UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
(Poughkeepsie Division)

Hearing Date: September 24, 2012
Hearing Time: 12:00 noon

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In re:

Chapter 11

Case No. 12-12900(SCC)

PATRIOT COAL CORPORATION,

Debtor.

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OBJECTION OF THE UNITED STATES TRUSTEE TO MOTION OF CERTAIN INTERESTED SHAREHOLDERS FOR ENTRY OF AN ORDER DIRECTING THE APPOINTMENT OF AN OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS PURSUANT TO 11 U.S.C. § 1102(A)(2)

**TO THE HONORABLE SHELLEY C. CHAPMAN,
UNITED STATES BANKRUPTCY JUDGE:**

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee"), in furtherance of the duties and responsibilities set forth in 28 U.S.C. §§ 586(a)(3) and (5), hereby files her Objection (the "Objection") to the Motion (the "Motion") of CompassPoint Partners, L.P, Frank Williams, and Eric Wagoner (the "Interested Shareholders") seeking an order directing the United States Trustee to appoint an official committee of equity security holders pursuant to 11 U.S.C. §1102(a)(2). (ECF Doc. No. 417). For the reasons discussed below, the Motion should be denied.

I. INTRODUCTION

The Motion should be denied because the Interested Shareholders have failed to meet their burden to establish that equity security holders' interests are not adequately represented or that there is a substantial likelihood of a meaningful recovery to them. For these reasons, the

United States Trustee, in the exercise of her discretion under Bankruptcy Code Section 1102(a)(1), declined to appoint an equity committee shortly before the filing of the Motion and nothing in the Motion suggests that the United States Trustee's declination should be disturbed.

II. FACTS

A. General Background

1. On July 9, 2012 (the "Petition Date"), the Debtors, consisting of Patriot Coal Corporation ("Patriot") and 98 of its affiliates, filed voluntary petitions for relief in this district under Chapter 11 of title 11, United States Code (the "Bankruptcy Code"). (ECF No. 1). Pursuant to an order dated July 10, 2012, the cases are being administered jointly. (ECF No. 30).

2. According to the Declaration of Mark N. Schroeder, Senior Vice President and Chief Financial Officer of Patriot Coal, the Debtors, together with their non-debtor subsidiaries (collectively, "Patriot"), are leading producers and marketers of coal in the United States, with operations and coal reserves in the Appalachia (Norther and Central) and Illinois Basin coal regions. Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007 dated July 9, 2012 (the "Schroeder Declaration") at ¶ 6. (ECF No. 4).

3. Since the Petition Date, the Debtors have operated their businesses and managed their properties as debtors in possession pursuant to Bankruptcy Code Sections 1107 and 1108.

4. On July 18, 2012, the United States Trustee, pursuant to Section 1102(a)(1) of the Bankruptcy Code, appointed the official committee of unsecured creditors (the "Creditors' Committee"). (ECF No. 118).

B. The Debtors' Capital Structure

5. Prior to the Petition Date, Patriot Coal's common stock was publicly traded on the New York Stock Exchange under the ticker "PCX." Schroeder Declaration at ¶ 16. As of the Petition Date, there were approximately 838 holders of record of Patriot Coal's common stock. Id.

6. As of the Petition Date, Patriot Coal, as borrower, and substantially all the other Debtors, as guarantors, were parties to a certain $427.5 million Amended and Restated Credit Agreement, dated as of May 5, 2012 (the "Credit Facility") by and among the Debtors, Bank of America, N.A., as administrative agent, and the lenders party thereto. Id. at ¶ 17. The Credit Facility provided for the issuance of letters of credit and direct borrowing. Id. As of the Petition Date, $300.7 million in letters of credit were issued and outstanding and $25 million in direct borrowing were outstanding under the Credit Facility. Id.

7. In addition, Patriot Coal was also party to a $125 million accounts receivable securitization program, which provides for the issuance of letters of credit and direct borrowing. Id. at ¶ 18. As of the Petition Date, $51.8 million in letters of credit were issued and outstanding under the securitization facility. Id.

8. Patriot Coal also issued two series of unsecured notes: (a) $250 million in 8.25% senior unsecured notes due 2018, which are guaranteed by substantially all of the Debtor subsidiaries of Patriot Coal (the "8.25% Notes") and (b) $200 million in 3.25% unsecured convertible notes due 2013 (the "3.25% Notes"). Id. at ¶ 19.

9. In 2005, a subsidiary of Patriot Coal also issued unsecured promissory notes in conjunction with an exchange transaction involving the acquisition of Illinois Basin coal

reserves. The promissory notes and related interest are payable in annual installments of $1.7 million and mature in January 2017. Id. at ¶ 20. As of the Petition Date, approximately $7 million was outstanding under the promissory notes. Id.

10. In connection with the filing of the Chapter 11 cases, the Debtors filed a motion seeking, among other things, Court authorization for the Company to obtain post-petition financing up to an aggregate principal amount of $802 million, consisting of (a) revolving credit loans in an amount not to exceed $125 million, (b) a term loan in the amount of $375 million, and (c) a roll-up of obligations under the pre-petition credit agreement in respect of outstanding letters of credit issued in the aggregate amount of approximately $302 million. (ECF No. 25). On August 3, 2012, the Court entered a final order approving the post-petition financing. (ECF No. 275).

11. According to the consolidated balance sheet attached to the Schroeder Declaration, as of May 31, 2012, the Debtors' had total assets amounting to $3,568,840,000, and liabilities of $3,072,248,000. See Schroeder Declaration, Schedule 3. Of the assets listed, $3,171,692,000 consisted of "Property, Plant, Equipment and mine development, net." Id. The total stockholder's equity was listed at $496,592,000. Id.

12. As reflected in the 10-Q for the quarter ended June 30, 2012 a copy of which is attached to the Motion and the recent monthly operating report, the following constituted the amount of assets, liabilities and stockholders' equity as of December 31, 2011, June 30, 2012 and July 31, 2012, respectively:

Assets and Liabilities	As of December 31, 2011	As of June 30, 2012	As of July 31, 2012
Property, plant, equipment and mine development, net	$3,202,121,000	$3,174,821,000	$3,171,765,000
Total Assets	$3,763,738,000	$3,579,553,000	$3,775,751,000
Total Liabilities	$3,170,896,000	$3,391,168,000	$3,715,906,000
Total Stockholders' equity	$592,842,000	$188,385,000	$59,845,000

13. Patriot Coal's 10-Q filed for the period ending June 30, 2012 reflects that the company sustained losses for the six months ended June 30, 2012 of $429,617,000, compared to losses for the same time the prior year of $65,505,000.

14. On August 30, 2012, the Debtors filed a Monthly Operating Report for the period ended July 31, 2012 showing a net loss of $135,615,000. (ECF No. 474).

C. The Request for an Equity Committee

15. On July 18, 2012, Hugh Ray, Esq. of McKool Smith, on behalf of CompassPoint Partners, L.P., Frank Williams, and Eric Wagoner, sent a letter (the "Interested Shareholders' Request") to the United States Trustee requesting the formation of an Official Committee of Equity Security Holders (an "Equity Committee"). A copy of the Interested Shareholders' Request is attached hereto as Exhibit A.[1]

16. By letter dated July 19, 2012, counsel to the United States Trustee sent a copy of the Interested Shareholders' Request to counsel to the Debtors and the Creditors' Committee and asked the respective parties for comments by no later than August 2, 2012.

[1] Given the size of the exhibits attached to the Interested Shareholders' Request and the responses of counsel to the Debtors and the Creditors' Committee, such exhibits are not filed with the Objection, but a copy of those exhibits will be provided to the Court.

17. On July 20, 2012, counsel to the Creditors' Committee requested that the response date of August 2, 2012 be extended to August 15, 2012 in order to respond to the Interested Shareholder's Request. Upon the consent of Mr. Ray on behalf of the Interested Shareholders, the United States Trustee granted the request. A copy of the correspondence evidencing the request and grant for the extension of the time to respond to the Interested Shareholders' Request is attached hereto as Exhibit B.

18. On August 15, 2012, the United States Trustee received responses from counsel to the Debtors and the Creditors' Committee with respect to the Interested Shareholders' Request (the "Responses"). A copy of the Responses is attached hereto as Exhibit C. Both the Debtors and the Creditors' Committee indicated in their Responses that the Interested Shareholders' Request should be denied.

19. By letter dated August 24, 2012, the United States Trustee declined to appoint an Equity Committee (the "Letter Denying Equity Committee"). A copy of the Letter Denying Equity Committee is attached hereto as Exhibit D.

III. ARGUMENT

A. The United States Trustee Properly Exercised Her Discretion in Declining The Interested Shareholders Request

20. Section 1102(a)(1) of the Bankruptcy Code provides that:

> Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and **may appoint additional committees** of creditors or **of equity security holders as the United States Trustee deems appropriate.**

11 U.S.C. §1102(a)(1) (emphasis added). The plain language of the statute indicates that the appointment of an equity committee is a discretionary act of the United States Trustee. See In re Park West Circle Realty, LLC, 2010 WL 3219531 (Bankr. S.D.N.Y. 2010) at *1 ("The UST is vested with the power and discretion to appoint creditors' and equity holders' committees, pursuant to § 1102(a).").

21. The United States Trustee performed a full and fair analysis of the request to appoint an equity committee and decided, in light of all the facts and circumstances then within her knowledge, that a committee should not be appointed at this juncture.

22. The United States Trustee took the following actions to evaluate the request:

a. Examined the capital structure, organizational structure and financial posture of the Debtors as reported by them in their verified bankruptcy petitions, affidavits and exhibits, as well as their filings with the Securities Exchange Commission;

b. Solicited and received input from the Debtors and the Creditors' Committee with regard to the desirability of appointing an equity committee; and

c. Reviewed correspondence from counsel to the Interested Shareholders.

23. The Bankruptcy Code is silent as to the nature and degree of the level of inquiry required of a United States Trustee in the analysis of a request to appoint an equity committee. See generally, 11 U.S.C. § 1102(a)(1). However, Section 1102 vests broad discretion in the United States Trustee with regard to the appointment of committees other than an unsecured creditors' committee. In re Williams Communications Group, Inc., 281 B.R. 216, 219 (Bankr. S.D.N.Y. 2002).

24. As discussed herein, the actions taken by the United States Trustee were a reasonable, balanced method of determining the wisdom of appointing an equity committee. In doing so, the United States Trustee took into consideration financial data reported and verified by the Debtors. It is appropriate and reasonable to rely upon financial data filed in a bankruptcy case and its wholly owned affiliate in assessing whether to appoint an equity committee. See e.g., In re Eastman Kodak Co., 2012 WL 2501071 at *4 (Bankr. S.D.N.Y. 2012); Williams, 281 B.R. at 220-221.

25. In conducting her review, the United States Trustee also solicited the comments and opinions of the Debtors and the Creditors Committee regarding this issue. Because each party in interest can be expected to have its own bias, no one entity's opinion is overwhelmingly persuasive, yet when considered together, may provide a balanced view of the cases. See

generally, Eastman Kodak, 2012 WL 2501071 at *3-4 (examining the differing constituencies and assessing where their interests are aligned). In this case, the Debtors and the Creditors' Committee opposed the appointment of an Equity Committee.

26. Finally, before reaching her determination regarding the request to form an equity committee, the United States Trustee also considered the request by the Interested Shareholders. In reaching her determination, the United States Trustee not only requested information from the main constituencies in the cases, but carefully considered all information received and all interested parties positions with respect to the request. Therefore, this was a proper exercise of the United States Trustee's discretion in declining the Interested Shareholders' Request.

B. The Motion Should Be Denied

27. Section 1102(a)(2) of the Bankruptcy Code provides that:

> On request of a party in interest, the court may order the appointment of additional committees of ... equity security holders if necessary to assure adequate representation of ... equity security holders. The United States trustee shall appoint any such committee.

11 U.S.C. §1102(a)(2). See generally Fed. R. Bankr. P. 2020.

28. The statute gives the Court discretion to order the appointment of an equity committee if necessary to assure adequate representation of equity security holders. Albero V. Johns-Manville Corp. (In re Johns-Manville Corp.), 68 B.R. 155, 159 (S.D.N.Y. 1986). Bankruptcy Code Section 1102(a)(2) does not set forth a test of adequate representation, however, so the Court must examine the facts of each case. Id., see also In re Beker Indus. Corp., 55 B.R. 945, 948 (Bankr. S.D.N.Y. 1985) (adequate representation is not defined in the statute, but requires interpretation by the Court). The focus of the statute is "not whether the

shareholders are 'exclusively' represented, but whether they are 'adequately' represented." In re Leap Wireless Int'l., Inc., 295 B.R. 135, 140 (Bankr. S.D. Cal. 2003)*(*quoting Williams at 222).

29. It has been held that the appointment of an official equity committee should be the "rare exception." Williams, at 223. It has also been determined that "[t]he statute requires the Court to find that the appointment of an equity committee is 'necessary,' a high standard that is far more onerous than if the statute merely provided that a committee be 'useful and appropriate.'" Eastman Kodak, 2012 WL 2501071 at *2 (citing In re Oneida Ltd, et al., 2006 WL 1288576, *1 (Bankr.S.D.N.Y. 2006)).

30. Courts consider a number of non-exclusive factors in determining whether there is adequate representation, including the debtor's insolvency, the number of shareholders, the complexity of the case, and whether the cost of the committee would significantly outweigh the concern for adequate representation. In re Johns-Manville Corp., 68 B.R. at 159-60.

31. More specifically, in recent cases courts have determined that an equity committee should not be appointed unless the equity holders carry their burden to establish that:

(a) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and

(b) they are unable to represent their interests in the bankruptcy case without an official committee.

In re Eastman Kodak Co., 2012 WL 2501071 at *4; In re Spansion, Inc., 421 B.R. 151, 164 (Bankr. D. Del. 2009); Williams, 281 B.R. at 223. The burden is on the equity holders to make of these showings. In re Eastman Kodak Co., 2012 WL 2501071 at *4. In cases such as these, where (a) the possibility of a recovery for equity is remote, (b) the equity holder's interests are represented by the Debtors and the creditors' committee, and (c) equity holders can represent

their interests without an official committee, an Equity Committee is an unnecessary and unwarranted burden on the estate.

i. There Is No Substantial Likelihood of a Distribution to Equity Holders, Therefore, No Equity Interest Exist To Be Protected By An Equity Committee

32. Courts will not appoint an official equity committee where they "have no economic interest to protect. . . ." Williams, 281 B.R. at 222. Where, as here, the Debtors "appears to be hopelessly insolvent," so that equity will receive nothing under a Chapter 11 plan, the appointment of an equity committee is inappropriate. See id. at 221.

33. In analyzing the solvency of a debtor in the equity committee context, the definition of the term "insolvent" in the Bankruptcy Code is set forth in section 101(32) as follows:

> with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, *at a fair valuation* . . . .

11 U.S.C. § 101(32)(A) (Emphasis added). Section 101(32) requires a "balance sheet test" to determine insolvency." In re Nirvana Restaurant, Inc., 337 B.R 505, 506 (Bankr. S.D.N.Y. 2006.) If the debtor is a going concern, fair valuation means "the fair market value of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts." Id., quoting Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.), 78 F.3d 30, 35 (2d Cir.1996). Accordingly, the analysis starts with a review of the balance sheet, with the recognition that book value does not always provide a fair estimate of market value. See Nirvana Restaurant, 337 B.R. at 506; see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 443 (1968) ("going-concern value, not book or appraisal value, must govern" valuation in bankruptcy); Cellmark Paper, Inc.

V. Ames Merch. Corp. (In re Ames Dep't Stores Inc.), 470 B.R. 280, 283 (S.D.N.Y. 2012) ("[B]ook values are not ordinarily an accurate reflection of the market value of an asset").

34. Other evidence of insolvency can be found in SEC filings and accompanying financial statements, including (1) reports of negative net worth, (2) statements or figures that show sustained losses, (3) facts that show that the debtor is operating in a depressed market, and (4) reports of failure to pay bank debt. Roblin Industries, 78 F.3d at 37. As the Court in Williams noted:

> This Court has made a determination that [the debtors] appear to be hopelessly insolvent based on many different factors. The Debtors' balance sheet and market value were two such factors, but so are the host of other indicia of Debtors' financial health set forth above. Regardless of the method used, the result will "rarely, if ever, be without doubt or variation."
>
> . . . In short, this Court has not made a valuation, nor is one necessary at this stage. Instead, it has reached a practical conclusion, based on a confluence of factors, that the Debtors *appear to be* hopelessly insolvent.

Williams, 281 B.R. at 221.

35. The Interested Shareholders offer no current valuation evidence in support of the Motion. Their primary reliance for the Motion is on the book value and equity value reflected in recent SEC and other public filings. See Motion at ¶¶ 1, 22. More specifically, they draw particular attention on the fact that in the company's 10-Q for the quarterly period ended June 30, 2012, the company indicated substantial equity value of nearly $190 million and that in the Schroeder Declaration, the financial information reflected equity value of $495 million. Id. Relying solely on speculation, the Interested Shareholders also point out the possibility that there may be other sources of value for the Debtors such as, among other things, potential tax refunds, claims against officers and directors, and other claims. See id. at ¶¶ 1(c), (d), 23. Throughout

the Motion, however, the Interested Shareholders acknowledge that the company's solvency is a mere possibility subject to good faith dispute. See id. at ¶¶ 1(c), (d), 3, 7, 23, 35 ("In any event, in the absence of current, audited financial information, the Debtor's solvency is at best subject to good faith dispute.").

36. Despite speculating about the solvency of the Debtors, the Interested Shareholders have fallen short of meeting their burden of establishing "a substantial likelihood" that there will be a "meaningful distribution" to equity. As set forth above, the total stockholders' equity value from December 31, 2011 to July 31, 2012 decreased by $532,997,000. See supra at ¶12. The total stockholder's equity as of July 31, 2012 totaled $59,845,000. Id. That figure represents approximately 1.6% of the total "book value" of the assets for that period. Accordingly, if the book value of the assets is in any way compromised by a mere 1.6%, the stockholder's equity would be $0.00. In these cases, based on the arguments advanced by the Debtors and the Creditors' Committee and the points raised in the Schroeder Declaration, it appears unlikely and unrealistic to expect that the book value of the Debtors' assets can yield, at liquidation, more than 98% given today's economic climate.

37. More specifically, as the Debtors and the Creditors' Committee point out in their Responses, strict book value is not evidence of the financial wherewithal and solvency of the Debtors here. See supra at ¶ 37. The decreased demand for coal over the past few years and increased costs, in fact, according to the Debtors, have eroded the company's free cash flow and widened its net losses. See Schroeder Declaration at ¶ 21 ("The Debtors' business has reached the point of unsustainability absent utilization of the tools presented by chapter 11. In recent years, the demand for coal has decreased . . . . At the same time, the Debtor's liabilities have been increasing as the Debtors face sharply rising costs to comply with such regulations and

because of unsustainable labor-related legacy liabilities."). Unlike the Interested Shareholders' vision of the future for Patriot, the Debtor's financial burdens and operating challenges are not conjectural. Not only have SEC filings revealed substantial losses over the past years, but the losses have continued into the bankruptcy as reflected by the recently filed monthly operating reports. See supra at ¶¶ 13-14.

38. Moreover, as further evidence of the company's enterprise value, the Debtors and Creditors' Committee point out that the company's unsecured notes were trading at depressed prices reflecting a substantial deficit of over $300 million. See Responses. More specifically, in the Responses, the Creditors' Committee and the Debtors' point out that the Debtor's two tranches of public bond debt – the 8.25% Notes and the 3.25% Notes – were currently trading, as of August 10, 2012, at approximately 45% and 12% of face value, which imply a total deficit of approximately $315 million owing under the bonds. Id. Notably, as of September 12, 2012, the 8.25% Notes and the 3.25% Notes were trading at approximately 46.5% and 12.5%. See Active Bankruptcy Bond Price Indications reported in the Daily Bankruptcy Review as of September 12, 2012 attached hereto as Exhibit E. While the numbers have slightly fluctuated, they still imply a significant deficit of hundreds of millions of dollars. Accordingly, the trading prices of these debt securities, which the Interested Shareholders do not mention in the Motion, are also a strong indicator that the investing public may not have confidence that the company's debt holders will ever be fully repaid.

39. In asserting that there may be equity value for the stockholders, the Interested Shareholders also point to possible other sources of value such as other "potential tax refunds, claims against officers and directors, and other claims" and net operating losses (the "NOLs") of approximately $867 million. See Motion at ¶ 1. First, with respect to the NOLs, as the Debtors

indicated in their Response, in order for NOLs to result in any equity value, Patriot would need to generate taxable income that the NOLs would offset. Based on the losses that the Debtors have been suffering over the past couple of years, the Debtors submit that it is unlikely that Patriot will generate taxable income in the next several years. The other argument made by the Interested Shareholder as to the additional value that Patriot may have is based on pure speculation and, as such, is unfounded.

40. Not only is the additional value from potential NOLs, tax refunds and other claims speculative, but the Interested Shareholders do not point to a single reported decision in this District that uses this new "standard" in the context of appointing an equity committee. Rather, such assertion runs counter to the law in this District that, as noted above, holds that an equity committee "should not be appointed unless equity holders establish that there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule." Williams Commn's, 281 B.R. at 223.

41. Based on all the facts analyzed as set forth above, the United States Trustee has determined that there is no substantial likelihood that the shareholders will receive a distribution in these cases. Based upon the financial data provided by the Debtors, the public filings, and the trading price of the notes, at the present time the value of the equity interest in Patriot appears to be zero.

42. Accordingly, the equity holders at this time have nothing to protect or to be adequately represented by an official committee.

ii. The Interested Shareholders have Failed to Demonstrate That the Appointment of an Equity Committee Is Necessary to Adequately Represent Equity Security Holders' Interests

43. As set forth above, Section 1102(a)(2) gives the Court discretion to order the appointment of an equity committee if necessary to assure adequate representation of equity security holders. 11 U.S.C. § 1102(a)(2). Thus, even where solvency has been established, which is not the case here, an equity committee should not be appointed unless the movant proves that shareholders "are unable to represent their interests . . . without an official committee." Williams, 281 B.R. at 223.

44. Courts have identified sources of "adequate representation" for shareholders other than official equity committees. In re Hills Stores Co., 137 B.R. 4 (Bankr. S.D.N.Y. 1992). A company's board of directors acts for the shareholders and the insolvency of a company does not absolve the board of its fiduciary duty to the shareholders. See Commodities Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985). "[T]he existence of a functioning board of directors supports the inference that equity's interests will be adequately represented notwithstanding the absence of an official equity committee." Moreover, generally speaking, an unsecured creditors' committee has a duty to maximize the value of the debtor's estate which would also inure to the benefit of shareholders. Eastman Kodak, 2012 WL 2501071 at *3.

45. The Interested Shareholders claim that the Debtors' management and the Creditors' Committee will not provide Patriot's shareholders adequate protection because (a) many of the Debtors' current officers and directors were at the Company's helm as the company's share price declined over the past year and (b) the Creditors' Committee owes its fiduciary duty solely to the unsecured creditors. See Motion at ¶¶ 27, 29. However, the fact that the stock price plummeted while many of the officers and directors were in control of the company does not disavow them of the fiduciary duties they owe the company's shareholders. Similarly, the fact that the Creditors' Committee owes a fiduciary duty to the unsecured creditors

in these cases does not mean that their interest in maximizing the value of the Debtors' estates is not aligned with the interests of the equity holders.

46. Lastly, the shareholders in these cases are not disenfranchised from the chapter 11 process. Equity holders have standing to be heard pursuant to 11 U.S.C. § 1109(b) on the adequacy of the disclosure statement and the confirmation of the proposed plan. It is clear that the Interested Shareholders are adequately represented as they have retained the reputable firm of McKool Smith. To the extent the Interested Shareholders continue to play an active role in these cases, and depending on the ultimate outcome of these proceedings, the Interested Shareholders, if they make a substantial contribution to the cases, may seek an award of their expenses under Bankruptcy Code Section 503(b). See In re Spansion, Inc., 421 B.R. at 164. Accordingly, the Interested Shareholders are free to proceed in these cases with their current representation, but the estates will not be obligated to bear the corresponding cost unless the Court so determines at a later time.

47. Thus, the unfounded statements regarding the lack of adequate representation made in the Motion do not support their position that the Interested Shareholders cannot be adequately represented unless they have "official" status.

iii. The Complexity Of The Cases Does Not Warrant the Appointment Of An Equity Committee and The Benefit of an Equity Committee Is Outweighed by the Cost

48. The size and complexity of a case is also a factor to be considered in the appointment of an equity committee. However, not every large and complex case with widely held shares warrants the appointment of an Equity Committee. See Williams Commc'n, 381 B.R. at 223 ("[W]hile there are a large number of shareholders, not every case with such a large number will require an official equity committee."). Indeed, official equity committees have

been denied in cases of far greater size and complexity than the instant bankruptcy cases. The Motion has failed to establish that these cases are so large and complex as to mandate the formation of an Equity Committee.

49. Lastly, the benefit of appointing an Equity Committee in this case is outweighed by the cost. First, as set forth above, the Interested Shareholders' argument that the Debtors are solvent and that there will be an eventual surplus to current equity holders is speculative. Moreover, if the actions of committees in other large Chapter 11 cases are an indication, an Equity Committee here would likely seek to retain general counsel, a financial advisor, possibly an investment banker, and various other professionals. This cost, when the prospect of a return to equity is mere conjecture, outweighs any concern for adequate representation. Eastman Kodak, 2012 WL 2501071 at *4.

IV. CONCLUSION

The size and complexity of this case, the status of the reorganization process, and the lack of any potential role of an equity committee at this stage of the reorganization process, lead to the conclusion that an official equity committee should not be formed. For the foregoing reasons, the United States Trustee requests that the Court exercise its discretion and deny the Motion, sustain the United States Trustee's objections, and grant other relief as is just.

Dated: New York, New York
September 14, 2012

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

By: /s/ Elisabetta G. Gasparini
Elisabetta G. Gasparini
Trial Attorney
33 Whitehall Street, 21st Floor
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Exhibit A

U.S. Department of Justice

Office of the United States Trustee

Region 2/Southern District of New York

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New York, NY 10004

Phone: 212-510-0500
Fax: 212-668-2255

July 19, 2012

VIA EMAIL

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Re: In re Patriot Coal Corporation., *et al.* (the "Debtors"), Case No. 12-12900(SCC)

Dear Counsel:

Attached, please find the letter dated July 18, 2012 from Hugh Ray of McKool Smith requesting the formation of an official committee of equity security holders in the above-referenced cases (the "Request").

Although the decision of whether to appoint an equity committee is within the discretion of the United States Trustee, this Office would appreciate your respective clients' view, if any, regarding the Request. Accordingly, please submit a written response to this Office on or before Thursday, August 2, 2012.

Very truly yours,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

/s/ Elisabetta G. Gasparini
Elisabetta G. Gasparini
Trial Attorney

Enc.
cc: Hugh Ray, Esq. (via e-mail) - McKool Smith
Linda Riffkin, Esq. (via e-mail) - Assistant United States Trustee
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July 18, 2012

VIA FACSIMILE AND FEDERAL EXPRESS
Ms. Tracy Hope Davis
United States Trustee, Region 2
33 Whitehall Street
21st Floor
New York, New York 10004

RE: Proposed Official Equity Committee for *In re Patriot Coal Corporation,* et al., Main Case No. 12-12900 (SCC); In the United States Bankruptcy Court for the Southern District of New York

Dear Ms. Davis:

We represent an informal group of equity security holders, including CompassPoint Partners, L.P., Frank Williams, and Eric Wagoner (collectively, the "Interested Shareholders"), who collectively hold a substantial amount of the outstanding shares of common stock of Patriot Coal Corporation ("Patriot Coal," or the "Company"), one of the debtors and debtors-in-possession in the above-referenced bankruptcy cases (the "Debtors"). Our clients have formed an informal group of shareholders working together solely to request that, pursuant to Bankruptcy Code § 1102(a)(2), you promptly appoint an official committee of equity security holders to represent the holders of the Debtors' common stock (collectively, "Equity Security Holders").[1]

With assets exceeding liabilities by over $539 million and stockholders' equity of almost $540 million as recently as March 31, 2012,[2] the Debtors had no apparent reason to file for bankruptcy when they did. What is more, news of the filing caused Patriot Coal's share price to plummet from $2.19 per share to $0.61 per share in a single trading day. Patriot Coal's common stock traded as high as $24.88 per share over the last 52 weeks, and, historically, Patriot Coal shares had traded as high as $80.69 per share. Equity Security Holders, as a group, deserve the right to seek answers and to have an effective voice in the reorganization.

Despite the bankruptcy filing, it appears that the Debtors' estates are teeming with value for Equity Security Holders. This letter explains the basis for that conclusion. With critical

[1] The Interested Shareholders have no intention of forming an *ad hoc* committee at this time.

[2] *See* Patriot Coal Form 10-Q for Quarter Ended March 31, 2011 at 3, relevant pages attached hereto as **Exhibit A.**

decisions that will set the stage for the Debtors' restructuring to be made in the very near term, Equity Security Holders deserve an official voice now so that their interests will not be sacrificed for the benefit of other constituents.

BACKGROUND

Patriot Coal is a leading producer of thermal coal in the eastern United States, with operations and coal reserves in the Appalachia and the Illinois Basin coal regions. Patriot Coal is also a leading U.S. producer of metallurgical quality coal. The Company's principal business is the mining and preparation of thermal coal, also known as steam coal, and metallurgical coal. Thermal coal is primarily sold to electricity generators, and metallurgical coal is sold to steel mills and independent coke producers.

As of December 31, 2011, the Company's operations consisted of fourteen active mining complexes, and its operations include company-operated mines, contractor-operated mines and coal preparation facilities. The Appalachia and Illinois Basin segments consist of operations in West Virginia and Kentucky, respectively, and the Company controls approximately 1.9 billion tons of proven and probable coal reserves.

The Company ships coal to electricity generators, industrial users, steel mills and independent coke producers, and, in 2011, the Company sold 31.1 million tons of coal, of which 76% was sold to domestic and global electricity generators and industrial customers and 24% was sold to domestic and global steel and coke producers.

LEGAL STANDARD

Bankruptcy Code § 1102(a)(2) governs the appointment of an official equity committee. Congress created the provision to "counteract the natural tendency of a debtor in distress to pacify large creditors, with whom the debtor would expect to do business, at the expense of small and scattered public investors."[3]

The legislative history of Section 1102 reflects that one of the purposes of the section was "to counteract the natural tendency of a debtor in distress to pacify large creditors . . . ." In determining whether appointment of an equity committee is appropriate, courts consider (i) the number of shareholders; (ii) the complexity of the case; (iii) the solvency of the debtor; (iv) whether the cost to the estate outweighs the adequate representation interest of shareholders; and (v) whether the interests of shareholders are already represented.[4]

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[3] S. Rep. No. 989, 95th Cong.2d Sess. 10 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5796.

[4] *See Exide Techs. v. State of Wis. Inv. Bd. (In re Exide Techs.)*, 2002 U.S. Dist. LEXIS 27210, at *4-5 (D. Del. Dec. 23, 2002); *In re Wang Labs., Inc.*, 149 B.R. 1, 2 (Bankr. D. Mass. 1992); *In re Eastern Me. Elec. Coop.*, 121 B.R. 917, 932 (Bankr. D. Me. 1990); *Albero v. Johns-Manville Corp (In re Johns-Manville)*, 68 B.R. 155, 159 (S.D.N.Y. 1986), *appeal dismissed* 834 F.2d 176 (2d Cir. 1987); *In re Beker Indus. Corp.*, 55 B.R. 945 (Bankr. S.D.N.Y. 1985); *In re Emons Indus., Inc.*, 50 B.R. 692 (Bankr. S.D.N.Y 1985).

ANALYSIS

I. Debtors are Likely Solvent.

From the information that Debtors have disclosed in their filings and otherwise, there appears to be significant value available for equity.

- **Petition Information**. Patriot Coal's bankruptcy petition list assets of $3,568,840,000 and $3,072,248,000 in liabilities as of the petition date, indicating an equity value of over ***$495 million***.[5]

- **SEC Filings**. As mentioned above, in its latest form 10-Q, Patriot Coal lists shareholders' equity in the realm of ***$540 million***.[6]

The Debtors also have other sources of value that could substantially increase the value of the reorganized Debtors, leading to the payment of creditors in full and a meaningful recovery to equity. Indeed, by the Debtors' own admission, they have consolidated net operating losses approximately $867 million for U.S. federal income tax purposes and a net operating loss for U.S. federal alternative minimum tax purposes of approximately $570 million, which they may carry forward to offset against future income under U.S. tax law.[7]

In addition to the assets mentioned above, the Debtors may also have tax refunds and claims against other third parties, including present and former officers and directors. Further, the Interested Shareholders believe that there may be significant value in the Debtors' non-debtor subsidiaries.

Based on the foregoing evidence, it appears that based on book value, the Debtors are likely solvent, and there would accordingly be significant value available for equity. The Debtors, their pre- and post-petition lenders, and the newly formed Creditors' Committee are already (or will shortly be) making decisions charting the course of these cases that may adversely impact shareholders, perhaps to the point of eviscerating shareholder value in its entirety, despite the fact that there is every indication of a meaningful shareholder recovery here, as demonstrated above.

The appointment of an official equity committee now is paramount, as any remaining equity value to shareholders may be eroded or simply given away to constituents in these cases as the Debtors resolve disputes, fix claims, and incur fees and costs borne by the bankruptcy estates.

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[5] Exhibit A to Voluntary Petition of Patriot Coal Corp. [ECF No. 1], attached hereto as **Exhibit B.**

[6] Form 10-Q for Quarter Ended March 31, 2012, *supra*, note 2.

[7] *Debtors' Motion for an Order Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interest in the Debtors' Estates* [ECF No. 22] ¶ 6, attached hereto as **Exhibit C.**

(II) Existing Constituent Groups Cannot Adequately Represent Equity Security Holders.

None of the other constituents in this case have an interest in protecting value for Equity Security Holders. This has been apparent thus far. The creditors' committee owes its duty solely to unsecured creditors. Furthermore, many of the Debtors' current officers and directors were at the Company's helm as Patriot Coal's share price significantly declined over the past year, severely damaging shareholder value. As mentioned above, shares were trading at a 52-week high of nearly $25 per share, down to $5 per share sixty days prior to the bankruptcy filing, obviously adversely impacting equity value. As current management presided over an evaporation of such an enormous amount of equity value without providing any adequate explanation, it would be patently unfair to require that shareholders should now be forced to rely on these same parties to protect their interests in the bankruptcy proceedings.

Accordingly, shareholders cannot take comfort in the fact that the Debtors' officers and directors—or, indeed, the newly formed creditors' committee, which owes its fiduciary duty solely to unsecured creditors—would constitute suitable shareholder advocates. Neither the Debtors' officers and directors nor the creditors' committee can substitute as adequate representatives of shareholders; they need an official committee for that.

Here, adequate shareholder representation through individuals is highly impractical, if not impossible. Individuals will not and cannot be expected to expend significant time, energy, and money without the official status to protect the interests of the shareholder class. Furthermore, the holdings of most shareholders are relatively small and it is not cost-effective for each individual shareholder to hire professionals to participate in this large and complex case.

Further, the Interested Shareholders cannot protect the rights of all shareholders because they owe no fiduciary duty to the entire group. They are not a substitute for an official committee, and the fact that they were able to come together to send this letter should not be used as a reason not to appoint an official equity committee. As the court in *Beker* noted[8]:

> The position that some members of the [investor] class may have resources sufficient to protect their interest is of little significance, in our judgment, at least where the security is widely held. They do not have the fiduciary duty to represent their fellow security holders.

As stated above, the Interested Shareholders do not owe a fiduciary duty to other shareholders to protect the interests of the entire group of equity holders. Consequently, absent the appointment of an official equity committee, individual, smaller, or non-institutional shareholders may be left unprotected.

[8] *Beker*, 55 B.R. at 949.

(III) The Other Relevant Factors Counsel Immediate Appointment of an Official Equity Committee.

The other factors considered by courts also require immediate appointment of an equity committee.

(a) Patriot Coal Shares Are Widely Held and Actively Traded in the Public Market.

When the shares of a debtor are widely held, official equity committee representation is necessary to ensure adequate representation of shareholders before the debtor attempts to cancel and discharge their interests.[9] According to the Debtors, the common stock is dispersed among approximately 840 holders,[10] which implicates a significantly higher number of beneficial holders.

Courts recognize that the existence of a large number of holders of small amounts of shares dictates the need for their representation through an official equity committee, which would have the responsibility of acting on behalf of all equity holders.[11] This factor is established in this case.

(b) These are Large and Complex Chapter 11 Cases.

These are clearly large and complex bankruptcy cases. The Court itself has designated these "Mega" cases. The size and complexity of the Debtors' cases are further highlighted by considering their corporate structure and workforce. Specifically, the Debtors—which principal entity, Patriot Coal, is publicly traded—are leading producers and marketers of coal in the United States, supplying coal to various customers across the country and internationally, shipping 31.1 million tons of coal in 2011 alone.[12] Among other factors, the Debtors (i) employ approximately 4,000 people, 42% of whom are unionized employees covered by collective bargaining agreements;[13] (ii) have estimated revenues of approximately $2.4 billion for fiscal year 2011;[14] (iii) have a book value of assets and liabilities of approximately $3.57 billion and $3.07 billion,

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[9] *Id.* (finding that debenture holders and stockholders needed representation by a separate official committee where the public debt at issue was widely held).

[10] *Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007-2* ("First Day Decl.") [ECF No. 4] ¶ 16, attached hereto as **Exhibit D.**

[11] *See Wang Labs.*, 149 B.R. at 2-3 (equity holders committee warranted where debtor is still operating, case is complex, and there exist large numbers of equity holders); *Beker*, 55 B.R. at 949 (existence of widely held stock and complex nature of case required official equity committee representation "through an official committee having the fiduciary responsibility of acting on their behalf"); *In re White Motor Credit Corp.*, B.R. 554, 557 (N.D. Ohio 1982) (noting that owners of small and intermediate number of shares should be appointed to serve on equity committee).

[12] First Day Decl., *supra*, note 10 at ¶¶ 11, 16.

[13] *Debtors' Motion for an Order Authorizing (i) Debtors to (a) Pay Prepetition Wages, Salaries, Employee Benefits and Other Compensation and (b) Maintain Employee Benefits Programs and Pay Related Administrative Obligations, (ii) Employees and Retirees to Proceed with Outstanding Workers' Compensation Claims and (iii) Financial Institutions to Honor and Process Related Checks and Transfers* [ECF No. 9] ¶ 7.

[14] *See* Patriot Coal Form 10-K/A For Fiscal Year 2011 at 64, relevant pages attached hereto as **Exhibit E.**

respectively;[15] (iv) have engaged sophisticated counsel and restructuring advisors to address potentially significant operational and financial issues at the Company; and, among other things, (v) likely have significant pension and multi-employer pension obligations that need to be evaluated. Based on the foregoing, it is evident that these cases are large and complex.

This factor cannot be genuinely disputed. The size and complexity of these cases weighs in favor of an official equity committee.

(c) Appointment of an Official Equity Committee Will Not Cause Delay or Significant Additional Cost.

Because the fundamental purpose of Bankruptcy Code § 1102(a)(2) is to provide adequate resources and a level playing field for equity holders, there will be costs. But such additional costs must be weighed against the need for adequate representation of equity holders generally.[16] In light of the Debtors' historical revenue relative to their debt burden post-filing, the cost associated with an official equity committee will not unduly burden these bankruptcy estates.

The appointment of an official equity committee also will neither delay these cases nor impose undue expense on the estates. These cases remain in their preliminary stages, with no indication that a plan of reorganization is forthcoming. The Court's oversight of professional fees also operates as a check against an official equity committee undertaking unreasonable activities, vexatious positions, or fruitless litigation. As one court has put it, "[t]he potential added cost is not sufficient in itself to deprive the creditors of the formation of an additional committee if one is otherwise appropriate."[17]

An official equity committee will focus solely on issues that impact recoveries for Equity Security Holders. Such a committee should work in tandem with other estate professionals, and the sharing of investigative efforts and work product between the committees, the Debtors, and any examiner or trustee that may be appointed will ensure that the equity committee does not impose undue cost. The incremental cost of professionals employed by an official equity committee will be modest relative to the costs that will be incurred by the creditors' committee and other estate professionals. Such costs would be negligible compared to the magnitude of losses and potential claims in issue and the overall assets and liabilities involved in these cases.

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[15] Patriot Coal Chapter 11 Petition, Exhibit A, *supra*, note 5.

[16] *See Wang Labs.*, 149 B.R. 4; *Beker*, 55 B.R. at 95-52; *Emons Indus.*, 50 B.R. at 964.

[17] *In re Interco, Inc.*, 141 B.R. 422, 424 (Bankr. E.D. Mo. 1992). *See also In re McLean Indus., Inc.*, 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987) ("Costs alone cannot and should not deprive public debt and security holders of representation"); *Beker*, 55 B.R. at 951 (same).

(d) Shareholders Need an Official Equity Committee to Participate in These Cases Meaningfully.

Official status for a committee of equity security holders is essential. The Debtors, their pre- and post-petition lenders, and the newly formed creditors' committee are already (or will shortly be) making decisions charting the course of these cases that may adversely impact shareholders, perhaps to the point of eviscerating shareholder value in its entirety, despite the fact that there is every indication of a meaningful shareholder recovery here, as demonstrated above. The appointment of an official equity committee now is paramount, as any remaining equity value to shareholders may be eroded or simply given away to other constituents in these cases.

CONCLUSION

In sum, shareholders deserve a place at the table in these cases now as the stakeholders with the most to lose at this juncture. An official committee of equity security holders should be appointed to advance and to protect the interests of shareholders.

Please let us know if you wish to meet with us to discuss these issues at your earliest possible convenience. Thank you for your consideration.

Sincerely,

/s/ Hugh Ray

Hugh Ray

cc:
Securities Exchange Commission (*via* email)
Marshall S. Huebner (*via* email)
Damian S. Schaible (*via* email)
Peter S. Goodman (firm)
Basil A. Umari (firm)
Michael R. Carney (firm)

Attachments

Exhibit B

KRAMER LEVIN NAFTALIS & FRANKEL LLP

ADAM C. ROGOFF
PHONE 212-715-9285
FAX 212-715-8265
AROGOFF@KRAMERLEVIN.COM

July 20, 2012

Via E-mail: Elisabetta.g.gasparini@usdoj.gov

Elisabetta G. Gasparini, Esq.
Office of the United States Trustee
33 Whitehall Street, Suite 2100
New York, NY 10004

Re: In re Patriot Coal Corporation., *et al.* (the "Debtors"), Case No. 12-12900 (SCC)

Dear Elisabetta:

I am writing with respect to your letter dated July 19, 2012 concerning the request for the formation of an equity committee.

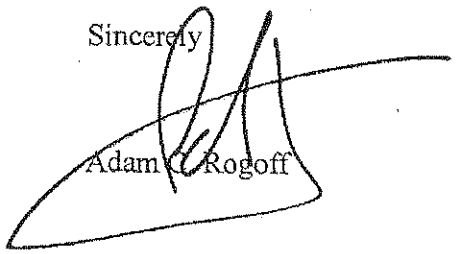
We request an extension of the time to submit a substantive reply to your letter. There is a fair amount of activity in these cases, including the recently filed venue transfer motion. We are in the process of coordinating with the Debtors to address these pending motions. In addition, the Committee has not yet selected a financial advisor, which will be essential to properly assess the financial basis of the request you have received. We do not believe that there is any prejudice to a short delay because these cases have only just been commenced, the Committee recently formed, and these cases are not on an expedited path.

We believe that an extension of the reply deadline until August 15, 2012 would be sufficient to permit due consideration of this issue. In addition, because the Committee would like to coordinate its views with the Debtors and their professionals, we believe it would be appropriate to extend the Debtors' reply deadline as well.

I would be happy to discuss with you if you have any questions.

Thank you in advance.

Sincerely,



Adam C. Rogoff

ACR:pt

cc: Hugh Ray, Esq. (via e-mail)
Linda Riffkin, Esq. (via e-mail)
Paul Schwartzberg, Esq. (via e-mail)
Marshall S. Huebner, Esq. (via e-mail)
Damian S. Schaible, Esq. (via e-mail)

U.S. Department of Justice

Office of the United States Trustee

Region 2/Southern District of New York

33 Whitehall Street, Suite 2100
New York, NY 10004

Phone: 212-510-0500
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July 20, 2012

VIA EMAIL

Marshall S. Huebner, Esq.
Damian S. Schaible, Esq.
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

Adam C. Rogoff, Esq.
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

Re: In re Patriot Coal Corporation., *et al.* (the "Debtors"), Case No. 12-12900(SCC)

Dear Counsel:

I am in receipt of Mr. Rogoff's letter of earlier today requesting, on behalf of the Official Committee of Unsecured Creditors (the "Committee"), an extension until August 15, 2012 (the "Extension Request") for the Committee and the Debtors to respond to the letter dated July 18, 2012 from Hugh Ray of McKool Smith requesting the formation of an official committee of equity security holders in the above-referenced cases.

Mr. Ray consented to the Extension Request. Accordingly, this Office would appreciate your respective clients' view, if any, regarding the request for an equity committee by no later than close of business on Wednesday, August 15, 2012.

Very truly yours,
TRACY HOPE DAVIS
UNITED STATES TRUSTEE

/s/ Elisabetta G. Gasparini
Elisabetta G. Gasparini
Trial Attorney

Enc.
cc: Hugh Ray, Esq. (via e-mail) - McKool Smith
Linda Riffkin, Esq. (via e-mail) - Assistant United States Trustee
Paul Schwartzberg, Esq. (via e-mail) - Trial Attorney for United States Trustee

Exhibit C

KRAMER LEVIN NAFTALIS & FRANKEL LLP

ADAM C. ROGOFF
PARTNER
PHONE 212 715-9285
FAX 212 715-8000
AROGOFF@KRAMERLEVIN.COM

August 15, 2012

BY ELECTRONIC MAIL

Tracy Hope Davis, Esq.
Elisabetta G. Gasparini, Esq.
Office of the United States Trustee
33 Whitehall Street, 21st Floor
New York, NY 10004

Re: In re Patriot Coal Corporation, et al., Case No. 12-12900 (SCC): Opposition of Official Committee of Unsecured Creditors to Request for Appointment of an Equity Committee

Dear Ms. Davis and Ms. Gasparini:

As you know, we are proposed counsel to the Official Committee of Unsecured Creditors (the "Creditors' Committee") of Patriot Coal Corporation appointed in the chapter 11 cases (the "Chapter 11 Cases") of the above debtors (the "Debtors"). By letter, dated July 18, 2012 (the "Request"), CompassPoint Partners, L.P., Frank Williams, and Eric Wagoner (the "Interested Shareholders") have requested that the United States Trustee (the "Trustee") appoint an official committee of equity security holders. On the same date, you solicited the Creditors' Committee views concerning the Request.

The Creditors' Committee **opposes** the Request.

The appointment of an official equity committee "constitutes extraordinary relief" that "should be the rare exception" in Chapter 11 cases. In re Eastman Kodak Co., 12-10202 ALG, 2012 WL 2501071, at *2 (Bankr. S.D.N.Y. June 28, 2012); In re Williams Communications Group, Inc., 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002); see also Collier on Bankruptcy, 15th Ed. ¶ 1102.03[2] ("appointment of official equity committee is the exception rather than the rule in chapter 11 cases").

At a minimum, before such a committee may be appointed, the Interested Shareholders must establish at least two critical factors: "(i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule and (ii) they are unable to represent their interests in the bankruptcy cases without an official committee." In re Nw. Corp., 03-12872 (CGC), 2004 WL 1077913, at *2 (Bankr. D. Del. May 13, 2004) (citing In re Williams Communications Group, Inc., 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002)). The Request makes nothing approaching this substantial showing and should therefore be denied.

I. The Interested Shareholders Have Failed to Show a Substantial Likelihood that Equity Will Receive a Meaningful Distribution

The party requesting the appointment of an equity committee bears the burden on the issue of solvency and must establish that "there is a substantial likelihood that they will receive a meaningful distribution in the case." In re Nw. Corp., 03-12872 (CGC), 2004 WL 1077913, at *2 (Bankr. D. Del. May 13, 2004) (citing In re Williams Communications Group, Inc., 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002)). To carry this burden, the Interested Shareholders offer only a copy of the Debtors' recent Form 10-Q (for the period ending March 31, 2012) which attached financial statements that reflect shareholder equity of approximately $540 million and a copy of Patriot Coal's bankruptcy petition which reflects an equity book value of over $495 million. Book value, however, is simply not evidence of the financial wherewithal and solvency of a debtor, let alone the likelihood of a distribution to equity. In fact, in a number of recent cases, debtors which had reported high prepetition book values ultimately provided no recovery to equity:

($ in millions) Company	Filing Date	Book Value of Stockholders' Equity	Financials as of	Equity Recovery
Lehman Brothers Holdings Inc.	9/15/2008	$28,443	8/31/2008	0%
CIT Group Inc.	11/1/2009	$5,121	9/30/2009	0%
Circuit City Stores, Inc	11/10/2008	$1,077	8/31/2008	0%
VeraSun Energy Corporation	10/31/2008	$1,071	9/30/2008	0%

At the same time they rely on book value, the Interested Shareholders ignore the current market values of the Debtors' debt and equity securities – which are far more probative of value. The Debtors' two tranches of public bond debt are currently trading at 45% and 12% of face value:

($ in millions) Issuer	Unsecured Bonds	Principal Amount Outstanding ($MM)	Mkt. Value ($MM)	Trading Price[1]	Implied Deficit
Patriot Coal Corporation	8.25% Notes	$250	$111	0.4456	$139
Patriot Coal Corporation	3.25% Convertible Notes	$200	$24	0.1175	$177
Totals		**$450**	**$135**		**$315**

[1] Reflects the final settled price as of August 10, 2012.

Far from indicating any positive equity value, these discounted trading prices reflect the bond market's determination that bondholders, who are senior to equity, will not be paid in full. In fact, they imply a *total deficit of roughly $315 million owing under the bonds.* Therefore, at this stage of these Chapter 11 Cases, the Debtors' unsecured bonds are trading at levels that indicate that *equity is very likely to receive no distribution in these Chapter 11 Cases.*

The aggregate market capitalization of the Debtors' stock also undercuts any suggestion of material equity value. As of August 10, 2012, the Debtors' common stock was trading at approximately $0.19 per share, indicating an aggregate market capitalization of approximately $18 million. In a case of this size, such a *de minimis* equity value – which is $297 million less that the deficit implied by the bond prices – most reasonably represents what is commonly referred to as "option value" in the marketplace, and not solvency or the likelihood of a meaningful recovery for equity. Certainly, this has been the case in recent chapter 11 cases such as General Maritime Corp. and Circuit City, where the debtor's equity continued to trade even though the stock would be extinguished and cancelled under the debtor's chapter 11 plan.

These facts belie any contention that the Interested Shareholders have met the burden necessary to grant the extraordinary relief they seek. The mere "possibility of solvency" in the future is insufficient to show a substantial likelihood of a distribution to equity. Williams, 281 B.R. at 222. At this stage in these Chapter 11 Cases, and where the Debtors are suffering from severe negative value based on their equity and debt securities, the United States Trustee should not appoint an official equity committee – especially absent based on the deficient showing that the Interested Shareholders have made.

II. The Interested Shareholders Also Have Not Established that Appointment of an Equity Committee Is "Necessary" to Assure Adequate Representation of Their Interests

A party seeking the formation of an official equity committee must also show that such a committee is "necessary to assure adequate representation . . . of equity security holders." 11 U.S.C. § 1102(a)(2). The statute's necessity requirement sets "a high standard that is far more onerous than if the statute merely provided that a committee be useful or appropriate." Kodak, at *2. Thus, even where solvency has been established – which is not the case here – an equity committee should not be appointed unless equity holders prove that they "are unable to represent their interests . . . without an official committee." Williams, 281 B.R. at 223.

Once again, the Interested Shareholders have made nothing like the required showing. The Interested Shareholders' assertion that the Debtors' board of directors and the Creditors' Committee have no interest in protecting the interests of equity security holders (along with other stakeholders) is completely unsupported. While they complain about the decisions of prepetition management, they offer nothing to suggest that management is incapable of fulfilling its fiduciary duty to shareholders, among others, or to dispel "'the usual presumption . . . that the Board will pay due (perhaps special) regard to the interests of shareholders' in bankruptcy." Kodak, at *2 (quoting CFTC

v. Weintraub, 471 U.S. 343, 355 (1985)). Furthermore, the Interested Shareholders have not demonstrated that the decline in the Debtors' stock price is driven by management's failures rather than factors outside of its control, such as low natural gas prices, the unseasonably mild winter of 2011-12, the evolving regulatory environment, and the softening global economy. Similarly, they ignore that many members of the Debtors' board of directors and officers have a personal stake in adequately protecting equity security holders' interests because, collectively, they hold 2.82% of the Debtors' shares.

In addition, the equity holders' interests will be adequately represented by the Creditors' Committee, whose interest in maximizing the value of the Debtors' estates is perfectly aligned with the interests of the equity security holders. At this stage of proceedings, the "economic interests of bondholders and shareholders appear to be the same - that is to find the highest value for company. And it is the fiduciary duty of the [Creditors' Committee] to do so" In re Leap Wireless Int'l Inc., 295 B.R. 135, 138-40 (Bankr. S.D. Cal. 2003)); accord Williams, 281 B.R. at 221 ("A higher valuation is in both the Creditors' Committees and the Shareholders interest."). In these Chapter 11 Cases, just as the court noted in Kodak, the Interested Shareholders have failed to show "that the creditors' committee will cease to attempt to maximize value once the point is reached at which creditors will be paid in full—as if it were possible to divine that point at this stage in these cases." Kodak, at *3.

Finally, despite assertions by the Interested Shareholders that the Debtors' stock is widely held by over 840 holders, they fail to note that over 35% of those shares are concentrated in the hands of eight entities. Therefore, unless and until equity, as opposed to the unsecured debt, truly becomes the fulcrum security in these Cases, an equity committee is unnecessary to ensure that estate value is maximized.

III. Conclusion

For the reasons set forth above, the Creditors' Committee believes that it is premature to appoint an official equity committee in these Chapter 11 Cases. Although these Chapter 11 Cases are complex, there are no exceptional circumstances that currently warrant the rare step of appointing an official equity committee. Because the Interested Shareholders have not made any meaningful showing that the Debtors are solvent and that there is a substantial and reasonable likelihood of a distribution to equity in these Cases, the Creditors' Committee submits that the costs, expenses and potential delay associated with formation of an equity committee are unnecessary and unwarranted at this time. The Creditors' Committee reserves the right to supplement this letter or to respond to replies, if any, by the Interested Shareholders.

I am available to discuss this letter and the Creditors' Committee's position with your office at your earliest convenience.

Sincerely,

Adam C. Rogoff

cc:
Hugh Ray, Esq.
Marshall Huebner, Esq.

New York
Menlo Park
Washington DC
São Paulo
London
Paris
Madrid
Tokyo
Beijing
Hong Kong

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Marshall S. Huebner

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CONFIDENTIAL

August 15, 2012

Re: In re *Patriot Coal Corporation, et al.*,
Case No. 12-12900 (SCC)

Ms. Elisabetta Gasparini
Office of the United States Trustee
33 Whitehall Street, Suite 2100
New York, New York 10004

Dear Ms. Gasparini:

I write on behalf of Patriot Coal Corporation ("Patriot" or the "Company") and its affiliated debtors (collectively, the "Debtors") in response to your request for the Debtors' position regarding the letter dated July 18, 2012 (the "Letter Request") submitted by certain holders of the Company's equity securities (the "Interested Shareholders") requesting that the Office of the United States Trustee (the "U.S. Trustee") form an official committee of equity security holders.

The Debtors have reviewed the legal standards applicable to equity committee formation and applied them to the facts and circumstances of these chapter 11 cases. For the reasons set forth in detail below, the Debtors strongly believe that it would be inappropriate to appoint an equity committee at this time. Likewise, the Creditors' Committee also opposes the request to form an equity committee, and will submit its own letter to the U.S. Trustee.

The Interested Shareholders' request for an official committee rests on an unfounded (and untrue) premise—that "the Debtors' estates are teeming with value for Equity Security Holders." (Letter Request at 1.) This hypothetical residual equity value, they argue, gives them an interest in these chapter 11 cases such that they "deserve an official voice" in the proceedings. (*Id.* at 2.) The Interested Shareholders' contention is baseless. The Interested Shareholders fail to set forth any relevant facts demonstrating that this value exists or that they have any economic interest to protect in these chapter 11 cases. Moreover, the Interested Shareholders do not approach the high bar of establishing that an official committee is necessary to adequately represent their interests here. *See In re Eastman Kodak Corp.*, No. 12-10202 (ALG), 2012 WL 2501071, at *2 (Bankr. S.D.N.Y. June 28, 2012).

The decision to appoint a committee rests firmly within the U.S. Trustee's discretion, 11 U.S.C. § 1102(a)(1). The U.S. Trustee recently explained in its objection to the appointment of an equity committee in the Eastman Kodak Company chapter 11 proceedings ("Kodak Objection") that an equity committee "should not be appointed unless *equity holders establish* that: (1) there is a *substantial likelihood* that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (2) they are unable to represent their interests in the bankruptcy case without an official committee." Kodak Objection ¶ 25 (citing *In re Williams Commc'ns Grp. Inc.*, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002)) (emphasis added). It is the Interested Shareholders' burden to establish both of these elements. *Id.* As the Kodak Court noted, the "appointment [of an equity committee] constitutes extraordinary relief and is the exception rather than the rule in chapter 11 cases." *Kodak*, 2012 WL 2501071, at *2. Where the shareholders do not show that they have an economic interest to protect, an equity committee is not warranted. *Williams*, 281 B.R. at 220.

The Interested Shareholders have shown neither that there is any likelihood of a distribution to equity in these chapter 11 cases, nor that they would be unable to represent their interests absent an official committee. The appointment of an equity committee here is unwarranted and would burden the Debtors' estates with substantial costs, reducing the amount available to all stakeholders. The Debtors therefore ask that the U.S. Trustee deny the Interested Shareholders' request to form an equity committee.

I. A Meaningful Recovery for Equity Holders Is Unlikely

The Interested Shareholders' speculative assertions of solvency are not supported by Patriot's fiscal reality. These cases are in their earliest stages, but all information known to the Debtors suggests that there is no reasonable likelihood of a meaningful recovery for equity holders. Section 101(32) of the Bankruptcy Code defines insolvency as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, *at a fair valuation*" (emphasis added). "If the debtor is a going concern, fair valuation means 'the fair market value of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts.'" Kodak Objection ¶ 28 (citing *In re Nirvana Rest., Inc.*, 337 B.R. 495, 506 (Bankr. S.D.N.Y. 2006)). A fair valuation of the Company's property and debts demonstrates that Patriot is likely insolvent.

A. Book Value Is an Irrelevant Measure of Solvency

The Interested Shareholders' arguments regarding Patriot's solvency rest on an irrelevant analysis of Patriot's GAAP balance sheet and the resulting book value of stockholders' equity. As this office and the courts routinely note, book value is an inappropriate measure of solvency of a debtor-in-possession. *See* Kodak Objection ¶ 29; *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 443 (1968) ("going-concern value, not book or appraisal value, must govern" valuation in bankruptcy); *Cellmark Paper, Inc. v. Ames Merch. Corp. (In re Ames Dep't Stores Inc.)* 470 B.R. 280, 283 (S.D.N.Y. 2012) ("[B]ook values are not ordinarily an accurate reflection of the market value of an asset."). Moreover, "[w]hile the GAAP value of assets may be relevant to the analysis, unless such value is adjusted to reflect market value, it is not determinative of a debtor's solvency under the Bankruptcy Code definition of insolvent . . . [;] a balance sheet analysis applying GAAP does not require inclusion of contingent liabilities unless the contingency is probable and can be reasonably estimated while an analysis under the definition of insolvent under section 101(32)(A) of the

Bankruptcy Code requires inclusion of contingent liabilities." *Official Comm. of Unsecured Creditors of Enron Corp. v. Arthur Andersen LLP (In re Enron Corp.)*, No. 01 B 16034 (AJG), 2004 Bankr. LEXIS 2261, at *16-17 (Bankr. S.D.N.Y. Oct. 28, 2004) (internal citations omitted).

Comparing the investing public's valuation of Patriot's equity and debt to the Interested Shareholders' assertions vividly demonstrates the inapplicability of a book value analysis. Patriot's debt and equity securities currently trade at a very substantial discount to their book value. Patriot's senior notes currently trade at a price of $0.46, suggesting a market value of $115 million.[1] This represents a 54% discount from their book value of $249 million. Patriot's convertible notes trade at a price of $0.12, reflecting a total market value of just $23 million, an 88% discount from their book value of $190 million. The trading prices of these debt securities demonstrate that the investing public does not believe that the Company's debt holders will ever be fully repaid. If there is no substantial likelihood that Patriot's debt holders, who are hundreds of millions of dollars "out-of-the-money," will be repaid, there is certainly no reasonable likelihood that its equity holders will obtain a recovery.

Moreover, there is vast discrepancy between the fair market value and the book value of Patriot's equity. With a share price of $0.17, the total market value of Patriot's equity currently stands at just $16 million, compared to a book value of nearly ten times that ($188 million).[2] Thus, a fair valuation of the Company's equity value is far lower than the GAAP valuation avowed by the Interested Shareholders—reflecting the market's "pennies a share" view that a recovery for equity holders is remote at best.

Furthermore, under the absolute priority rule, section 1129(b) of the Bankruptcy Code, the Company's DIP lenders will recover first, followed by its other administrative and priority creditors, as well as its secured and, ultimately, unsecured creditors. Only after all these classes are satisfied would equity holders recover.

An examination of the valuations of Patriot's competitor coal companies further confirms a stark contrast between book value and fair market value of debt and equity. For example, Alpha Natural Resources' debt and equity currently trade at a 47% discount to book value, while James River's debt and equity trade at a 67% discount. These substantial discrepancies highlight that book value is an irrelevant measure for determining a fair

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[1] All market prices incorporated herein represent the market prices as of market close on August 13, 2012.

[2] In any event, an aggregate market capitalization of $16 million is not a meaningful number, which highlights the unlikelihood of any recovery for equity. There is some level of trading in the common equity of nearly every publicly-owned chapter 11 debtor of reasonable size, despite equity being out of the money by hundreds of millions—or billions—of dollars. Having a remaining equity market capitalization (which is usually many multiples of $16 million) is assuredly neither evidence of nor precedent for a recovery for equity. Northwest, for example, had an equity market value of $62 million ten days after its bankruptcy filing, while its unsecured debt was quoted at approximately 24.5% to 25.5% of par, suggesting a multi-billion dollar impairment of unsecured creditors and the implication of no recovery for equity. Northwest's common stock was (of course) ultimately cancelled and received no recovery. As of April 18, 2012, AMR Corp. ("AMR") had an equity market capitalization of $160.9 million, while its unsecured debt was quoted at 42% to 44% of par. While AMR's ultimate claims pool remains unknown, analysts have estimated the pool to be at least $7 billion (and potentially much higher).

valuation of a coal company, and the Interested Shareholders' arguments to the contrary should be disregarded.

Finally, even if the U.S. Trustee were inclined to consider Patriot's book value, the most recent 10-Q for the period June 30, 2012, filed by Patriot on August 9, 2012 differs significantly from the March 31, 2012 filing supporting the Interested Shareholders' conclusions. (Patriot Coal Corporation Form 10-Q for the quarterly period ended June 30, 2012, attached as Ex. 1, at 3.) Namely, Patriot's asset value decreased significantly, falling to approximately $3.58 billion. Its liabilities also increased to $3.4 billion, incorporating nearly $300 million in additional liabilities. Notably, the book value of total stockholder's equity fell from nearly $540 million to just $188 million.

B. The Debtors' Financial Condition Shows That an Equity Recovery Is Unlikely

Moving from irrelevant book values to the Debtors' actual financial condition underlines how unlikely an equity recovery is in these cases. As set forth in the Schroeder Declaration, prior to the petition date Patriot's business "had reached the point of unsustainability" absent chapter 11 relief. (Declaration of Mark Schroeder dated July 9, 2012 ("Schroeder Decl."), attached as Ex. 2, at 8.) In recent years, the demand for coal has decreased as alternative sources of energy have become increasingly attractive. *Id.* Coal's share of total U.S. electricity generation, for example, declined from 45% in the first quarter of 2011 to 36% in the first quarter of 2012. *Id.* at 9. Moreover, the slowed global economy has resulted in concomitant slowing in demand for metallurgical coal, used in manufacturing steel. *Id.* at 9-10. This decreased demand for coal compelled the Company to idle several coal mines in the early months of 2012, dramatically decreasing their coal production. *Id.* at 10.

While demand has declined, Patriot's costs of operation have increased, further diminishing its business prospects. *Id.* Regulatory changes have imposed a significant financial burden on the Company. For example, rules promulgated by the United States Environmental Protection Agency (the "EPA") threaten to close coal-fueled electricity plants that are not equipped with certain advanced pollution control equipment. *Id.* at 11. Meanwhile, federal and state governments are working to incentivize electricity generators to use alternative energy sources and decrease their use of coal. *Id.* In addition, Patriot faces substantial and unsustainable legacy labor costs, in the form of medical benefits and pension obligations. *Id.* at 13.

This decreased demand for coal and increased costs have eroded Patriot's free cash flow for the last several years.[3] For three of the last four calendar years Patriot generated negative free cash flow. In the latest twelve months, Patriot generated negative $96 million in free cash flow, a figure that is expected to further drop substantially in future months. Patriot does not generate sufficient revenue to support its operations—it is supporting itself through debt financing. This financial performance eviscerates any conclusion that Patriot's shareholders will receive a distribution in these cases.

[3] Free cash flow reflects cash flow from operations less cash from investing.

C. The Mere Possibility of Solvency Is Inadequate to Justify an Equity Committee

In their effort to mount a plausible argument that equity holders are likely to obtain a meaningful distribution, the Interested Shareholders necessarily rely on speculation and conjecture. The remote possibility of a distribution from the estate, however, is inadequate to justify an equity committee. *See Williams*, 281 B.R. at 222 (finding the mere "possibility of solvency" insufficient to show a substantial likelihood of a distribution); *In re Hills Stores Co.*, 137 B.R. 4, 6-7 (Bankr. S.D.N.Y. 1992) (speculation inadequate to support the appointment of an official committee).

For example, the Interested Shareholders speculate that the Company's consolidated net operating tax losses might result in additional value for equity holders. This optimistic conjecture falls flat. In order for net operating tax losses to result in equity value, Patriot would need to generate taxable income that the net operating tax losses would offset. Patriot reported taxable losses of $147.8 million in 2010 and $72.6 million in 2011.[4] Patriot's DIP model and history would suggest that it is unlikely that Patriot will generate taxable income in the next several years.

The Interested Shareholders have not shown that equity holders have any economic interest to protect in these cases. At this time, it does not appear that any value will remain after Patriot pays its secured and unsecured claims and administrative expenses. Thus, "[a]ny distribution [shareholders] would receive under a hypothetical plan of reorganization would be tantamount to a gratuity," and the appointment of an equity committee is unjustified. Kodak Objection ¶ 36.

II. The Shareholders' Interests Will Be Adequately Represented by Patriot's Management, Board and the Creditors Committee

To be entitled to an equity committee, the Interested Shareholders must also prove that their interests would not be adequately represented without an official committee. *Williams*, 281 B.R. at 223. They fail to make the necessary showing. Patriot's Board of Directors, its senior management and the Creditors' Committee are already diligently working toward the same goal that a shareholders' committee would pursue: maximizing the value of the bankruptcy estate. Because multiple constituencies already exist to adequately protect shareholders' interests, appointment of an official equity committee is unnecessary and wasteful.

A. The Board of Directors and Management Adequately Represent Shareholders' Interests

It is well-established that a company's board of directors has a fiduciary duty to protect shareholders' interests, even in bankruptcy. *Kodak*, 2012 WL 2501071, at *2 ("[T]he insolvency of a company does not absolve the board of its fiduciary duty to shareholders."

[4] The cited loss for 2011 is a projection; the Company's return is to be filed at the end of August. Furthermore, these figures represent regular taxable losses. Alternative minimum taxable losses equaled $72.9 million in 2010 and $28.3 million in 2011.

(quoting *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985))). Indeed, "the usual presumption [is] that the Board will pay due (perhaps special) regard to the interests of shareholders" in bankruptcy. *In re Oneida Ltd.*, No. 06-10489, 2006 WL 1288576, at *2 (Bankr. S.D.N.Y. May 4, 2006). Accordingly, "the existence of a functioning board of directors supports the inference that equity's interests will be adequately represented" without an official equity committee. *Kodak*, 2012 WL 2501071, at *2. There is no question here that Patriot's Board of Directors remains "functioning," and the Interested Shareholders have presented no contrary facts that would overcome the "usual presumption" that the Board will adequately represent shareholder interests in bankruptcy.

In particular, the Interested Shareholders fail to acknowledge that the Company's officers and directors have significant personal stakes as shareholders of Patriot. As the Court in *Kodak* noted, "[t]here is no reason to think that the interests of shareholders will be ignored . . . where [Debtor's] directors and officers own over 10 million shares of [Debtor's] stock themselves." *Id.* Patriot's most recent proxy statement filed with the SEC states that senior executive officers and directors held approximately 2.82% of the Company's shares as of March 15, 2012, greater than the 1.83% stake held by officers and directors in Kodak. *Compare* Patriot Coal Corp., Schedule 14-A, at 19 (April 2, 2012), with Eastman Kodak Co., Schedule 14-A, at 31 (March 31, 2011). Management thus has every incentive to seek a recovery for equity if it were available and appropriate to pursue.

Indeed, the Interested Shareholders do not even claim that the interests of the Board and management are incongruent with shareholders' interests. Rather, they merely contend that an official shareholders' committee could better discern what is best for shareholders than Patriot's current officers and directors because Debtors went into bankruptcy during the current management's tenure. That argument, however, glosses over the exogenous events that led to the Company's current predicament—namely, a reduction in demand for coal caused by the recent rise in natural gas production and concomitant drop in natural gas prices, warmer weather, stricter environmental standards that will cost Debtors hundreds of millions of dollars, and rising legacy costs for employee and retiree pension and health benefits. *See* Schroeder Decl. ¶¶ 14, 21-39. Far from ignoring this confluence of events, management has responded aggressively by reducing production costs, shutting down higher-cost operations, slashing capital spending, and reducing the Company's workforce. *See id.* ¶ 40. These diligent efforts reflect management's desire to maximize shareholder value.

Additionally, the Interested Shareholders overlook the fact that Chairman of the Board Irl Engelhardt took over Patriot's reins as CEO only two months ago—evidence of a strong and proactive Board seeking to right the ship. In sum, there is no evidence supporting the view that the Debtors' management cannot adequately represent shareholder interests. In the absence of such a showing, the Interested Shareholders are not entitled to the "rare exception" of appointment of an official shareholders' committee. *See Williams*, 281 B.R. at 223.

B. The Unsecured Creditors' Committee Adequately Represents Shareholder Interests

In addition to the Board and management of Patriot, the Creditors' Committee will serve to independently protect shareholders' interests. Although the Interested Shareholders note that the Creditors' Committee's duties run solely to creditors, the fact remains that it is motivated to maximize the value of the estate, to the benefit of creditors and shareholders alike. *See Kodak*, 2012 WL 2501071, at *3 ("[The] unsecured creditors' committee has a duty to maximize the value of the [Debtors'] estates which would inhere to the benefit of shareholders."). Indeed, precisely the same argument that the Interested Shareholders make here was emphatically rejected in *Kodak*:

> The Shareholders wholly fail to support the position taken in their papers that the creditors' committee will cease to attempt to maximize value once the point is reached at which creditors will be paid in full—as if it were possible to divine that point at this stage in these cases. For present purposes, creditors and shareholder interests are generally aligned.

Id.; *see also Williams*, 281 B.R. at 222-23; *In re Leap Wireless Int'l, Inc.*, 295 B.R. 135, 139-40 (Bankr. S.D. Cal. 2003).

C. An Ad Hoc Group of Shareholders Would Adequately Represent Shareholders' Interests

The Interested Shareholders themselves, along with other potential members of an ad hoc group of shareholders, would seemingly be well-placed to represent the interests of shareholders in general. The Interested Shareholders are sophisticated investors: CompassPoint Partners L.P. is an investment fund that specializes in distressed companies, and Frank Wagoner is its general partner. They are moreover already represented by a national, well-known trial firm with expertise in bankruptcy litigation. *See Kodak*, 2012 WL 2501071, at *3 ("[G]iven the quality of the legal talent hired by the Shareholders, there is no reason to conclude the Shareholders cannot be represented ably through an unofficial, or ad hoc, committee."); *accord In re Spansion*, 421 B.R. 151, 163 (Bankr. D. Del. 2009) ("[T]he Ad Hoc Equity Committee is well organized, well represented by counsel, and adequate to the task of representing its interests without 'official' status.").

Indeed, the only reason the Interested Shareholders provide for the claim that an ad hoc group could not adequately represent other shareholders is that they owe "no fiduciary duty to the entire group." (Letter Request at 4.) But that mischaracterizes the issue: presence of a fiduciary obligation is relevant to determining adequacy of representation but it is not sufficient to establish inadequate representation. *See Kodak*, 2012 WL 2501071, at *3 (concluding ad hoc committee could adequately represent all shareholders); *Spansion*, 421 B.R. at 163 (same). As in both *Kodak* and *Spansion*, here all stakeholders' interests are aligned in seeking the greatest possible recovery to the estate, and thus there is no reason why this sophisticated group of ad hoc Interested Shareholders—ably represented by a well-known national law firm—would not adequately represent shareholders' interests without official committee status.

III. The Size and Complexity of These Chapter 11 Cases Do Not Mandate an Equity Committee

While the size and complexity of a chapter 11 case is a factor in deciding whether to appoint an official equity committee, "not every case with . . . a large number [of shareholders] will require an official equity committee." *Williams*, 281 B.R. at 223. To the contrary, official equity committees have been denied in cases of far greater size and complexity than the instant bankruptcy.

For example, both the U.S. Trustee and bankruptcy court denied authorization of an official equity holders' committee in the Lehman Brothers bankruptcy, perhaps the largest and most "massively complex" bankruptcy of all time, because the facts did not "appear to reflect any value in the equity securities." *See* Transcript at 100, *In re Lehman Bros. Holdings, Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y. Oct. 16, 2008). Similarly, the court held in Kodak that "[a]lthough Kodak's chapter 11 cases are large and complex," the costs of appointing an equity committee were not justified by the benefits, in light of the presence of other constituencies to ably represent shareholders. *Kodak*, 2012 WL 2501071, at *4. The reasoning in each of those cases applies a fortiori here where the bankruptcy is smaller and more manageable. The chart below, which compares the Kodak and Lehman bankruptcies to the much smaller Patriot, underlines the point:

	Number of Companies	Employees (approx.)	Liabilities (Book)[5]
KDK	121	17,000	$6.7 billion
LEH	7,000+ in over 40 countries	25,000	$613 billion
PCX	99	4,000	$3.07 billion

Furthermore, while the Interested Shareholders contend that Debtors' stock is widely held, they overlook the fact that over a third of Patriot's outstanding shares are held by only eight entities.

IV. Any Potential Benefit of an Equity Committee Is Significantly Outweighed by the Inevitable Costs

When considering the appointment of an equity committee, courts balance the costs against concerns about adequate representation. *Williams*, 281 B.R. at 220. Where "the costs that would result from appointment of an equity committee are substantial," and "equity's interests are represented by other constituencies seeking to maximize the value of the estate and by a sophisticated ad hoc group of shareholders," the appointment of an equity committee is not justified. *Kodak*, 2012 WL 2501071, at *4.

[5] The book value of the companies' liabilities represents the value provided in connection with each debtor's respective chapter 11 petition.

Appointing an official equity committee here would result in substantial costs in the form of additional professionals' fees and would further complicate negotiations and delay the progress of the reorganization. It would be particularly wasteful for the Debtors' estate to bear those additional expenses and complications when the shareholders are extremely unlikely to recover and have no real economic interest to protect. *Id.* Moreover, in the event the shareholders make a substantial contribution to the progress of the chapter 11 cases, they can petition the Court for compensation, without obliging the estate "to fund a constituency that appears to be out of the money." *Kodak*, 2012 WL 2501071, at *3.

Thus, the costs of an equity committee outweigh the benefits, especially where, as here, equity holders are sophisticated, represented by counsel, and likely to pursue their objections at hearings in the future. *Id.* at *4; *In re Ampex Corp.*, No. 08-11094 (AJG), 2008 Bankr. LEXIS 1536, at *1 (Bankr. S.D.N.Y. May 14, 2008).

Conclusion

The Debtors respectfully submit that the appointment of an equity committee in these chapter 11 cases is unwarranted under governing law. The Interested Shareholders have not shown a substantial likelihood of a meaningful distribution from the estate, nor have they shown that an official committee is necessary to represent their interests. Moreover, these cases are at their very early stages. While present information indicates that a recovery for equity is extremely unlikely, if that were to change at some future date, an equity committee could be proposed to represent shareholder interests at that time. Until then, an official committee would only burden the estate with substantial expenses on behalf of a constituency that has no economic interest at stake in these chapter 11 cases, and that is already adequately represented by multiple constituencies.

The Debtors appreciate the invitation to respond to the Letter Request, and welcome any questions that the U.S. Trustee might have. The Debtors note that the information herein is confidential, and request that this letter, and all information contained herein, be kept in confidence.

Very truly yours,

Marshall S. Huebner

Enclosures
cc w/ enc: Hugh Ray, Esq.
Adam C. Rogoff, Esq.

Electronic Mail and Overnight Courier

Exhibit D

U.S. Department of Justice

Office of the United States Trustee

Region 2/Southern District of New York

33 Whitehall Street, Suite 2100
New York, NY 10004

Phone: 212-510-0500
Fax: 212-668-2255

August 24, 2012

VIA E-MAIL

Hugh Ray, Esq.
McKool Smith
600 Travis Street, Suite 7000
Houston, Texas 77002

Re: In re Patriot Coal Corporation, *et al.* (the "Debtors"), Case No. 12-12900(SCC)

Dear Counsel:

The United States Trustee received your letter dated July 18, 2012 (the "Letter Request"), requesting that the United States Trustee appoint an official committee of equity security holders (the "Equity Committee") in the above-referenced cases.

As you know, the United States Trustee gave counsel to the Debtors and to the Official Committee of Unsecured Creditors (the "Respondents") an opportunity to respond to the Letter Request.

After careful consideration of the facts of these cases and an analysis of your Letter Request and the comments from the Respondents relating to your request, the United States Trustee declines to form an Official Equity Committee at this time.

Very truly yours,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE
/s/ Elisabetta G. Gasparini
Elisabetta G. Gasparini
Trial Attorney

cc: Marshall S. Huebner, Esq.
Damian S. Schaible, Esq.
Adam C. Rogoff, Esq.

Exhibit E

More online at dbr.dowjones.com

Active Bonds

ACTIVE BANKRUPT BOND PRICE INDICATIONS

Issuer	Coupon	Maturity	Most Recent Price	Previous Trade Price	Previous Trade Date	Change
AMBAC FINANCIAL GROUP INC	5.875	3/24/03	8.25	7.8	9/10/12	0.45
AMBAC FINANCIAL GROUP INC	5.95	2/28/03	8.62	8.15	9/10/12	0.47
AMBAC FINANCIAL GROUP INC	9.5	2/15/21	35.75	34	9/7/12	1.75
AMBAC FINANCIAL GROUP INC	5.95	12/5/35	35.5	32.5	9/10/12	3
AMR CORP	7.875	7/13/39	12.125	12.833167	9/10/12	-0.708167
AMR CORP	9	9/15/16	59.1	60	9/10/12	-0.9
AMR CORP	6.25	10/15/14	66.5	64.75	9/10/12	1.75
AMR CORP	10.2	3/15/20	59.125	52.5	9/10/12	6.625
AMR CORP	9.75	8/15/21	59.125	52.5	9/10/12	6.625
ATP OIL & GAS CORP	11.875	5/1/15	25.95	26.1875	9/10/12	-0.2375
DYNEGY HOLDINGS LLC	7.5	6/1/15	59	57.25	9/10/12	1.75
DYNEGY HOLDINGS LLC	0	5/1/16	58.818636	59.2	9/10/12	-0.381364
ENERGY CONVERSION DEVICES INC	3	6/15/13	45.125	42	9/10/12	3.125
MF GLOBAL HOLDINGS LTD	6.25	8/8/16	46	45.5	9/10/12	0.5
NORTEL NETWORKS LTD	5.34438	7/15/11	103.5	104	9/7/12	-0.5
PATRIOT COAL CORP	3.25	5/31/13	12.75	10.955	9/7/12	1.795
PATRIOT COAL CORP	8.25	4/30/18	46.5	47	9/10/12	-0.5
RESIDENTIAL CAPITAL LLC	9.625	5/15/15	99.25	99	9/10/12	0.25
TRIBUNE CO	5.25	8/15/15	37.75	32.55	9/4/12	5.2

Source: MarketAxess, marketaxess.com

Composite high yield bond price indications are compiled from various market sources, some of which may make a market in or have financial interest in the issues for which prices are provided. PRICES ARE INDICATIVE ONLY. The information contained herein does not represent a solicitation to sell or buy the underlying issues. Dow Jones shall not be held liable for any reason for any errors or omissions, delays or inaccuracies in the indications or any decision made in reliance upon the indications. Dow Jones shall not be liable to any person for any loss of business revenues or lost profits or for any indirect, special, consequential or exemplary damages whatsoever, whether in contract, tort or otherwise, arising in connection with the indications, even if Dow Jones has been advised of the possibility of such damages. Dow Jones makes no warranty whatsoever, express or implied, including specifically any warranty of merchantability or fitness for a particular purpose with respect to the indications and specifically disclaims any such warranty.