufsky
8 include a liability related to interest payable?
9 A. I am not sure if he did.
10 Q. It's not listed here.
11 A. Okay.
12 Q. Did Mr. Stufsky include a liability related to rejected
13 executory contracts and leases, 151 million dollars?
14 A. I think we go back to the point that this wasn't available
15 at the time that Mr. Stufsky did his review.
16 Q. Well, I've now checked, and it appears that the 10-K was
17 issued on February 22nd. His report is dated February 27th, so
18 it was available. He may not have looked at it, but it was
19 available. In any event, even if we put aside the number, it's
20 correct that he included no number corresponding to rejected
21 executory contracts and leases.
22 A. Well, I think if we look at the Q, he included trade
23 payables. And it's possible, but, obviously, I'm not Jeff, so
24 it's possible that he would have included rejected contracts in
25 his analysis.

1 Q. So you just don't know.
2 A. I don't know.
3 Q. So you don't know whether he included it or whether he
4 didn't.
5 A. But this was not a category if we look at the Q that was
6 included at the time, I believe.
7 Q. But it's here in the K.
8 A. And so tell me again when this was issued and when Jeff's
9 report was issued. It sounds like it was contemporaneous.
10 Q. It was issued on February 22nd, about five days before Mr.
11 Stufsky's report.
12 A. Okay.
13 Q. Now why don't we turn to page -- staying in the same
14 Exhibit F-4. It's entitled Patriot Coal Corporation Debtor-In-
15 Possession Consolidated Balance Sheets. Do you see that?
16 A. Yes.
17 Q. You look under -- about half-way down the page, you'll see
18 a category that says liabilities not subject to compromise?
19 A. Yes.
20 Q. So these are liabilities that aren't subject to the
21 bankruptcy process that, indeed, are part of the company's
22 books and records.
23 A. Yes.
24 Q. Did Mr. Stufsky include the liabilities not subject to
25 compromise, because they were, indeed, certain and capable of

1 being estimated and reported in the company's books and
2 records?
3 A. So there are certain liabilities here, including asset
4 retirement obligations which we would characterize -- that are
5 not generally dischargeable in bankruptcy. Asset retirement
6 obligations are the type of liability that's sort of akin to an
7 operating cost, which is, in fact, a cost that needs to be
8 serviced over a long period of time, differentiated between
9 financial debt with defined maturities, and, therefore, our
10 understanding of those obligations is that that's also an
11 estimate not subject to compromise, but to the extent the
12 debtor is successful reorganizing, it would be our
13 understanding that there would be no claim against the estate
14 resulting from that assumption.
15 Q. But isn't it correct, while there would be no claim
16 against the estate, they would be a liability of the estate
17 that would go forward.
18 A. Yes.
19 Q. And would have to be deducted from the company's value.
20 And, indeed, is deducted from the company's value here in the
21 10-K.
22 A. Yes. I would agree with that. However --
23 Q. 720 million dollars.
24 A. However, again, there have been instances in which ARO
25 liabilities can be assumed by companies to the extent that

1 those -- those liabilities are able to be serviced over decades
2 and still have the presence of equity.
3 Q. Did Mr. Stufsky include any cost attributable to the ARO
4 liabilities in his declaration?
5 A. I think, in the initial instance, and still, there is not
6 any information that was provided from the company as to what
7 those costs would be.
8 Q. So Mr. Stufsky has not included the company's cost of
9 servicing its ARO obligations when he came up with an equity
10 value, and he hasn't included it as a liability to deduct from
11 enterprise value. So he's -- essentially, his analysis assumes
12 that Patriot's ARO liabilities are just going to go away. And
13 again, he values them at zero, isn't that right?
14 A. It just wasn't information that was provided to the
15 interested shareholders, even upon request, regarding those
16 liabilities.
17 Q. So then how, Mr. Wu, are you relying on the KLR report to
18 reach the view that there's going to be an equity value worth
19 from the shareholders when you acknowledge that it doesn't
20 include the ARO liabilities in any form?
21 A. That was based on the information we had at that time,
22 which everybody acknowledges was incomplete, unlike the
23 creditors' committee and the debtors who have much more
24 information and fact-sharing valuation matrixes between
25 themselves. We were not afforded that opportunity.

1 Q. But Mr. Wu, the information is available. I have it right
2 here. It's in the 10-K. You can get it off the Web. It's 720
3 million dollars.
4 A. But in order to determine what those future costs would
5 be, there is no cash flow demonstrating exactly what the deduct
6 for future years would be related to that liability.
7 Q. But isn't that 720 million dollars the present value of
8 the amounts the company estimates that it will spend on ARO?
9 A. True.
10 Q. Discounted back?
11 A. True, Ms. Starr; however, we don't really know, for
12 example, whether that is a one-billion-dollar payment thirty
13 years from now discounted to the present, or whether, in fact,
14 that's thirty million dollars -- or seventy-two million dollars
15 every year into perpetuity. So we don't know the nature of
16 those cash flows which, in fact, would have an impact on a
17 company's liquidity and solvency.
18 Q. Well, we do know what the cash flow was 2012 for ARO,
19 don't we? We go back to page F-2. Just look back one. And
20 you look under costs and expenses, third one down, asset
21 retirement obligation expense, 354 million dollars. So Mr.
22 Stufsky isn't reflecting just 354 million dollars' expense.
23 He's not reflecting the 720 million dollar amount. What else
24 is Mr. Stufsky looking for? What else are you looking for?
25 A. So Mr. Stufsky, I believe, provided a prospective Patriot

1 Coal that's in line with peer group identified by him as to
2 what the restructuring could be, even on a lower-tier basis.
3 And, therefore, applying margins that were comparable to other
4 participants and competitors in the industry, he applied a
5 margin analysis to derive an EBITDA. And so that would be a
6 representative right-sized reorganized Patriot in which that
7 company would be able to emerge and compete with its peers.
8 And that was a basis and a proxy -- a reasonable one --
9 pursuant to this reorganization process that he analyzed to
10 derive what that company could be.
11 Q. But haven't we already agreed that the asset retirement
12 obligations aren't going away? They're going to be assumed
13 because you can't discharge them in bankruptcy.
14 A. And --
15 Q. So they have to be a part of the -- you're not going to
16 right-size them away.
17 A. But competitors also have those costs, too. Everybody has
18 selenium and reclamation obligations which go into their margin
19 analysis.
20 Q. Well, let me move on. We've been on this a long time.
21 Just quickly, workers -- if we keep looking under liabilities
22 not subject to compromise, that are part of the company's
23 actual value, we've got workers' compensation obligations of
24 254 million dollars. Am I correct Mr. Stufsky did not include
25 any liability relating to Patriot's workers' compensation

1 obligations?
2 A. No, he did not.
3 Q. And then we've got post-retirement benefit obligations and
4 obligations to the industry fund which, basically, correspond
5 to the Coal Act, which together are about 120 million dollars.
6 Did Mr. Stufsky include anything for these Coal Act liability
7 obligations?
8 A. I don't believe he did.
9 Q. By the way, you'll note -- well, let me ask you this:
10 have you reviewed Patriot's monthly operating reports?
11 A. I have not.
12 Q. Let's just take a quick look -- we won't look at all of
13 them, but let's look at -- if you go to your Exhibit 45. This
14 is Patriot's monthly operating report for February 28th, 2013,
15 which I believe is the most recent one currently available.
16 And if you'll flip a couple of pages in. Unfortunately,
17 they're not numbered.
18 A. Okay.
19 Q. To the page that's entitled Balance Sheet, February 28,
20 2013.
21 A. I see it.
22 Q. Okay. If you look on the second line, you'll see there's
23 a line for cash and cash equivalents?
24 A. Yup.
25 Q. It's 241 million dollars, is that right?

1 A. Yes.
2 Q. The cash that Mr. Stufsky includes in his report is about
3 383 million is that right?
4 A. Yes.
5 Q. So the cash that Mr. Stufsky includes is actually
6 incorrect. And if we were going to update it to include the
7 current state of the company's cash, it would be more like --
8 it would be closer to the 241 million.
9 A. Yes.
10 Q. And that reduces the company's equity value under his
11 analysis?
12 A. Yes.
13 Q. The company, it appears, has gone through, based on this,
14 about 140 million dollars of cash since the 383-million-dollar
15 number that Mr. Stufsky pulled from, we understand, the 10-Q.
16 A. Right.
17 Q. Have you evaluated the reduction in Patriot's cash in
18 considering the equity value that we were provided by Mr.
19 Stufsky?
20 A. You mean the difference between what Mr. Stufsky put in
21 his report and 241, have I evaluated that?
22 Q. Yes, Mr. Wu?
23 A. No; I have not evaluated that, and that difference appears
24 to be 140 million dollars. At the same time, I think we'd have
25 to review more of a pattern of liquidity versus a snapshot in

1 time. But I understand what you're saying; I did not evaluate
2 that.
3 MR. GOODMAN: Your Honor, may I approach?
4 THE COURT: You may.
5 MR. GOODMAN: Just in terms of moving forward today, I
6 think Mr. Wu has been on the witness stand for slightly over
7 seventy-five minutes, and my understanding is we have three
8 more witnesses today. I just wanted to --
9 MS. STARR: Yes. I'll wrap this up in the next two
10 minutes, Your Honor, so you can get --
11 THE COURT: That would be great. I was about -- I was
12 going to give you until about 5:15, because we had the
13 discussion about the declaration.
14 MS. STARR: Thank you, Your Honor.
15 BY MS. STARR:
16 Q. So, Mr. Wu, briefly, Mr. Stufsky's enterprise value
17 analysis is based on a series of assumptions that Mr. Stufsky
18 makes about coal prices and operating costs and the number of
19 tons that we produced, among other assumptions, is that right?
20 A. You say assumptions. In order to derive his analysis,
21 valuation always involves assumptions; always.
22 Q. So in order to reach that valuation, he's had to make
23 assumptions, he's taken uncertain facts like the future price
24 of coal in five years, or what Patriot's production is going to
25 be, and he's taken those uncertainties and he's come up with

1 his -- the best assumption he could.
2 A. Right. He isn't the expert in coal, so he's had to make
3 assumptions based on the information that was provided.
4 Q. So Mr. Stufsky was comfortable making assumptions about
5 how much -- where the coal price was going, and how much coal
6 Patriot was going to produce, and what Patriot's prices in the
7 future were going to be, but he was not willing to make any
8 assumptions about what the claims were going to be and make any
9 kind of reasoned analysis?
10 A. I don't know, if you tip the scale, whether those are
11 equivalent. So many things have a huge impact on valuation, so
12 you can't just say, "Oh, he made these assumptions, but he
13 can't make those assumptions." Again, in the context of what
14 his work was, he made assumptions to the best of his ability,
15 based on the information that he had.
16 Q. He was comfortable making assumptions when he reached an
17 analysis of the assets, but he wasn't comfortable making any
18 assumptions or estimates when he was coming up with a set of
19 liabilities.
20 A. I think he felt like he could at least rely on his
21 experience, reasonably, to project a forward price curve. And
22 he could evaluate a run rate in line with his peers type of
23 cost structure in order to determine certain types of margin.
24 I think he lacked the experience in terms of bankruptcy in
25 order to evaluate those liabilities subject to compromise.

1 Q. So the short answer is he might have been qualified to
2 make some assumptions about the assets, but he wasn't qualified
3 to make assumptions about the liabilities. So we've got an
4 enterprise value that's based on someone who doesn't have the
5 experience to actually analyze the liability piece of the work.
6 A. Well, I think, to be frank, really, that information isn't
7 dispositive or known by any party right now. Obviously,
8 certain parties here have much more information than others,
9 and a lot of variables can transpire in bankruptcy. And so he
10 wasn't privy, nor are we, in terms of truly understanding, you
11 know, how those liabilities could be restructured.
12 Q. Okay.
13 MS. STARR: Mr. Wu, thank you.
14 THE COURT: All right. Thank you, Ms. Starr.
15 Mr. Goodman.
16 MR. GOODMAN: Yes, Your Honor?
17 THE COURT: Did you have anything briefly from this
18 witness?
19 MR. GOODMAN: Yes, Your Honor.
20 Your Honor, counsel to the creditors' committee, I
21 believe, was getting up to as a question, so, I think --
22 MR. O'NEILL: No, I wasn't. It's all good, counsel.
23 I'm sorry.
24 MR. GOODMAN: Okay.
25 CROSS-EXAMINATION

1 BY MR. GOODMAN:
2 Q. Can you turn to Exhibit 36 for a moment, which is the
3 first KLR report?
4 A. Yes, I'm there.
5 Q. Okay. And if you flip to, I believe it's page 10.
6 A. I'm there.
7 Q. Okay. What's your understanding of that chart on page 10?
8 A. My understanding is that KLR employed three methodologies
9 In order to arrive at a range of possible equity values and
10 estimates. He then subtracted from that those liabilities that
11 he knew would be deducted prior to equity value.
12 Q. Um-hum.
13 A. And he excluded those liabilities that were either subject
14 to compromise, or would be ordinarily assumed if a debtor was
15 successful reorganizing.
16 Q. Uh-huh. And is there a number there for current equity
17 value?
18 A. There is a range of equity values depending on three
19 different methodologies, and those values range from negative
20 thirty-three in one of methodologies to eight billion dollars
21 in one of -- in another methodology. But clearly, each
22 methodology has a range of imputed equity value, based on the
23 information by --
24 Q. And that negative value, am I correct, can be used to
25 satisfy some of the liabilities that Ms. Starr just took you

1 through in the 10-K?
2 A. Yes. Yes.
3 Q. With respect to the AR --
4 AUTOMATED MESSAGE: Hello, you have been conducting a
5 meeting for a long period of time. If you need to continue
6 meeting, press 1 now.
7 THE COURT: Okay. Sorry about that. I guess AT&T
8 said you've been on the phone too long.
9 Q. Okay.
10 A. I agree with her.
11 Q. In terms of the ARO, do you know what the interest rate
12 assumption the debtors used in present valuing the ARO?
13 A. No idea.
14 Q. Uh-huh. And would that affect the overall value --
15 present value? Would the interest rate -- would the interest
16 rate affect the overall present value?
17 A. I think the interest rate would be -- and also if the
18 debtors who are not operating a wide variety of mines, that
19 could change the estimates. That's also a dynamic figure, my
20 understanding is.
21 Q. Uh-huh. With respect to the post-retirement benefit
22 obligations -- Ms. Starr asked you some questions about it --
23 what's your understanding of the 1,517,000,000 of post-
24 retirement benefits, with respect to the debtor's intention?
25 Do you have any understanding?

1 A. Well, I think the debtor is engaged in discussions with
2 those constituents; some of them -- some of the -- a billion of
3 that billion-five relates to nonactive retirees and their
4 healthcare costs, an estimate, and half a billion represents
5 healthcare costs to active unionized employees.
6 Q. Okay. And with respect to the 500 million of healthcare
7 claims -- union healthcare claims, do you have any
8 understanding what the debtors propose to do with that claim?
9 A. The debtors have proposed to reject that claim. And the
10 debtors proposed that no unsecured claim resolved from that
11 rejection.
12 MR. GOODMAN: Thank you, Your Honor. Thank you, Mr.
13 Willard. Your Honor, no further questions.
14 THE COURT: All right. Thank you.
15 MS. STARR: Your Honor, just before we -- I think
16 we're going to go to Ms. -- the cross-examination of Mr.
17 Huffard, I just want to make a motion.
18 The standard, here, Your Honor, is, is there, A, is it
19 necessary to appoint an equity committee in order to represent
20 the equity holders, or can they be properly represented by a
21 management? And there's been nothing put forward by the
22 interest of the shareholders, that there's anything wrong with
23 Patriot's management or their ability to represent the
24 shareholders. And in fact, they compliment management on their
25 hard work to rationalize the business, et cetera. In addition,

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1 if that's established, that's the end of the case. It doesn't
2 matter if the company's solvent or insolvent or hopelessly
3 insolvent.
4 If you get past that, then the question is, is there a
5 substantial likelihood of a meaningful distribution to the
6 equity after the application of the absolute priority will --
7 and we asked Mr. Wu was that -- what was his opinion, and he
8 said, there's a likelihood. Might have even said reasonable
9 likelihood at one point, but he never substantial likelihood.
10 And, indeed, I don't think he can say substantial likelihood
11 because he doesn't have any view on the liabilities right now.
12 Given that showing, I don't see why we need to go
13 forward. That, alone, makes the application of the equity
14 holders deficient. It doesn't even matter, given that, what
15 Mr. Huffard or Mr. Schwartz have to say. Given the standard
16 that clearly applies here, they can't satisfy, even if you take
17 Mr. Wu's opinion. So I would say, Your Honor, that you could
18 decide this motion right now.
19 MR. O'NEILL: I would echo that position, Your Honor.
20 There's nothing on one prong of the analysis. And as to the
21 valuation prong of the analysis, Mr. Wu's told you, he did no
22 valuation himself. And he hasn't looked at the basis for
23 anyone else's evaluation. So his testimony as to the issue of
24 whether or not the debtors are solvent or insolvent, or whether
25 there's a likelihood or no likelihood of a distribution to

1 equity, is worthless, Your Honor. And on that basis, you
2 should direct a verdict, or enter a judgment on partial
3 findings denying the motion. Thank you.
4 THE COURT: All right --
5 MR. GOODMAN: May I respond, Your Honor?
6 THE COURT: You may, Mr. Goodman.
7 MR. GOODMAN: Your Honor, the, the debtors and the
8 creditors' committee here is making a legal argument. Okay?
9 The standard, and what that standard should be, has not yet
10 been decided by the Court. We say the standard is not
11 hopelessly insolvent. There are also other issues involved
12 regarding adequate representation. That's part of the
13 element -- that's part of the elements that the Court is looked
14 to in, in making a determination of whether an equity committee
15 should be appointed. As Judge Lynn noted in the Pilgrim's
16 Pride case, which we've cited in our brief, the court notes
17 that the dynamics of a Chapter 11 where management, can be
18 constrained to argue to the court, a conservative value in
19 order to obtain creditor acceptance of a plan. The dilemma for
20 management is do they hold out for equity, or do they risk
21 failure? What the judge said, in that case, is the unsecured
22 creditors' committee confuses management's duty to maximize
23 value with adequate representation. The issue here is not
24 management's attempt to maximize value. The issue here is
25 adequate representation.

1 THE COURT: All right. Well, while we're on that
2 issue, then, of adequate representation, I guess, Mr. O'Neill,
3 that seems to be what the committee's objection is: that
4 essentially there is no reason that the committee couldn't
5 represent the interest of the shareholders, as well as looking
6 at the current face value of the debtors' public securities, as
7 to how we get to whether or not they're insolvent. I guess I
8 would ask you to speak briefly on the issue of adequate
9 representation since Mr. Goodman has raised that issue.
10 MR. O'NEILL: I would begin by saying, Your Honor,
11 that it's Mr. Goodman's burden, and Mr. Goodman has introduced
12 absolutely nothing on the topic.
13 However, I'm prepared to extol the virtues of the
14 committee. I always like to do that. The committee and the
15 debtors, as you know, Your Honor, have been highly active in
16 this case, attempting to maximize value. I think you've seen
17 evidence of that throughout the day today. And you haven't
18 heard anything to the contrary from Mr. Wu. Mr. Wu, in fact,
19 is not competent to testify about what's been going on in this
20 case because he hasn't been involved in it. And in any event,
21 he hasn't been doing very much work. But other than that, Your
22 Honor, it's his burden to show that the existing fiduciaries
23 are not adequately representing him. And he hasn't shown
24 anything.
25 MR. GOODMAN: Your Honor, we filed, I believe, a

1 thirty-page brief which highlights the testimonies of the
2 debtors and the committee's witness. Both of their key
3 valuation witnesses say there is no equity value in the case
4 and there is no likelihood of equity value, but none of their
5 valuation experts have done a valuation of the company. That
6 is part of the -- that is part of our brief, and we should have
7 the opportunity to cross-examine those issues.
8 How can a committee, or a debtor, represent our
9 interest if they've already made a determination -- already
10 made a determination that there is no equity value, when they,
11 themselves, have not done a valuation. We have done a
12 valuation and presented evaluation with a range of values from
13 2.7 billion, okay, to 700 million of equity value. Obviously,
14 there are issues of very, very complicated issues, which Your
15 Honor's going to decide next week, regarding the value of
16 healthcare claims. There's going to be future issues of
17 pension claims. There's going to be a whole slew of issues.
18 What Mr. Wu summarized in his reports, is that those
19 issues are going to be dealt with either by the Court or by
20 various negotiations. There are cost savings involved by
21 instituting a VEBA. Those cost savings have to be taken into
22 account. Mr. Foyt reports on them. I understand Your Honor
23 has not, not allowed that letter, but he explains that in great
24 detail in the second declaration. I just don't see how the
25 committee or the debtors have a basis to ask for a ruling from

1 Your Honor, at this point, before we've heard from their
2 witnesses.
3 MR. GOODMAN: The basis is simple, Your Honor. It's
4 his burden, and he's failed to carry it. What he says our
5 witnesses say about value, which, frankly, we don't agree with,
6 is beside the point as to whether or not the existing fiduciary
7 is adequate to represent the interest of equity in these
8 proceedings. And Mr. Foyt's second letter is not part of the
9 record.
10 MR. O'NEILL: Your Honor, this is just a summation.
11 This is a summation that you do after evidence is presented by
12 both sides. There's plenty of issues regarding complexity of
13 the case, adequate representation, solvency, insolvency,
14 statements made by the debtors, statements made by the UCC.
15 MS. STARR: Your Honor, the question of -- interested
16 shareholders' direct case has gone in. Whatever they've got,
17 they've got. So then that you -- it leaves the question of
18 whether or not management and the board, as well as the UCC,
19 provide adequate representation. Whatever evidence Mr. Goodman
20 has to put in, it's in. And there's no evidence that
21 management or the board or the UCC are inadequate to represent
22 the interest of the shareholders.
23 Indeed, the only thing that he's cited is that the
24 management and the board and the UCC and the U.S. Trustee and
25 the DIP lenders, and a whole series of other creditors, all

1 oppose his motion. Opposing his motion doesn't mean that the
2 company management and board, who are indeed the shareholders'
3 elected representatives, are incapable of representing their
4 interest. And here, the standard is quite high. Is it
5 necessary? So it's not -- would it be better; would it be
6 helpful? It's whether it's necessary.
7 There is a whole series of questions on insolvency and
8 our witnesses are going to establish pretty decisively the
9 question on solvency, but that's actually a secondary question.
10 If Your Honor determines that the representation that exists is
11 adequate, it doesn't matter whether they're insolvent, really
12 insolvent, hopelessly insolvent, not insolvent at all; that's
13 beside the point. And that's, indeed, why you rarely see
14 equity committees. They are a "extraordinary remedy" because
15 in the ordinary circumstances this is entrusted to the board
16 and to management.
17 So my point, here, in asking for a decision now, is
18 simply to look at this first opening question, even before you
19 get to the question of solvency, because now that the evidence
20 from the interested shareholders is in, there's nothing, and
21 they're the ones who carry the burden on this point.
22 MR. GOODMAN: Your Honor, look. The record isn't
23 complete. There have been admissions made by the debtors with
24 respect to that the estate currently does not have sufficient
25 value to make a distribution to equity. Now, if you look again

1 at the Pilgrim's Pride case, there are some very similar facts
2 in that case that you can draw into this case. For example,
3 the Pilgrims' Pride court, okay, noted that the debtor was
4 solvent on the filing day. When this debtor filed this Chapter
5 11 petition, it showed it was 495 million solvent. In its June
6 30th 10-Q, it showed that it was solvent by about 180 million.
7 It wasn't until the September 30th 10-Q that the debtors, okay,
8 finally showed negative equity of about eight million dollars.
9 Now, this is a very cyclical business. Our experts have talked
10 about it; they've done it in their declarations, which has been
11 their direct testimony. This is a very cyclical business, and
12 this company, right now, is at the trough. I think I should at
13 least be allowed to bring out those admissions and the
14 testimony of their very own witnesses on that subject.
15 THE COURT: Mr. O'Neill was there something else you
16 wanted to say?
17 MR. O'NEILL: Your Honor, I think I would just be
18 repeating myself.
19 THE COURT: All right. Ms. Long, does the U.S.
20 Trustee have any --
21 MS. LONG: Not on this aspect of the issue, Your
22 Honor.
23 THE COURT: All right. All right, let me just take
24 about a five-minute recess, and then we'll go on. In temporary
25 recess.

1 (Recess from 5:30 p.m. until 6:26 p.m.)
2 THE CLERK: Your Honor, we are back on the record.
3 THE COURT: All right. Thank you. Be seated, please.
4 All right. I have reviewed the arguments of counsel
5 here today. I have, again, reviewed the Pilgrim's Pride case
6 that was cited by the shareholders. And in that case, the
7 debtors filed a response, neither in support or opposition, to
8 the motion to appoint a shareholders' committee. The SCC
9 appeared, in support of the motion, to appoint a committee, and
10 the U.S. Trustee initially opposed the motion; then filed no
11 pleadings in opposition to the motion. In the Pilgrim's Pride
12 case there was also evidence through the debtor's monthly
13 operating reports that the debtor was solvent, and the debtor's
14 chief restructuring officer testified that, "Debtors' position
15 was not even close to hopeless insolvency."
16 This case here is a totally different picture. This
17 Court has looked at the factors that are to be considered.
18 There appears to be no substantial likelihood that equity will
19 receive a meaningful distribution, in these cases, to justify
20 appointment of a committee. Mr. Wu's testimony was
21 speculative, at best, on the most optimistic outlook
22 imaginable. The shareholders here, likewise, have not shown
23 that an official committee is necessary for their interest to
24 be adequately represented. Appointment of an equity committee
25 is the exception and not the rule. There is no basis for

1 concluding that the unsecured creditors' committee will not
2 adequately represent the shareholders, because the unsecured
3 creditors' committee has a duty to maximize the value of the
4 debtors' estates, which will trickle down to the benefit of the
5 shareholders.
6 Further, the board of directors of the debtors also
7 have fiduciary duties to the shareholders, even in Chapter 11
8 cases.
9 Therefore, I will sustain the committee's objection
10 and deny the motion for appointment of a shareholder committee.
11 Mr. O'Neill or Mr. Willard, could I ask you all to provide me
12 with the proposed order, please?
13 MR. WILLARD: Yes, we will, and thank you, Your Honor.
14 THE COURT: All right. All right, thank you.
15 I believe that takes care of everything on the docket
16 today. I appreciate everyone's being well prepared and
17 adhering to our time constraints, but I hope that that assisted
18 us, then, in getting through the number of matters that were on
19 the docket today. Ms. Starr, is there anything else on behalf
20 of the debtors, again, today?
21 MS. STARR: No, Your Honor, except to thank you very
22 much for your time and attention to this very long day.
23 THE COURT: No problem. You are welcome. All right.
24 Are there any other requests, then, by any of the other parties
25 present in the courtroom?

1 All right, hearing none; now, are there any requests
2 by any of the parties, if they're still there on the phone.
3 All right. Then hearing none, then we will be in
4 recess until Monday morning. Thank you.
5 IN UNISON: Thank you, Your Honor.
6 (Whereupon these proceedings were concluded at 6:29 PM)
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2 for appointment of a shareholder committee denied

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

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12–51502 –A659

CHAPTER 11

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

To: All Persons of Record at Hearing

A transcript of the proceeding held on April 23, 2013 was filed on April 26, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: May 3, 2013. Personal data identifiers include: **social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice:May 17, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no Statement of Transcript Redactions is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

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

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: May 28, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: July 25, 2013, unless extended by court order. However, during this 90–day period the transcript is available for viewing only during normal business hours at the Clerk's office.

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

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 4/26/13

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