UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
	)	
	)	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	)	**Case No. 12-51502-659**
	)	**(Jointly Administered)**
	)	
Debtors.	)	**Objection Deadline:**
	)	**March 8, 2013 at 11:59 p.m. CT**
	)	
	)	**Hearing Date:**
	)	**March 18, 2013 at 1 p.m.**
	)	**(prevailing Central Time)**
	)	
	)	**Hearing Location:**
	)	**Courtroom 7 North**

OBJECTION OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST AND THE UNITED MINE WORKERS OF AMERICA 1993 BENEFIT PLAN TO THE DEBTORS' MOTION FOR AUTHORITY TO IMPLEMENT COMPENSATION PLANS

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COME NOW The United Mine Workers of America 1974 Pension Trust (the "UMWA 1974 Plan") and the United Mine Workers of America 1993 Benefit Plan (the "UMWA 1993 Plan," and together with the UMWA 1974 Plan, the "UMWA Funds"), by and through their undersigned attorneys, and for their objections to the *Debtors' Motion for Authority to Implement Compensation Plans* (the "AIP/CERP Motion") filed with this Court on February 12, 2013 [ECF No. 2819], state as follows:

PRELIMINARY STATEMENT

1. The Debtors have requested that this Court approve – purportedly as a cautionary measure – their payment of approximately $7 million to upper level management and other employees, in order to incentivize improved performance and to encourage employee retention. The Debtors assert that the relief sought in the AIP/CERP Motion is in the ordinary course of business, and arguably does not even require the approval of this Court. To the contrary, the AIP/CERP Motion raises significant questions that remain unanswered by the discovery provided by the Debtors. The information the Debtors have provided reflects several incentive thresholds whose satisfaction requires little, if any, additional effort from the subject employees. Accordingly, the AIP[1] is more retentive than incentivizing, and, absent significant additional showings, not permissible under Section 503(c)(1) of the Bankruptcy Code.

2. Even assuming the AIP can be characterized as an incentive plan, it is not justified by the facts and circumstances of these cases, as required under Section 503(c)(3) of the Bankruptcy Code. As further discussed in the accompanying Declaration of David Juza in Support of this Objection (the "Juza Declaration"), attached hereto as Exhibit 1 and incorporated herein by reference, [redacted]

[1] Capitalized terms used herein without definitions shall have the meaning assigned to them in the Motion.

[redacted]

[redacted] Other than a broad assertion, the Debtors have also failed to make any showing that the foregoing individuals, as well as several others in management positions, are not insiders. Furthermore, the AIP/CERP Motion asserts that the Debtors require immediate approval of the Proposed Compensation Plans to avoid employee attrition during an uncertain time, but the Motion fails to show any immediate harm. The Debtors have failed to demonstrate the necessity of the AIP or the CERP or to tie the payments thereunder to the Debtors' emergence from bankruptcy or some other major transaction in these cases.

3. Accordingly, the Debtors have failed to satisfy the statutory thresholds necessary for approval of the Motion, and it must be denied.

4. The timing of the AIP/CERP Motion is also inappropriate. While the Debtors are seeking this Court's approval to pay out approximately $7 million in asserted incentive and retention bonuses, they are simultaneously negotiating deep cuts to wages and benefits among their rank and file employees, who are already at the low end of the salary scale. The Debtors have already proposed to eliminate their obligation to provide retiree health benefits to any former, current or future employee as well as any non-Coal Act UMWA retirees, which could jeopardize, among other things, the ability of the 1993 Plan to continue to provide retiree health benefits to approximately 3,000 "orphan" retired coal miners, widows, and dependents. See Second Amended Complaint for Declaratory Relief and Interference with Protected Rights Under Section 510 of ERISA, Case No. 2:12-cv-06925 (D.W.V.), filed Jan. 30, 2013 (dkt. ent. 39), ¶ 121. The Debtors are also negotiating with other present and former employee constituencies for dramatic reductions in benefits under the thesis that such reductions are

"necessary." Presently, there is no context for assessing how the burdens of this reorganization effort will be distributed among these constituencies, and therefore no way to assess meaningfully how the proposed payment of increased compensation to the beneficiaries of the AIP and CERP relates to the treatment of others whose pay and benefits are being reduced. Patriot should not be able to pay out over $7 million in additional compensation to management employees while reneging on its promises and contractual obligations to support the elderly and needy beneficiaries of the UMWA Funds. Given the Bankruptcy Code's policy of "shared sacrifice," considering the AIP/CERP Motion in isolation does not make sense, and the AIP and CERP should not be approved at this time.

5. For all of the foregoing reasons, and as further described herein, the UMWA Funds object to the approval of the Proposed Compensation Plans and request that this Court deny the AIP/CERP Motion in its entirety.

BACKGROUND

A. The Chapter 11 Cases

6. On July 9, 2012, each of the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to an order of the Bankruptcy Court for the Southern District of New York (the "SDNY Bankruptcy Court") dated July 10, 2012, the cases are being administered jointly. After significant and hotly contested litigation over the propriety of the Debtors' admitted creation of two subsidiaries for the sole purpose of creating venue for this case in New York, the Debtors' cases were transferred to this Court pursuant to an order of the SDNY Bankruptcy Court dated December 19, 2012. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

7. The UMWA Funds are comprised of health and retirement benefit plans to which the Debtors have historically contributed and to which they currently are contractually obligated to contribute. One of the UMWA Funds, the UMWA 1974 Plan, provides pension benefits to approximately 93,000 retired coal miners, disabled miners, and widows, including over 11,000 from the Debtors, and is a member of the Official Committee of Unsecured Creditors (the "Creditors Committee"). In connection with this Objection, the UMWA 1974 Plan is acting on its own behalf and not as a representative of the Creditors Committee. The UMWA 1993 Plan provides health benefits to approximately 11,000 retired coal miners, widows, and their dependents who are considered "orphans" because their last signatory employer is no longer in business. Approximately 3,000 of the beneficiaries in the UMWA 1993 Plan are funded solely by contributions from companies such as Patriot Coal Corporation, which have made contractual promises to fund the necessary health benefits for these orphan retirees through the term of current National Bituminous Coal Wage Agreement, which extends until December 31, 2016.

B. The Statutory Framework

8. Congress enacted new Section 503(c) of the Bankruptcy Code in connection with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), to curtail overly broad "pay to stay" programs directed at retaining company executives and other insiders during bankruptcy proceedings.[2] Judge Glenn of the Bankruptcy Court for the Southern District of New York recently described the purpose of Section 503(c) as follows:

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[2] Pursuant to the Bankruptcy Code, "insider" includes, in relevant part:
(B) if the debtor is a corporation—
(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor;
(C) if the debtor is a partnership—

> Congress enacted section 503(c) . . . to eradicate the notion that executives were entitled to bonuses simply for staying with the Company through the bankruptcy process . . . and to limit the scope of key employee retention plans and other programs providing incentives to management of the debtor as a means of inducing management to remain employed by the debtor.

See, e.g., In re Residential Capital, LLC, 478 B.R. 154, 169 (Bankr. S.D.N.Y. 2012) (internal citations omitted); In re Velo Holdings, Inc., 472 B.R. 201, 209 (Bankr. S.D.N.Y. 2012); see also In re Hawker Beechcraft, Inc., 479 B.R. 308, 312-13 (Bankr. S.D.N.Y. 2012); In re Global Home Prods., LLC, 369 B.R. 778, 784 (Bankr. D. Del 2007).

9. Section 503(c)(1) of the Bankruptcy Code now sets a particularly high threshold for payment plans benefiting insiders that are primarily retentive in nature.[3] See, e.g., In re Dana

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(i) general partner in the debtor;
(ii) relative of a general partner in, general partner of, or person in control of the debtor;
(iii) partnership in which the debtor is a general partner;
(iv) general partner of the debtor; or
(v) person in control of the debtor; . . .
(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and
(F) managing agent of the debtor.
11 U.S.C. §101(31).

[3] Bankruptcy Code Section 503(c)(1) states, in relevant part:

> (c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—
>
> (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
>
> (B) the services provided by the person are essential to the survival of the business; and
>
> (C) either—
>
> (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
>
> (ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred . . .

Corp., 351 B.R. 96, 101 (Bankr. S.D.N.Y. 2006) ("Dana I") ("[T]o the extent a proposed transfer falls within section[] 503(c)(1) . . . then the business judgment rule does not apply, irrespective of whether a sound business purpose may actually exist."). The statutory definition of insiders is "illustrative, not exclusive." See, e.g., Stalnaker v. Gratton (In re Rosen), 346 B.R. 798, 804 (8th Cir. BAP 2006) ("An insider is one who has a sufficiently close relationship with the debtor that his or her conduct should be subject to closer scrutiny than those dealing at arms' length with the debtor.") (citing legislative history); Kroh Bros. Devel. Co. v. United Missouri Bank of Kansas City (In re Kroh Bros. Devel. Co.), 137 B.R. 332, 335 (W.D. Mo. 1992) (same).

10. Where an employee bonus plan benefiting insiders is shown by a preponderance of the evidence to be primarily incentivizing, and not primarily retentive, those payments may be reviewed under the less stringent Section 503(c)(3) of the Bankruptcy Code, which allows those payments to the extent they are justified by the facts and circumstances of the case.[4] In re Borders Group, Inc., 453 B.R. 459, 471 (Bankr. S.D.N.Y. 2011). The same test is applicable to retention payments to non-insiders. See id.

11. Courts most often review proposed retention or incentive plans under Bankruptcy Code Section 503(c)(3) by applying the "business judgment" test associated with other transactions outside the ordinary course under Section 363(b) of the Bankruptcy Code. See, e.g., In re Dana Corp., 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006) ("Dana II"); In re Borders Group, Inc., 453 B.R. at 471; but see In re Pilgrim's Pride Corp., 401 B.R. 229, 237 (Bankr. N.D. Tex. 2009) (holding that, rather than merely deferring to the debtor's business judgment, "the

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[4] Bankruptcy Code Section 503(c)(3) proscribes "other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition" (emphasis added).

court must make its own determination that the transaction will serve the interests of the creditors and the debtor's estate"). As the Debtors noted in the AIP/CERP Motion, bankruptcy courts in the Southern District of New York have considered the following six factors in evaluating proposed incentive plans, which, although not binding on this Court, provide useful guidance:

> (1) whether the plan has a reasonable relationship to the results to be obtained, including, whether the key employee will stay through the achievement of the desired result, and in the case of a performance incentive, whether the plan is calculated to achieve the desired performance;
>
> (2) whether the cost is reasonable in light of the debtor's assets, liabilities, and earnings potential;
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> (3) whether the scope of the plan is fair and reasonable, whether it applies to all employees, or whether it discriminates unfairly;
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> (4) whether the plan is consistent with industry standards;
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> (5) the due diligence efforts of the debtor in investigating the need for a plan, analyzing the employees that should be incentivized, what is available and the general applicability in the particular industry; and
>
> (6) whether the debtor received independent counsel in performing due diligence and in creating and authorizing the incentive compensation.

See Dana II, 358 B.R. at 576-77 (citing pre-BAPCPA cases).

12. As further set forth below, the AIP cannot satisfy the foregoing test, and neither the AIP nor the CERP can be approved. First, the Debtors cannot establish that the AIP and CERP have a reasonable relationship to the results to be obtained. There is no basis to conclude that the thresholds in the AIP will provide actual incentives that will result in value to the estate. Instead, the AIP is a disguised retention plan. There is also no evidence that the CERP is important to achieving a successful reorganization. Second, the cost of the AIP and CERP is unreasonable in light of the extreme proposed cuts to the wages and benefits of the union-

represented employees. Third, the AIP and CERP are [redacted] Fourth, the Proposed Compensation Programs have not been shown to be consistent with industry standards, as the "comparables" used by Debtors include industries that have nothing to do with the Debtors' industry and fail to consider important factors, such as geography. Fifth, as set forth in more detail in the Juza Declaration, the Debtors' process in creating the AIP and CERP was deeply flawed and is insufficient to establish adequate due diligence to support the AIP and CERP. Sixth, a review of the testimony offered by Nick Bubnovich [redacted]

13. Finally, upon a review of (i) a debtor's historical business dealings considered from the vantage point of a hypothetical creditor (the so-called "vertical test") and (ii) similar programs at comparable companies (the so-called "horizontal test"), courts may determine that payment plans are within a debtor's ordinary course of business. In re Nellson Nutraceutical, 369 B.R. 787, 804-05 (Bankr. D. Del. 2007). Such transactions are subject to review under Section 363(c) of the Bankruptcy Code, which requires that the determination was "a business judgment made in good faith upon a reasonable basis and within the scope of authority under the Bankruptcy Code." See id.; see also In re Borders Group, Inc., 453 B.R. at 471 (noting, but not applying, alternative test where debtors did not seek it). Even if a transfer is determined to be made in the ordinary course, however, it is nevertheless subject to scrutiny under Section 503(c)(1) if the transfer is made to an insider for retentive purposes. See In re Nellson Nutraceutical, 369 B.R. at 791. Notwithstanding the Debtors' conclusory assertions to the

contrary, neither the AIP nor the CERP is within the ordinary course of business, and Section 363(c) does not apply.

OBJECTION

I. The Debtors Have Not Shown that the Proposed Compensation Plans Satisfy the Statutory Thresholds Set Forth in the Bankruptcy Code

A. The AIP and the CERP

14. The AIP is available to 225 employees, comprising five percent of the Debtors' workforce, including all employees who were eligible to participate in the Debtors' pre-petition AIP (other than the Debtors' six-member executive team). The AIP, as described in the AIP/CERP Motion, contemplated two six-month measurement periods, January 1 through June 30, 2013, and July 1 through December 31, 2013, with total payments of up to $875,000 attributable to each period, payable between 30 and 60 days following the end of each performance period. AIP/CERP Motion ¶¶ 20, 22. The potential AIP recipients are 225 employees who are "best positioned to help maximize the Debtors' financial and operational performance." Id. ¶ 20; Hatfield Dec. ¶ 25. Potential AIP participants include purportedly "critical salaried employees in operations management, finance, human resources, legal, engineering, and sales." Id. ¶ 20; Hatfield Dec. ¶ 25. According to the Debtors' Chief Executive Officer, [redacted] Transcript of Deposition of Bennett Hatfield ("Hatfield Deposition Transcript"), attached hereto as Exhibit 2, at 83:16-19. Pursuant to an agreement between the Debtors and the Office of the United States Trustee (the "UST Agreement"), the Debtors agreed to withdraw seven individuals from CERP eligibility, and to add their contemplated CERP distributions to their prior potential

distributions under the AIP. See Notice Regarding Debtors' Motion for Authority to Implement Compensation Plans filed with this Court on March 6, 2013 [ECF No. 3088]. Accordingly, the total amount payable under the AIP is approximately $[redacted], which presumably would be payable in two installments of approximately $[redacted] each.

15. The CERP, as described in the AIP/CERP Motion, was available to 119 employees, Hatfield Dec. ¶ 29, nearly [redacted]% of whom are also eligible for the AIP. The maximum payout under the CERP was originally contemplated to be approximately $5.2 million, to be paid in three installments: (i) 25% on March 31, 2013; (ii) 25% on September 30, 2013 and (iii) 50% (or up to $2.6 million) payable on the later of March 31, 2014 or 90 days following the Debtors' emergence from Chapter 11. Id.; Hatfield Dec. ¶ 37, Bubnovich Dec. ¶ 23. CERP-eligible employees include individuals working "in areas such as mine operations and management, finance, human resources, legal, engineering, and sales." AIP/CERP Motion ¶ 28. Pursuant to the UST Agreement, there are now 112 contemplated CERP participants, and the total anticipated payout under the CERP should be reduced by approximately $[redacted], to $[redacted].

B. The AIP is Primarily Retentive

16. Pursuant to the Bankruptcy Code, an incentive plan must "closely link vesting of the [incentive] awards to metrics that are directly tied to challenging financial and operational goals for the businesses, tailored to the facts and circumstances of the case." In re Residential Capital, LLC, 478 B.R. at 173. The AIP/CERP Motion sets financial, safety and other milestones, all of which the Debtors characterize as "aggressive" in light of depressed coal prices. Hatfield Dec. ¶ 28; Bubnovich Dec. ¶¶ 10-11. A closer look, however, reveals that several of the Debtors' thresholds here are easily satisfied. That is, "although the [AIP] includes

incentivizing targets, the lowest levels are well within reach." In re Hawker Beechcraft, Inc., 479 B.R. at 313. Therefore, the AIP cannot be approved.

17. The most heavily weighted aspects of the AIP are the Debtors' financial targets, EBITDAP and liquidity, each of which is given a weighted percentage of 30%. AIP/CERP Motion ¶ 27. For the January through June 2013 period, the Debtors must achieve $75.1 million in EBITDAP, and $205.8 million in liquidity, as each is defined in (or derived from terms defined in) the documents governing the Debtors' debtor-in-possession financing (the "DIP Facility"). Id. For the July through December 2013 period, the Debtors must achieve $72.4 million in EBITDAP, and $100.6 million in liquidity. [redacted] See Update for Unsecured Creditors' Committee (Dec. 5, 2012), attached hereto as Exhibit 11, at 48. [redacted] Id. By merely coming to work, the Plan participants should earn a significant portion of their incentive bonuses.

18. Furthermore, it is unrealistic to assert that the non-management AIP participants can meaningfully affect either the Debtors' liquidity or EBITDAP. See Exhibit 1, Juza Declaration ¶ 23. Accordingly, these metrics cannot truly be viewed as incentivizing for lower-level employees, again leading to a determination that the AIP is merely retentive in nature. Id.[5]

19. The Debtors also accord 5% weighting to (a) their safety incidence rate (3.27 threshold for both the January through June and July through December periods), (b) the

[5] The Debtors make much of the fact that the Creditors Committee has endorsed the AIP/CERP Motion. See, e.g., AIP/CERP Motion ¶ 9. The AIP/CERP Motion, however, reflects recent revisions that were not presented to the Committee.

environmental incidence rate (.0092 for both the January through June and July through December periods) and (c) their Mine Safety and Health Administration ("MSHA") compliance rate (.95 for both the January through June and July through December periods). AIP/CERP Motion ¶ 27. These thresholds, in each case, contemplate compliance rates that are less successful than the Debtors' rates for 2011. See, e.g., Schedule 14A Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (filed March 30, 2012), attached hereto as Exhibit 3, at 26, *available at* http://www.sec.gov/Archives/edgar/data/1376812/000119312512143555/d316417ddef14a.htm, setting forth the following actual numbers for 2011: (a) safety incidence rate (2.73); (b) environmental incidence rate (.009) and (c) MSHA compliance rate (.88). Despite the Debtors' assertion that the AIP targets are aggressive, the thresholds for 2013 are less so than the actual numbers the Debtors achieved in 2011. Thus, the Debtors propose to award their personnel for attaining a lower level of compliance with safety and environmental standards than they have in the past.

20. The Debtors also accord 25% of the AIP to individual "qualitative goals" to be determined by the eligible employee's supervisor. AIP/CERP Motion ¶ 27. [redacted] See Exhibit 2, Hatfield Deposition Transcript at 76:18-21. Because the Debtors have not provided any specific information about these goals, it is not possible to measure whether they will have an incentivizing effect, or whether such goals are so-called "lay-ups," that are achieved without any additional effort. See Exhibit 1, Juza Declaration ¶ 24.

21. Finally, the AIP is payable 30 to 60 days after it is earned. See, e.g., Hatfield Decl. ¶ 27. However, [redacted]

[redacted] See Exhibit 2, Hatfield Deposition Transcript at 57:2-24. Bankruptcy courts have previously found such a requirement to be retentive in nature. See In re Hawker Beechcraft, Inc., 479 B.R. at 314 (declining to approve incentive plan, where, among other things, each beneficiary had to "stay for his pay").

22. Each of the foregoing points leads to one conclusion: the AIP is not incentivizing, and is a disguised retention plan. See, e.g., In re Residential Capital, LLC, 478 B.R. at 173 (denying approval of key employee retention plan that was primarily retentive and appeared to "attempt an end-run around section 503(c)(1) of the Bankruptcy Code"); In re Hawker Beechcraft, Inc., 479 B.R. at 315 (denying approval of key employee retention plan where insiders likely would earn some bonus merely by remaining with debtors); Dana I, 351 B.R. at 102 n.3 ("If it walks like a duck (KERP) and quacks like a duck (KERP), it's a duck (KERP)").

C. The Impact of Bankruptcy Code Section 503(c)(1) on the Proposed Compensation Plans

23. As the AIP is primarily retentive, and the CERP is by its terms retentive, any insiders are barred from participating in the Proposed Compensation Programs pursuant to Section 503(c)(1) of the Bankruptcy Code, which the Debtors have not attempted to satisfy. See, e.g., Am. Housing Foundation, 2011 Bankr. LEXIS 3831 (Bankr. N.D. Tex. Sept. 30, 2011) (denying retention bonuses to insiders); In re Foothills Texas, Inc., 408 B.R. at 585 (denying retention bonuses where vice presidents failed to rebut presumption that they were officers).

24. The AIP/CERP Motion summarily states that "the Proposed Compensation Plans apply only to non-insiders." AIP/CERP Motion ¶ 38 n.13. The Debtors, however, have not provided sufficient evidence to rebut the presumption that the management- and senior-level employees participating in the Proposed Compensation Programs are officers or otherwise

insiders of the Debtors. Several of the AIP participants who, pursuant to the UST Settlement, are no longer eligible for the CERP, [redacted] See Minutes of Meeting on August 14, 2012, attached hereto as Exhibit 5, at 2 [redacted]; Patriot Coal Corporation Resolution of the Board of Directors [redacted], attached hereto as Exhibit 6, at 1.[6] The AIP also includes [redacted] Many of the foregoing individuals are also included as participants in the CERP.

25. Courts have held that it is the Debtors' obligation to rebut the presumption that potential beneficiaries under a retention plan are insiders, and are thus eligible for participation. See, e.g., In re Foothills Texas, Inc., 408 B.R. 573, 579 (Bankr. D. Del. 2009) ("In order to overcome the presumption that a person holding an officer's title is not what he or she appears to be requires submission of evidence sufficient to establish that the officer is, in fact, not participating in the management of the debtor."). While the testimony of the Debtors' CEO suggests that [redacted][7] case law interpreting the Bankruptcy Code's definition of "insider" has taken a decidedly broader view. See Office of the U.S. Trustee v. Fieldstone Mortgage Co., 2008 U.S. Dist. LEXIS 91479 (D. Md. Nov. 5, 2008) (fact that individuals had been appointed as officers by the debtor's board of directors was sufficient to establish their

[6] Pursuant to Section 3.2 of the Amended and Restated By-Laws of Patriot Coal Corporation, [redacted] See Amended and Restated By-Laws of Patriot Coal Corporation, attached hereto as Exhibit 7, at 5.

[7] See Exhibit 2, Hatfield Deposition Transcript at 59:7-63:16.

officer status as a matter of law); Dana I, 351 B.R. at 103 (declining to find that only company executives and directors were insiders of the Debtors, noting that such a determination was a factual finding and that the Court had "no basis to make a finding that no other insiders are employed by [the Debtors] absent a showing of proof"). Therefore, absent a satisfactory showing by the Debtors that the participants in the AIP and CERP are not insiders, they may not be approved.

D. The AIP and the CERP Are Not Within the Ordinary Course, and Are Not Justified By the Facts and Circumstances of These Cases

26. To the extent that either the AIP or the CERP is a non-insider plan and is subject to consideration under 503(c)(3) or 363(c), they still may not be approved. The Debtors have not shown that either Plan has a reasonable relationship to the results to be obtained thereunder. With respect to the AIP, several of the thresholds are likely to be reached with or without an incentive plan. The establishment of easily reachable targets that trigger approximately $2 million in incentive pay cannot be justified. See, e.g., In re Hawker Beechcraft, Inc., 479 B.R. at 315-16; In re Residential Capital, LLC, 478 B.R. at 172-73. The Debtors cannot be permitted to award bonuses for results that are a foregone conclusion.

27. Similarly, the Debtors have not reasonably linked the CERP to a reorganization, sale process or other transaction. See Exhibit 1, Juza Declaration ¶ 19 (listing typical requirements for earning payment under a retention plan). Under the proposed timing, half of the distributions under the CERP will be made prior to the Debtors' exit from Chapter 11. Although the Debtors argue that the bankruptcy has increased attrition, their own data indicate that [redacted] See Retention and Incentive Plan Proposals (Feb. 5, 2013), attached hereto as Exhibit 4, at 9.

28. The Debtors' data supporting the proposed CERP measure [redacted] See id. This misleading sample period ignores the first several years of Patriot's corporate existence, which coincided with a precipitous decline in the national economy. See Exhibit 1, Juza Declaration ¶¶ 10-12. Thus, the data fail to consider the impact of the downturn on hiring and attrition rates generally: as the economy has improved and the hiring freeze that affected so many companies between 2009 and 2011 has lifted, there is a natural increase in attrition that reflects a "righting" of the market. See id. ¶ 13; see also Bureau of Labor Statistics, U.S. Dep't. of Labor, Job Openings and Labor Turnover Highlights December 2012 (February 12, 2013), attached hereto as Exhibit 8, at 5-7, *available at* http://www.bls.gov/web/jolts/jlt_labstagraphs.pdf (highlighting that the number of voluntary employee-initiated terminations, or "quits," is cyclical, and has increased by 33% since September 2009).

29. To the extent the Debtors do have an attrition problem, the Debtors' CEO has acknowledged that cash may not resolve it. See, e.g., Hatfield Dec. ¶ 15 (citing job security, not compensation, as the Debtors' retention issue, including "one critical employee – an engineer – who, citing job uncertainty, accepted a lower-level position with a competitor despite the Debtors' offer of a promotion that included a $20,000 pay increase"). The Debtors simply have not shown that the prospect of payments under the CERP will convince employees to stay. Further, as currently contemplated, CERP payments are to be paid within 30 to 60 days following the date they are earned. See Hatfield Dec. ¶ 27. Thus, [redacted] See Exhibit 2, Hatfield Deposition Transcript at 57:16-58:9.

30. Nor have the Debtors shown that the AIP and the CERP are consistent with industry standards. The Debtors' February 5, 2013 presentation to the Creditors' Committee [redacted] See Exhibit 4, Retention and Incentive Plan Proposals (Feb. 5, 2013) at 11-12. With respect to the AIP programs, for example, the sizes of the chosen companies varied widely, both in terms of size of workforce and revenue at filing. Id. Furthermore, the nature of the chosen comparable companies was not intuitive: it is not clear how the Debtors are comparable to video game manufacturers, mortgage or financial instrument issuing entities or retailers (or whether any of the comparator debtors employed a largely unionized workforce), and the analyses do not distinguish between true reorganization efforts and Chapter 11 liquidations. Id. Certain of the comparables also pre-date BAPCPA, and are inapt for that reason. Id. Thus, it seems the sole reason the comparator entities were chosen was because [redacted] See Transcript of Deposition of Nick Bubnovich ("Bubnovich Deposition Transcript"), attached hereto as Exhibit 9, at 66:2-3 [redacted]

31. The salary benchmarking undertaken by the Debtors' advisors also fails to support AIP/CERP Motion. The Debtors assert that the Proposed Plan Participants are grossly underpaid. See AIP/CERP Motion ¶ 17. The Debtors' advisors, however, [redacted] See Exhibit 9, Bubnovich Deposition Transcript at 89:16-90:6. Compensation fluctuates on a regional basis due to, among other things, the cost of living in a particular region and the existence of comparable employment opportunities in the same region. See Exhibit 1, Juza Declaration ¶¶ 15-18. The failure of the Debtors' advisors to

consider geographic location in their benchmarking undermines the claim that employees are undercompensated in their market, a fundamental flaw that cannot be overlooked. See id. ¶¶ 16-17.

32. Finally, the Debtors have failed to satisfy the "vertical" test under Section 363(c) of the Bankruptcy Code. [redacted] See Minutes of the Special Meeting of the Compensation Committee (June 19, 2012), attached hereto as Exhibit 10 (approving pre-petition CERP). [redacted] See Exhibit 9, Bubnovich Deposition Transcript at 129:4-20. The Debtors' historic retention efforts differ materially from the CERP currently before the Court, such that a creditor would reasonably expect notice and an opportunity to be heard in connection with its approval. See, e.g., Johnston v. First Street Cos., Inc. (In re Waterfront Cos., Inc.), 56 B.R. 31, 35 (D. Minn. 1985) (disallowing claim arising under unauthorized indemnity agreement, where agreement was the "type of transaction which creditors would expect to have advance notice of and have a chance to object to").

E. Overall Reasonableness of Proposed Payments, Including Whether the AIP and CERP Discriminate Unfairly

33. Payments under the AIP were originally anticipated to range from 1.25% to 15% of a participant's annual base salary, with average per employee cost of $7,526. AIP/CERP Motion ¶¶ 20, 26. Payments under the CERP were anticipated to range between 11% and 45% of a participant's annual base salary. Id. ¶ 30. As a result of the UST Agreement, payments under the AIP are now anticipated to range from [redacted]% to [redacted]% of a participant's annual base salary, with an average per employee cost of $[redacted].

34. A closer look at the sharing of the proposed payments reflects the top-heavy distribution of payments under the Proposed Compensation Programs. [redacted]

F. Section 105

35. Finally, the Debtors cite Section 105 of the Bankruptcy Code as a separate statutory basis for the relief sought in the AIP/CERP Motion. AIP/CERP Motion ¶ 27. Section 105 is available, however, only if the Code does not otherwise proscribe the relief in question. As the AIP and CERP are prohibited under Sections 363 and 503(c) of the Bankruptcy Code, the Debtors cannot look to Section 105(a) as an alternative. See Landsing Diversified Properties-II v. The First Nat'l Bank and Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 601 (10th Cir. 1990) ("[A] bankruptcy court's supplementary equitable powers . . . under [section 105(a)] may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code.").

II. The AIP/CERP Motion is Inappropriate at this Time

36. Even if the Debtors could satisfy their statutory burden, a look at the broader picture militates against a granting of the AIP/CERP Motion. The Debtors are currently

negotiating with their various employee constituencies to determine across-the-board concessions that will enable the Debtors to reorganize and emerge from bankruptcy as going concerns. Against that background, but with any final determination with regard to those concessions still weeks, if not months, away, the Debtors seek approval of the Proposed Compensation Programs. It does not make sense, and is in the interests of neither fairness nor efficiency, to decide the AIP/CERP Motion in a vacuum, with no understanding of how the compensation being offered to eligible participants will compare to the packages offered to other employees. Instead, approval of the Proposed Compensation Programs should be deferred until it can be reviewed in the context of a global proposal.

37. There is tremendous discrepancy even among the potential AIP and CERP beneficiaries, [redacted] Such a deviation reveals that the Debtors are not truly invested in "shared sacrifice" across their employee constituencies, and that the AIP/CERP should be shelved while other negotiations continue.

38. The Company's unionized employees are all too aware of the deep potential wage and benefit cuts before them. Seeking approval of incentive and retention programs for non-union salaried employees at this time (particularly upper-level management), when these issues remain on the negotiating table for the Debtors' other employees, will only engender dissension, as evidenced by the recent UMWA protest and by the hundreds of letters that have been filed with this Court. The awarding of management bonuses in the face of rank-and-file cuts smacks of the very senior-level enrichment that Section 503(c) of the Bankruptcy Code was intended to prevent, and can only have a negative impact on ongoing negotiations. Such

dissatisfaction does not provide a constructive path forward for a bankrupt company. See, e.g., In re US Airways, Inc., 329 B.R. 793, 799 (Bankr. E.D. Va. 2005) (approving pre-BAPCPA retention plan, but acknowledging that its approval was "a betrayal of the principle of 'shared sacrifice' that was championed by the company in the litigation and negotiations that resulted in . . . wage and other concessions by its unionized workforce."); see also In re Century Brass Prods., Inc., 795 F.2d 265, 273 (2d Cir. 1986) (In the context of a motion for relief under Section 1113 of the Bankruptcy Code, "The court must also assure itself that 'all creditors, the debtor and all affected parties are treated fairly and equitably.' The purpose is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree.") (citing legislative history).

39. Rather than fostering conflict that will only put the Debtors' reorganization at increased risk, a holistic approach to employee compensation is appropriate and constructive here. The Debtors must reaffirm their commitment to shared sacrifice by agreeing to address labor-related issues globally rather than piecemeal.

CONCLUSION

40. The AIP/CERP Motion, and the Debtor's Proposed Compensation Programs described therein, do not satisfy the Debtors' statutory burden under Sections 363 and 503 of the Bankruptcy Code. Moreover, the Debtors have asked this Court to make a decision in a vacuum: that is, to rule on the compensation available to primarily one employee constituency, without consideration to whether the Proposed Compensation Programs reflect "shared sacrifice" across the enterprise. The Programs are better considered in the context of a global settlement, alongside a review of all of the Debtors' proposed wage and benefit revisions. Anything other

than a holistic approach is inequitable to other constituencies, and fails to give effect to a fundamental underpinning of the Bankruptcy Code.

WHEREFORE, for the foregoing reasons, the UMWA Funds respectfully request that the Court (i) deny the AIP/CERP Motion in all respects, and (ii) provide such other and further relief as the Court deems just and appropriate.

Dated: March 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed on March 8, 2013 using the Court's CM/ECF system and that service will be accomplished upon all counsel of record by operation of that system.

/s/ Edward L. Dowd, Jr.