UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
Case No. 12-51502
- -x
In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- -x

United States Bankruptcy Court
111 South 10th Street
4th Floor
St. Louis, Missouri

March 18, 2013
1:13 PM

B E F O R E:
HON. KATHY A. SURRATT-STATES
U.S. BANKRUPTCY JUDGE

Motion for Authority to Implement Compensation Plans by Debtor (2819)

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P R O C E E D I N G S

THE CLERK: Your Honor, we are back on the record.

THE COURT: All right, thank you. Be seated, please. All right, this is in the matter of the Patriot Coal Corporation. It's the motion for authority to implement compensation plans by the debtor. Let me start first with appearances on the record in the courtroom, please.

MR. WALSH: Good afternoon, Your Honor. Brian Walsh and Laura Hughes from Bryan Cave, on behalf of the debtors.

THE COURT: Good afternoon.

MR. WALSH: Also here today from the Davis Polk firm, we have Benjamin Kaminetzky, Michael Russano, Elliot Moskowitz, Daniel Voss (ph.), Angela Libby.

THE COURT: Good afternoon.

MR. WILLARD: Good afternoon, Your Honor. May it please the Court, Greg Willard and Angie Schisler on behalf of the official committee of unsecured creditors, the members of whom are American Electric Power, Gulf Coast Capital Partners, U.S. Bank as indenture trustee for the convertible notes, the United Mine Workers of America, the United Mine Workers of America 1974 Pension Plan and Trust, and Wilmington Trust Company as indenture trustee for the senior unsecured notes.

I'd also, at this time, Your Honor, like to introduce to the Court, my co-counsel, Mr. Tom Mayer, from the Kramer Levin firm.

THE COURT: Good afternoon.

MR. WILLARD: And Mr. Mayer obviously is in the courtroom. Therefore, Mr. Rogoff will not be appearing by telephone.

THE COURT: All right.

MR. WILLARD: Thank you, Your Honor.

THE COURT: Thank you.

MR. RANDOLPH: Good afternoon. Paul Randolph for the U.S. Trustee.

THE COURT: Good afternoon.

MR. CROWE: Good afternoon, Your Honor. Jim Crowe from Dowd Bennett, local counsel for the United Mine Workers of America 1974 Pension Trust and the United Mine Workers of America 1993 Benefit Plan. With me in court this afternoon are Ms. Rebecca Hillyer --

MS. HILLYER: Good afternoon.

THE COURT: Good afternoon.

MR. CROWE: -- from Morgan Lewis and her colleagues Rachel Mauceri and Melina Forte, sitting in the gallery We're also joined this afternoon, Your Honor, by Richard Welch from Mooney Green in Washington, D.C.

THE COURT: All right. Good afternoon.

MR. CROWE: Thank you, Your Honor.

THE COURT: Thank you.

MS. TOLEDO: Good afternoon, Your Honor. Laura Toledo on behalf of Bank of America as agent for the pre-petition secured lending group and the second out DIP lender. In the court with me today is Ana Alfonso from Willkie Farr. And also joining by phone is Margot Schonholtz --

THE COURT: All right.

MS. TOLEDO: -- of the Willkie firm. Thank you.

THE COURT: Good afternoon.

MR. PERILLO: Good afternoon, Your Honor. My name is Fred Perillo. I represent the United Mine Workers of America. My client is the union which represents approximately 1,800 of the debtors' mining employees. Thank you.

THE COURT: Thank you and good afternoon.

MR. CRANDALL: And Grant Crandall with the United Mine Workers.

THE COURT: Good afternoon.

MR. TURNER: Good afternoon, Your Honor. Marshall Turner on behalf of Citibank, N.A. as first out -- as agent for the first out DIP lenders. And in the courtroom is Ana -- sorry --

MS. SAAVERDRA: Andrea Saavedra of Weil Gotshal & Manges.

THE COURT: Good afternoon.

MR. TURNER: Thank you, Your Honor.

THE COURT: Thank you.

MR. DOYLE: Good afternoon, Your Honor. Dan Doyle on behalf of Caterpillar Financial Services Corporation and the Caterpillar Global Mining entities.

THE COURT: Good afternoon.

MS. CASE: Good afternoon, Your Honor. Rebecca Case, local counsel Payne-Gallatin Company and Shonk Land Company. Thank you, Your Honor.

THE COURT: Good afternoon.

MR. COUSINS: Good afternoon, Your Honor. Steven Cousins of Armstrong Teasdale, co-counsel with Peabody Energy Corporation, together with Jones Day. Thank you.

THE COURT: Good afternoon. All right, then. And then on the telephone, I believe we have Ms. Schonholtz on behalf of Bank of America.

MS. SCHONHOLTZ: I'm here. Good afternoon, Your Honor.

THE COURT: Good afternoon. Blaine Early on behalf of Argonaut Insurance?

MR. EARLY: This is Blaine Early. And on behalf of four other sureties as well, Your Honor. But I'm here.

THE COURT: All right. Thank you and good afternoon. And then Mr. Huebner, you're on the line with us on behalf of the debtors?

MR. HUEBNER: I am, Your Honor. Good afternoon.

THE COURT: Good afternoon. And David Barney on behalf of Alexis Cook, et al.

MR. BARNEY: Present, Your Honor.

THE COURT: Good afternoon. And Tom Persinger on behalf of Southern Land Company.

MR. PERSINGER: Thank you, Your Honor. Good afternoon. Today it's here on behalf of Payne-Gallatin Company.

THE COURT: All right. All right, thank you.

All right, then, Mr. Walsh or Mr. Kampinsky (sic), this is the debtors' motion.

MR. WALSH: Good afternoon, again, Your Honor. For the record, Brian Walsh of Bryan Cave on behalf of the debtors. Your Honor, we received a note from Mr. Huebner saying he's having trouble hearing, there's a lot of static on the line. I'm not hearing it the courtroom, but there may be something going on. If we might re-emphasize the importance of keeping phones on mute, I'm hopeful that might help the situation.

THE COURT: All right. Then let me remind everybody who is appearing by telephone, if you would please place your phone on mute other than when you are speaking, and hopefully that will address the issue.

MR. WALSH: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. WALSH: Your Honor, I will have some concluding remarks on the motion, but Mr. Kaminetzky is going to take the lead on this motion today. I'd like to give him a brief introduction to the Court, as I've done with other counsel from Davis Polk.

Mr. Kaminetzky is a litigation partner in the litigation group at Davis Polk. He's a former law clerk for a judge on the Sixth Circuit. He's been involved in a number of billion-dollar disputes arising from leveraged buy-outs, which as the Court is aware, give rise to interesting issues in bankruptcy cases and outside of bankruptcy.

He's also handled a number of incentive programs in Chapter 11, similar to the one that we're bringing to the Court for consideration today. And finally, as a bit of local color, Mr. Kaminetzky has spent time in our courthouse here. He represented the equity group in the Bridge Information Systems case that was pending before Judge McDonald a few years ago.

So, Your Honor, with that, I'll yield the podium to Mr. Kaminetzky.

THE COURT: All right.

MR. KAMINETZKY: Good afternoon, Your Honor. Benjamin Kaminetzky of Davis Polk for the debtors. It's a pleasure being here in front of Your Honor this afternoon. And thank you for agreeing to hear the motion this afternoon.

Your Honor, they say a picture is worth a thousand words. In a slight variation to that theme, a CEO's word is worth a lot more than a thousand words of a litigator. And it's for that reason, Your Honor, and because the issue today is the debtors' business judgment, that my remarks will be very brief, just a few bullet points, and we will quickly, then, turn to the testimony of Patriot's CEO and president, Mr. Bennett Hatfield, who is with us in court today.

So just again, briefly, a few bullet points. Why are we here today? Quite simply, Your Honor, much work remains in these cases and it will demand extraordinary amounts of time, dedication, patience, and sacrifice from the debtors' employees. However, the debtors are currently losing their most critical employees at historically unprecedented and alarming rates. Each departure forces the debtors to expend precious dollars and time on locating, recruiting, and training new employees. But perhaps, far more important, with each critical employee who resigns from the companies, the debtors face the loss of well-respected employees, mentors, supervisors, managers, with years of experience at Patriot.

And as you'll hear, Your Honor, the debtors are all too often unable to attract full replacements for those who leave, and are forced to demand more from personnel across all areas of their business, often forcing one person to do many people's jobs or forced to hire high-cost outside consultants to fill the gaps.

In short, the debtors' remaining work force has been stretched to the maximum capacity, all during the most critical period in the debtors' history. Now, the loss of any more critical employees or the failure to quickly implement a plan to adequately incentivize key employees, will threaten the entire restructuring effort.

So, Your Honor, the debtors are here today to ask the Court's approval for a very modest, yet critically important, incentive and retention plan. As you will see this afternoon, these plans are a prudent and necessary exercise of the debtors' sound business judgment. They are cheap. They are broad-based. The incentive performance metrics are aggressive. The retention program payments are timed so as to retain employees throughout the course of these cases.

They still -- that means even if every dollar is paid, they still leave employees well below market and pre-petition levels of compensation. They do not include insiders. They were developed over an eight-month period and are the product of extensive collaboration with various constituencies in this bankruptcy. Indeed, it would be a gross breach of fiduciary duties if these debtors did nothing to hold the company together and allow the reorganization to unravel from the inside due to the continuing exodus of critical employees.

And let me pause here to note that in an act of leadership, Mr. Hatfield and his executive management team, completely excluded themselves, not only from the retention plan, but from the incentive plan as well.

Just two more brief points, Your Honor: one about the law and one about who has voiced objections to these plans, and perhaps more importantly, who has not. First the law. The union and the funds, the only objectors, pretend -- they literally pretend that the applicable law here is complicated or not well-settled. Nothing can be further from the truth. All incentive plans, what we call AIPs or [apes] are accorded business judgment deference under Section 503(c)(3) of the Code. Similarly, any retention plan, what we call CERP or [kirp], that does not include insiders, is similarly accorded business judgment deference under 503(c)(3) of the Code.

The heightened showing contained in 503(c)(1) only applies -- again, only applies, if you are giving a retention plan to insiders. This is black-letter law. Here it is debtors' position that no insider is in either plan. And as I noted before, the entire executive management team is excluded from both plans.

But let me be fair and pause here. The U.S. Trustee's Office, Ms. Long, expressed that -- we believe erroneously, but she expressed the view that seven employees that were in the CERP, in the retention plan, are insiders, because they were technically elected by the board of directors. Again, we don't think the case law supports this position, but because we love Leo and Paul and have the utmost respect for the U.S. Trustee's Office, we settled with the U.S. Trustee, and removed these seven people from the retention plan and moved all those dollars to one hundred percent incentive. And as I just stated, all incentive plans, even to insiders, are accorded business judgment deference.

So with this change, Your Honor, the U.S. Trustee now concedes the 503(c)(3), business judgment, is the only thing at issue in today with respect to both the AIP and the CERP, both the retention plan and the incentive plan. And under the applicable and familiar business-judgment standard as stated in the Eighth Circuit and many cases, for example, In re Food Barn Stores, the Court should approve the motion if it is "not manifestly unreasonable or made in bad faith and appears to enhance the debtors' estate."

And it is also worth mentioning what I hope is obvious to all. Today is not the day -- today is not the place or the time to litigate 1113 and 1114 issues. As I just noted, our settlement with the U.S. Trustee removed any lingering insider concerns. The objectors, however, ask this Court to ignore, literally ignore, the reams of cases that we cite in our papers and find mid-level employees to be insiders, based solely on their titles. Again, the case law says absolutely not.

Courts all around the country hold that just like you can't judge a book by its cover, you can't -- you cannot determine an employee's insider status from his or her title. Instead, courts are instructed to employ a functional test and look at things such as whether plan participants are members of the debtors' inner circle; are they responsible for making the debtors' critical financial and operational decisions; do they exercise sufficient authority over the debtors to dictate corporate policy and the disposition of corporate assets; do they report to the board of directors or CEO in the ordinary course? These are the questions you ask when deciding if someone is an insider under the Bankruptcy Code. And as you will hear in a few minutes from Mr. Hatfield, none of the employees in the CERP, in the retention plan, come close.

Finally, Your Honor, I ask that you look around the room and take note who is sitting where. And I mean this more spiritually than physically because of the limitations of the courtroom. If there was anything truly unlawful, remiss, inequitable, too generous, discriminatory about the plans, if there was not a serious retention issue, if the relatively few dollars allocated to these plans could have been saved without risking substantial damage to the estates and to the reorganization, if the metrics in the incentive plans were so-called layups instead of robust hurdles, quite frankly, many of which we're currently falling short; if the retention plans included insiders, where would the creditors' committee be today?

Would they be supporting the plans like they are here, or would they be arm-in-arm with the objectors? To be sure, getting the committee's support was not easy. Believe me, it wasn't easy at all. We literally worked with the committee for months to get the proposed plans into a state where they would receive committee support.

Where would the DIP lenders be? Again, if these plans were not absolutely necessary to the reorganization, would the DIP lenders be supporting a motion where limited and precious cash was being spent? And as noted earlier, if there was any lingering post-settlement doubt that these plans did not one hundred percent comport to the Bankruptcy Code, wouldn't you see Ms. Long and Mr. Randolph raising the U.S. Trustee's hand in fierce opposition?

I submit, Your Honor, that the silence of these parties, and in the case of the unsecured creditors' committee and the Bank of America DIP agent, the affirmative support of these constituencies speak volumes.

And with that, Your Honor, unless you have any questions, I'd like to call Mr. Bennett Hatfield to the stand.

THE COURT: No, I don't have any questions. And let me ask the fund who has the objections, United Mine Workers' Association, are you all fine with waiving your opening argument until after Mr. Hatfield would have had his testimony, or do you want to do your opening argument now?

MR. PERILLO: If it would please the Court, I would like to --

THE COURT: We need you at the podium, I'm sorry, so we can get the recording accurate.

MR. PERILLO: With the indulgence of the Court, I would give a brief opening.

THE COURT: All right. All right, then, Mr. Kaminetzky, let me have -- let him give his brief opening argument and then we'll proceed with the testimony.

MR. KAMINETZKY: Okay.

THE COURT: All right.

MR. PERILLO: Your Honor, Fred Perillo on behalf of the United Mine Workers and its 1,800 members and tens of thousands of retirees who are involved in this case.

Your Honor, there is something inherently unseemly in the effort to insulate the executives from the financial risks all other stakeholders face in the bankruptcy process. Those are not the words of an overheated union lawyer; that is what the Court said in U.S. Airways. We now know, because of the recent filing of the 1113 and 1114 petitions in this case, that the debtor seeks something in the order of 150 million dollars per year in concessions from the union and the retirees. No stakeholder is being asked to make that sacrifice except for us. That is the reason why the other voices are silent. It is the reason why only the union and the funds are protesting.

It tells us something, Your Honor, about these debtors, that they believe that highly compensated officials, people making 300,000 dollars a year or a quarter of a million dollars a year, and who now demand bonuses of hundreds thousands more, view this 6 or 7 million dollar program as a small matter and view the 150 million dollars of concessions they seek from low compensated, frankly, in the United States today, poor people, that they view those as necessary and equitable.

If we go down this road, Your Honor, we know where this story ends. When bankruptcy managers ask to enrich themselves, they balance the budget on the backs of the workers. And when that path is followed to its logical conclusion, the workers resist, most often resulting in the liquidation of the debtor. This is where we are headed if we do not stop this process today.

These bonuses are, in fact, huge and hugely inequitable. This type of confrontation will lead to the liquidation of this debtor. The United Mine Workers has already told the debtor at the bargaining table, there will be no consensual concessions if managers are paid these enormous bonuses.

We disagree with Mr. Kaminetzky on the law and on what the evidence will show in almost every respect. With respect to the question of insiders, Your Honor, we find it impossible to believe that the debtors' eleven mining complexes and nineteen mines, are run by just six people -- just six people who would qualify as insiders. That of the 900 salaried people of whom 225 are in the program, none -- none count as having control over this debtor. That is a staggering and unbelievable statement and one we think will be belied by the evidence.

For example, there are dozens of senior vice presidents and vice presidents, general managers and operation managers in this program. One of the board of directors of a subsidiary debtor is in the program, a member of the board. Corporate officers are in the programs, named in the bylaws. These people are clearly insiders, and the program is heavily weighted toward them.

We believe, Your Honor, in addition, you will find that diligence was lacking in the creation of this program; that there was no effort to determine whether employees had job opportunities elsewhere, let alone actual job offers; that there was no study done of attrition or even to determine that there was a CERP in a comparable mining enterprise. There was no diligence done with respect to setting the thresholds or comparing the eleven percent to forty-five percent bonuses to other mining concerns. You will be surprised, I think, at the evidence of how little diligence was actually done.

I wish to say, Your Honor, in addition, that the incentive -- so-called incentive program here, will be shown to be, in reality, a retention program. These are all bonuses that are designed to compensate people, in effect, to give them the maximum bonus they would have earned if the company were not in bankruptcy.

I'll conclude, Your Honor, by asking you to take a step back and looking at this case from a longer perspective. If it indeed is true that Patriot is in such difficult shape that its rank and file workers must make these major sacrifices, sacrifices that will put some of them into poverty, how can it be that we are the only ones willing to bend our backs in this way and that managers will sit on their hands and say without more money, without money that is double the compensation of a miner, we will not strive to make this enterprise succeed?

And how is it possible that for the five years prior to bankruptcy -- Patriot was created in 2007 to 2012 -- they labored under that compensation when there was literally nothing stopping Patriot from having a corporate-wide program?

I would ask Your Honor that when you view the evidence, that you determine that this bonus program is an enormity, is unnecessary, is unfair, and should be denied. Thank you.

THE COURT: Thank you. And then also, do the pension trusts, do they want to make an opening statement as well?

MS. HILLYER: Good afternoon, Your Honor. Rebecca Hillyer on behalf of the funds. I have nothing to add to Mr. Perillo's opening statement. Thank you.

THE COURT: All right. Thank you. All right, then Mr. -- oh, Mr. Randolph?

MR. RANDOLPH: Yes, Your Honor. I'd like to clarify something for the record. The U.S. Trustee is not here supporting the debtors' motion. We were able to resolve one of our sure objections which would have been officially filed with the Court regarding seven individuals that we thought, because they were appointed by the board of directors, were certainly insiders. We defer to the Court after hearing all the evidence, whether or not the compensation plans should be approved. Thank you.

THE COURT: All right. Thank you.

All right, Mr. Kaminetzky, you may call your witness.

MR. KAMINETZKY: With your permission, Your Honor, I'd like to call president and CEO of Patriot, Mr. Bennett Hatfield.

THE COURT: All right, Mr. Hatfield, would you step up to the podium first, please, to be sworn.

(Witness sworn)

THE CLERK: Please have a seat in the witness box sir. There's a step up.

MR. KAMINETZKY: May I proceed, Your Honor?

THE COURT: You may.

MR. KAMINETZKY: Thank you.

DIRECT EXAMINATION

BY MR. KAMINETZKY:
Q. Could you please state your name for the record?
A. Bennett K. Hatfield.
Q. If you could keep your voice up for the folks on the phone.
And where are you currently employed?
A. I'm employed by Patriot Coal Corporation.
Q. And could you briefly tell us your educational background?
A. Yes. I'm a -- I have a bachelors in science degree from Virginia Tech in mining engineering. And I'm a licensed professional engineer.
Q. Prior to joining Patriot, where were you employed?
A. Prior to joining Patriot, I was employed by International Coal Group, where I was president and CEO for approximately six years.
Q. Before that?
A. Before that I was employed by Arch Coal as president of their eastern operations for approximately two years.
Q. And prior to that?
A. Prior to that, I was employed by El Paso Corporation for fourteen months, as their executive vice president and chief administrative officer for their Coastal Coal Company operations, that later became part of Alpha Natural Resources.
Q. And before that?
A. Before that, I had a plus-twenty year career with Massey

Energy Company. I was, in my final position there, executive vice president and chief operating officer.
Q. So how many years have you worked in the coal industry?
A. Over thirty years.
Q. And how long have you been employed by Patriot?
A. I joined the company about nine months before the filing, so I guess I've been here since September of 2011.
Q. And what is your current position at Patriot?
A. I'm president and chief executive officer.
Q. And how long have you held that position?
A. Since -- I've held that position since October of 2012.
Q. And what position did you hold at Patriot before October of 2012?
A. Prior to October 2012 I was president and chief operating officer.
Q. And could you briefly describe your role as Patriot's chief executive officer?
A. Yes. I'm responsible for overall management of the company. I report to the board of directors. I'm responsible for all aspects of operations, management, marketing, financial reporting, essentially all aspects of the company and all its business units.
Q. Now, as you know, Mr. Hatfield, today we're in court to gain approval or to seek approval of the retention and the incentive plan for your company. What role did you have in

development of the debtors' proposed compensation programs?
A. Those programs were developed at my initiative. I was the primary director, if you will, the primary person that helped formulate the plans and determine the final constituency of both programs.
Q. And from whom did you seek advice with respect to both the retention and the incentive plans?
A. I relied heavily on the executive team, the five people that report directly to me, including general counsel, senior vice president corporate development, the chief marketing officer, the executive vice president of mining operations and chief financial officer.
Q. Did you also work with any outside advisors, with respect to the development of these -- this retention and incentive program?
A. Yes, we relied on several parties. We certainly relied on Davis Polk, our legal counsel, to guide us with respect to the legal requirements and limitations of such programs. We relied on Towers Watson, compensation consultant, to help us with the market benchmark for comparable positions with respect to compensation standards. And also Towers Watson advised us with respect to what other companies that are undergoing a Chapter 11 reorganization had done, by way of providing comparables.
Q. Okay. Do you have a compensation committee at Patriot?
A. Yes, we do. A small -- it's a segment of the board of

directors that's called the compensation committee.

Q. And what role, if any, did they have in connection with the incentive and retention program at issue today?

A. They provided guidance on the program. And they obviously had to approve the program before we were even able to take it to other parties to seek their approval. So we presented several variations of the program to the compensation committee as it evolved over the course of several months.

Q. And did the creditors' committee and/or its advisors have a role with respect to the retention and incentive plans at issue today?

A. Yes, they certainly did. We presented the program in earlier drafts to the -- both the advisors for the creditors' committee, their counsel, Kramer Levin, and their financial advisors, Mesirow and Houlihan; and we presented it directly to the committee as well, and received feedback and suggested changes and reacted in response to that direction.

Q. Now, I want to just get a clear idea of the division of responsibility between the executive management team that you described and Patriot's advisors with respect to the development of these programs. Who established the total cost of the program?

A. That would be the executive team.

Q. And who selected which participants or who from the company would participate in the two programs?

A. I and the executive team.
Q. Who determined the compensation opportunities for participants?
A. That was myself and the executive team.
Q. Who set the performance metrics for the incentive plan?
A. Myself and the executive team.
Q. Who set the targets for payout of the incentive plan?
A. That would be me and the executive team.
Q. And who determined the timing of the payouts?
A. The same; me and the executive team.
Q. Okay. And if you could then describe, so what did Towers Perrin, again, do in connection with the incentive and retention plans?
A. Towers provided the comparables, if you will, for positions, to tell us essentially where the market is for certain categories of salary positions. And they also provided comparables with respect to other companies that were going through the reorganization that had established incentive plans, to give us some guidance as to what was in past cases deemed to be reasonable, permissible.
Q. And did Blackstone have a role in connection with these plans?
A. Blackstone certainly was of benefit through the process. They primarily helped us crunch the numbers and also helped us prepare presentations to explain the program to the creditors'

committee and to our DIP lenders.

Q. Okay. You've described the role of the executive management team and of your outside advisors. Did other company employees have a role in developing the proposed plans?

A. There were others that we had to rely on for information, certainly. Certain people in the human resources group, obviously, had to provide payroll data, salary data, historic compensation levels. They were in the category generally of providing data. Similarly in the safety department and the environmental engineering area, we needed to get data with respect to past safety and environmental performance and what reasonable target might be. So we received data from several segments of other areas of the company, but those people weren't involved in actually framing the policy or making decisions on it.

Q. Now, who made the decision that there should be two programs, both a retention plan and an incentive plan?

A. That was me.

Q. And why did you decide that there should be two different programs rather than just one?

A. Well, the programs serve two very different purposes. The retention program is designed to do exactly what it describes. So we have identified approximately 110 employees that we think are -- we're at very high risk of losing. They provide critical skills, critical experience to the company. We think it's essential to retain those people for us to reorganize this company successfully. And we wanted to put in place a clear award program that would help motivate their remaining with the company, because they certainly have other job opportunities. So that one's aimed specifically at retaining those employees and gaining their commitment, if you will, to stay with the company through what's clearly going to be a challenging reorganization.

Q. And the incentive program, what's that's purpose?

A. The incentive program is aimed at a larger group, generally the corporate office and the regional offices, both in Henderson, Kentucky and in Charleston, West Virginia, where we have a large group of our 1,100 salaried employees that don't participate in any mine-level incentive program. The mines have their individual safety and production and environmental bonus programs.

But there's a core group of corporate and regional office employees that don't participate in any incentive program. So we wanted something that is in line with our standard practice of incentivizing their support of helping us achieve these key targets with respect to financial performance, safety performance, and environmental performance.

This is also consistent with frankly what's been historically the case. This group of employees has, since Patriot was created, participated in an incentive program of this sort that awards the employees based on financial performance, safety performance, and environmental performance. It's also consistent with what's in the competitive marketplace. Each of our competitors, among the publicly traded companies, have similar programs.

Q. Similar incentive programs?

A. Yes.

Q. Now, how are payments under the two programs structured? You could start with the incentive payments.

A. The incentive payments are made on the basis of performance in well-defined areas. Financial performance represents about sixty percent of the determination. Safety represents five percent, environmental five percent, compliance five percent; and then there's a twenty-five percent that's driven specifically by individual goals that are set for that particular individual.

So those components comprise one hundred percent of the test, if you will that must be met. And --

Q. And what's the measuring period in terms of when the participants would see payments using those metrics?

A. There are two major periods: January through June; the first six months of 2013. There'll be a measurement for those target metrics, those target performance metrics. And then there's a second payout period, a second measurement period, from July through December. The respective awards will actually be made within thirty to sixty days after the period has been completed and measurements made as to what has been earned.

Q. And what is the timing of the proposed retention payments?

A. Retention payments would pay out twenty-five percent at the end of the first quarter of 2013, another twenty-five percent at the end of the third quarter of 2013, and the final fifty percent -- it's obviously backloaded by design -- would pay out the later of March 31, 2014 or ninety days after we have had a successful emergence from the Chapter 11 reorganization. It'll be the later of those two tests.

Q. Now, why did you decide to pay some of the retention payment this year rather than making a hundred percent of it contingent on the employee remaining with the company until emergence from bankruptcy?

A. Quite frankly, many of our key employees are becoming skeptical as to whether any program's going to be approved. They have had this retention program described to them since the middle of 2012 and many were anticipating payments as early as August, September, October of 2012. And obviously we have not been able to make any of those payments because of the reorganization and the need to get a program approved.

So there's some skepticism among the covered group as to whether the payments will be made. And we felt that it's important to show some progress payments, some demonstration that there's actually going to be a payment. Otherwise we have the challenge of ongoing skepticism. That's demonstrated vividly by the fact that several people that are covered by the retention program are already choosing to leave the company. They've resigned and gone to other companies just because they don't believe there's going to be a delivery of that award.

Q. Now, what criteria did you use to determine participation in the two proposed programs?

A. I relied heavily on input from the executive team and their -- and they also relied on direct input from their reports. That helped us essentially review the workforce of 1,100 salaried employees and determine who were the 110 people that were of most critical experience and skills and need to retain those folks. And they went into the retention program.

And the incentive program is essentially defined by positions with respect to their working on those offices and not being covered by a mine-level program.

Q. Now, without revealing the substance of any privileged conversations with lawyers, do you understand that with respect to retention plans, the Bankruptcy Code treats insiders differently?

A. Yes, I do.

Q. Okay. And are there insiders, in your opinion, in either one of the plans?

A. Absolutely not.

Q. Now, did the company eliminate everyone with an officer or manager title from the proposed plans?
A. No. It would be -- frankly, it made no sense to do so. There were a number --
Q. Why not, if insiders should be excluded from retention plans, why didn't you eliminate everyone with an officer or manager title?
A. Because lots of people have the title of vice president or director or operations manager, and have absolutely no control of corporate policy or strategy forming or key decisions on divestures or acquisitions. They don't interact with the board of directors. They -- many people have that title, frankly, as a morale booster of sorts, to show that they are important in the organization and they sometimes represent the organization or a subsidiary of the organization in some particular area, but by no means are they an insider and certainly not an officer that frames policy and decision making for Patriot Coal Corp.
Q. Did you prepare a few demonstrative exhibits in connection with your testimony today, in order to assist you in your testimony?
A. Yes, I did.
MR. KAMINETZKY: Your Honor, may I approach the witness?
THE COURT: You may.

Q. Now, do you recognize page 1 of the slides that I just handed you?

A. Yes, I do.

Q. Okay. And could you describe what it is -- what page 1 indicates?

A. Yeah. Page 1 is a table that captures the information that I asked our attorneys and advisors to gather for me. It lists the characteristics of an insider as we understand it, down the left side of the page, and demonstrates, as indicated by the red x's, that we've scrutinized this list and concluded that in this case, none of the plan participants truly is an insider.

Q. And could you just run down the list real quickly and explain why that's the case?

A. Certainly. With respect to the first characteristic, resides within the inner circle, making the company's critical financial decisions, certainly does not apply to anyone in the incentive program.

Q. In either of the programs, so the record's clear. Is that correct?

A. That's correct; either of the programs. Has the authority to make company-wide or strategic decisions. That's certainly not the case for anyone below the level of the executive team. And we think that's abundantly clear.

Q. Exercises sufficient authority over the debtor so as to unqualifiedly dictate corporate policy and the disposition of corporate assets. Certainly none of these people have the authority or capabilities of doing that. And that's demonstrated.

None of them report to the board in the ordinary course. There are some individuals in the plan that are invited to board meetings for a specific purpose, perhaps to make a presentation. And in the incentive plan, there's a person who is the corporate secretary and attends the board meetings to take minutes and solely for the purpose of taking minutes, but otherwise has no reporting relationship to the board with respect to framing decisions or managing the business.

The other characteristic referenced there is, is not subordinate to or required to report to an officer. Attends board meetings, I've already spoken to in part. But clearly in this case, none of these people are attending board meetings on a regular basis and only a few of them have ever attended a board meeting.

Is elected or appointed by the board of directors to manage the daily operations of the corporation. And that's certainly not the case for the plan participants that we have identified.

Q. Now, notwithstanding what's shown on page 1, did the company recently make changes to the proposed plans in response to issues the U.S. Trustee raised regarding insiders?

A. Yes, we did.
Q. And could you describe those changes and why they were made?
A. The U.S. Trustee had concerns about a group of seven individuals because of what I view to be a technicality, and we thought was clearly a technicality, that the board of directors, in a technical context, approves those positions or elects those positions on an annual basis. This group was the primary focus and concern of the U.S. Trustee. And in discussions with the U.S. Trustee, we made the determination to resolve that issue, that we would remove those people, all seven, from the retention program, and put their entire compensation at risk in the incentive program, which assures, certainly, that they're going to get a somewhat reduced award, because the entire amount then becomes at risk and deliverable only upon satisfaction of each and every performance target.
Q. And was that an easy decision to make with respect to these seven employees?
A. No, it was --
Q. To take them out of the retention program?
A. -- it absolutely was not?
Q. And why not?
A. Because I don't believe it was the right answer. These people are not insiders. These people are at great risk of loss. In fact, as you may know from the news report we got

earlier this morning, one of these seven has since resigned from the company, and delivered a notice of resignation this morning to go to work for another company.

Q. So one of the seven resigned this morning?

A. Yes.

Q. Now, just so the record's clear, are there any participants left in the retention program who were elected by the board of directors?

A. No.

Q. Now, how did you select the various performance metrics for the incentive program?

A. The performance metrics were guided primarily by the historic program compensation. We've had an incentive program of this type for as long as Patriot has existed. And indeed, as I noted earlier, most of the companies we compete with have similar incentive programs for their corporate office and regional office personnel. So we started with a general framework of the incentive program that's historically been in place. And then we made revisions to certain of the metrics in light of our situation with the Chapter 11 reorganization.

Q. Okay. And what adjustments did you make specifically to the metrics from pre-petition to what you're trying to get approved here in terms of the adjustments of the various percentages for each metric?

A. On financial performance, for example, normally that would be fifty percent of the award, and it would be gauged entirely on the basis of EBITDA, operating profit in general terms. And we changed the fifty percent to sixty percent to put greater weight on financial performance, which we think would certainly be expected and assuredly so by both the creditors' committee and the DIP lenders. So we put further weight than normal on financial performance and divided it into two categories.

Instead of just all EBITDA, we put half of that weight, thirty percent of the sixty percent, on liquidity; liquidity being a critical covenant and compliance requirement in our DIP agreements. Additionally, on EBITDA, we made a slight revision to call -- to base that portion of the financial performance measurement on EBITDAP, EBITDAP being a slight variation that excludes any savings that may be achieved through the 1114 process through reduction or elimination of retiree medical obligations.

Q. How does the aggressiveness of the metrics in the proposed incentive plan compare to the aggressiveness in the pre-petition program?

A. The current program, the post-petition program, is substantially more aggressive in terms of difficulty in meeting those targets. Financial is certainly going to be a challenge, in large part because coal prices have continued to drop since the forecast was completed. The coal market continues to be very weak. We've indeed have to idle mines and complexes for weeks since the forecast was completed, just because we can't sell the coal. So we're very much price-challenged, revenue-challenged on the forecast. And that's going to make the financial performance of it particularly difficult to meet.

Q. Now, you were here for the opening statements. Weren't you here -- by the lawyers? You were in court?

A. Yes.

Q. And you heard Mr. Perillo say that the incentives in the -- the metrics in the incentive programs are "give-mes". Did you hear him say that?

A. With all due respect, that's nuts. The issue with respect to the financial is, for two months of the year, we're already way behind, just because of the pricing disadvantage. And so we're going to have a huge challenge with respect to overcoming the drag that we're already going to have to deal with in the first half of the year from the low pricing.

Q. So just so that we're clear, I just want to make sure the record's clear. So you're saying for the EBITDA metric, you're already missing it?

A. Yes.

Q. Okay. And that's thirty percent of the program?

A. Yes.

Q. Okay. So explain to me what happens if you miss EBITDA even just by a little bit. Does anyone -- does any of the participants get any of that thirty percent?

A. A miss goes to zero. There's no pro-ration. It's not ten percent low you get ninety percent of your bonus. You miss it. You go to zero.

Q. So explain to me how that EBITDA metric is a give-me if you're not hitting it today?

A. It's absolutely not a give-me. It's a stretch target. And it's going to be very difficult to achieve it. And for that matter, liquidity, even though we're meeting liquidity through two months, if the rate of liquidity decline is the same for the balance of this year as it was in the month of February, we will not make the liquidity test either. So --

Q. So you --

A. -- both are at significant peril, frankly, of satisfying the targets.

Q. You're already missing EBITDA, and if things continue the way you are now, you're saying you're going to miss liquidity? Is that your testimony?

A. Yes.

Q. And that's sixty percent of the potential dollars to be earned under the entire incentive program. Is that right?

A. Yes.

Q. And how are you doing on the other metrics?

A. Well, on safety we're performing miserably, to this point. We had a record good safety year in 2012, the best we've had in the history of Patriot. But the first two months have been

very painful with respect to accident performance. And we're not performing well at all, and far off target on safety.
Q. So you're not hitting that metric as well. Is that what your testimony is?
A. We're not even close at this point.
Q. Not even close. So how is that a give-me?
A. That isn't a give-me. It'll be difficult to get any credit at all on safety unless we have just a spectacular ten months over the balance of the year.
Q. Now, you mentioned -- you testified earlier that twenty-five percent of the incentive award is based on individual metrics. Do you recall that?
A. Yes.
Q. Could you explain to the Court what that means? What's an individual metric and how those are determined or created or set up?
A. Yes. First I should clarify that historically that number's been closer to thirty-five percent, so when we put additional ten percent weight on financial performance, we essentially took that away from the individual performance. So the individual performance component of the new program is lower than historic.
But essentially in -- for each of these participants in the plan, when their annual performance review is completed, targets are set for the coming year. And there are three to

five targets per individual. And to the extent that we can, we try to make those objective targets with a number. Some of the targets are necessarily subjective, qualitative, if you will. And that's unavoidably the case. But as to the extent we can, we try to make it a point of measurement so you can hear -- see a clear demonstration of achievement.

A good example, for instance, would be a vice president of purchasing, if his job is negotiating roof bolts and other commodities, one of his targets might be to reduce our roof bolt cost by ten percent over the coming year. If he's a manager of contract services, he might be asked to reevaluate our trucking costs and see if there isn't a way to improve costs by five percent for a particular truck haul, say from Kanawha Eagle to the river dock; or he might look for compliance on insurance certification. It's critically important that all our truckers be insured and so that the general public is protected. So he may have a test requiring one hundred percent pass on all spot inspections on insurance certification.

So the goals are generally set to the individuals and the job that they're being asked to do for the coming year. And that would represent when that's scrutinized, about twenty-five percent.

Q. You testified earlier that the creditors' committee played a role in connection with the retention and incentive plan at issue today. Could you just describe for the Court again, what exactly their role was, when did you engage them, and the number of conversations, the best you recall, that you had with the creditors' committee and its advisors?

A. Yes. I can't remember the exact date we met with them, but we met with them -- with the creditors' committee specifically, in the fourth quarter, in November of December. And we presented to them the plan that we thought met all the standards and the required targets at that time. We then had a couple of conversations, our advisors speaking with both the legal advisors for the committee, Kramer Levin, and Houlihan and Mesirow, discussing it with Blackstone.

And the cumulative feedback we got from the committee and its advisors was that they wanted some substantial changes in the program before they would support it.

Q. And could you describe in general what changes the committee wanted in the program after you presented it to them in the fourth quarter of last year?

A. They were most vocal with respect to the total cost, because the designed program, at that point, was significantly greater expense than the one that we've proposed and is presented for court approval today. So they asked us to scale down the size -- the cost of the program dramatically. And they also asked us to reevaluate the timing of payouts, because there was an earlier payout sequence that was proposed in the earlier drafts of the plan.

Q. Now, did you agree with the comments that the committee or its advisors gave with respect to the proposed program?

A. No, I did not. At that time, frankly, we had already put in front of the committee what I thought was a credible plan that was required to keep the key people that we need to keep to make this reorganization successful. I did not agree with it. But at the same time, we recognized that we have to have a consensus here, that these -- this -- their cooperation and frankly the cooperation of our DIP lenders, was essential to moving this effort forward. So we took their advice as guidance that we needed to meet and revised the program accordingly.

Q. So you took the changes that they requested?

A. Yes, we did.

Q. So you took the changes that the UCC requested, the unsecured creditors' committee, and the U.S. Trustee. Is that right?

A. Yes.

Q. And you also met with the DIP lenders. Is that correct?

A. Yes.

Q. Okay. And did the DIP lenders object to the plan that you proposed.

A. I don't recall them asking for specific changes other than generally concurring with the feedback from the creditors'

committee. As we addressed the creditors' committee, that seemed to also satisfy the DIP lenders, as I recall.
Q. And what's the final cost of the version of the plans that we presented to the Court today, if you know?
A. The maximum cost would be 6.9 million dollars, if we achieve every target on the list: safety, environmental, regulatory compliance, and EBITDAP and liquidity. If we hit a hundred percent on all cylinders, the maximum cost would be 6.9 million dollars.
Q. Now, how does the cost of the proposed compensation plans compare to the cost of Patriot's pre-petition incentive and retention plan?
A. It's substantially lower.
Q. And have you prepared a slide to illustrate that?
A. Yes, I have.
Q. And is that page 2?
A. Yes.
Q. And if you could please explain to the Court what's depicted on page 2?
A. Page 2 illustrates the cost of the incentive program and the retention program in 2013 at maximum payout with the red bar. That's the 6.9 million dollars number that I referenced earlier; the red bar on the right on the slide. That is shown in contrast to the actual cost of the 2011 incentive program and the 2010 incentive program. 2011 the incentive program

alone paid out 7.9 million dollars to this group of participants, and in 2010, the payout to this same group of participants was 9.4 million dollars.

So in short, both programs in total, at maximum payout, in 2013, are significantly lower than what's been paid out historically for the incentive program alone.

Q. Now, your company is in bankruptcy, correct?

A. That's correct.

Q. And your company is facing a severe liquidity problem. Is that correct?

A. That's correct.

Q. So why would you spend up to 6.9 million dollars on these plans if you need to save every possible dollar?

A. This reorganization is just as much at risk of failure from loss of key management talent as it is of running out of cash. Because if we lose key managers that are contributing to improving our performance and turning this company around, operating performance will deteriorate; we'll be running with fewer people, trying to do more jobs, running in less than adequate fashion. And that will increase the cash drain. And that will push us further toward chaos.

So in short, I think keeping this critical group of employees is just as important as avoiding running out of cash, and an essential component of reorganizing this company.

Q. Now, how are the compensation opportunities allocated among the plan participants both for the AIP and the CERP?

A. With respect to -- I'm not sure I understand your question. Could you repeat it?

Q. I guess, how was it decided how many dollars to allocate to which person and to which group of people, with respect to the retention plan and the incentive plan?

A. Well, the determination on how the dollars would be awarded or distributed was frankly made by me, working with the executive team. But it's -- the allocation is generally to the more senior people in the organization, the people that are delivering the most critical skills getting a larger share of the award. But if you start from the top down, frankly, the first six people in the organization get zero. So the executive team is getting no portion of the benefit here.

Their direct reports are the regional vice presidents, the department heads, the critical staff members, long haul coordinators, mine superintendents, general managers, that really drive the bus and make us successful or do not. So that's where you generally see the higher portion of the payout being on the more senior group of the participant list, with smaller percentages toward the bottom rank, if you will.

Generally, the metric that's used is percent of salary. So on the low end of the payout, for instance, with an incentive program, the payout, if they hit all targets, might be only five percent of salary. On the upper end of the incentive program, the payout might be as much as forty percent of salary, again, recognizing the critical need to keep a certain group of people.

Q. We talked earlier about the various targets or the various metrics in the incentive program. How can a lower level employee influence or help the company achieve financial metrics?

A. Well, I think the -- every member on the team can make a difference. I mean, granted that a mine superintendent can make a greater difference than a person directing -- an accounting clerk or something of that sort. But if they're all -- if they're an administrative assistant and they're ordering office supplies, they can help us control costs. If they're directing janitorial services, they can help us control costs and reduce the cash outlay. So I believe every member of the team can make a contribution. And that's why the incentive plan is designed as such. It takes in a much wider group of our work force that has no involvement in the mine plans, they get no benefit from the bonuses that are paid out on the basis of mine production or mine safety. But they're captured by this corporate incentive program that recognizes they can contribute to the success of the effort.

A good example, for instance, is even on safety. Some might ask the question, why do -- why is there a safety component for someone who's only an accounting clerk or administrative assistant in the Charleston office. And the answer is they're part of the team. So even if we have a safety meeting and do safety presentations, the administrative assistant is helping us make the safety presentations and helping set up the room, and try to do so at the lowest cost. So everybody's contributing to an effort that we think should ultimately be successful.

Q. I'd like to switch focus now to attrition over the last several months. Did you prepare a slide, slide 3, to assist in your testimony in that regard?

A. Yes.

Q. Okay. And could you tell the Court or explain to the Court what's depicted in slide 3?

A. Yes. Slide 3 lists the critical employee voluntary departures since June of 2012. This approximates the period in which we have been in this reorganization process, having filed the petition on July 9th of 2012, but we began to use people in a marked fashion -- accelerated fashion in June of 2012. And this slide lists approximately between thirty and thirty-five people who have left the company since -- since that time.

Q. And this slide, sorry, doesn't include the gentleman that announced this morning that he's leaving, is that correct?

A. No, it does not. We only learned that a few -- a couple of hours ago, actually.

Q. And --

A. Of greater concern, if I could clarify, is that the rate didn't slow down at the end of December. Quite frankly, it seems to have accelerated thus far, in 2013, an alarming loss of talent since the beginning of the year.

Q. And why did you choose to put a column on this slide that says "location"?

A. I wanted to be able to illustrate that this isn't just a corporate office problem. Granted that we're concerned about the losses in the corporate office in St. Louis, and we're concerned about the losses in Charleston, but we're also losing key management talent at the mine level, at locations like the Guyan mine in Logan County, West Virginia, the Dodge Hill complex in West Kentucky, the federal mine in Northern West Virginia. We're losing talent across the company, at the operating level and the corporate level.

Q. Now, have any of the departing employees told the company why they were leaving?

A. Yes.

Q. And what were some of the things that they said?

A. The typical response, frankly, is --

MR. PERILLO: Objection, Your Honor. This elicits hearsay.

MR. KAMINETZKY: Your Honor, it's not for the truth of the matter asserted. We don't really care why they leave. It's important -- again, what we're measuring here is the debtors' business judgment. So what the debtor heard or what Mr. Hatfield heard is extremely important. And the statement that he's going to testify to is not for the truth, but rather for the fact that it was said and what was said, and that's clearly a hearsay exception.

THE COURT: All right. I'll overrule the objection. You can answer the question.

A. The typical response is uncertainty about the future. These people are taking jobs with other companies that are not in bankruptcy. They have great concern about whether the Patriot's going to emerge successfully and whether there will be any sort of incentive program that helps offset their risk. So they're leaving us because of uncertainty about the future, uncertainty about the success of our reorganization effort, and going to work for competitors in the coal business that are more financially stable, and even companies outside the coal industry.

Q. How has Patriot managed to cope with the loss of these critical employees listed on page 3 of your testimony?

A. It's been extremely difficult to replace people at this talent level when you're in bankruptcy; no one wants to come to work for a bankrupt company. So the only -- the only people we're sometimes able to attract, frankly, are those that may be between jobs. Otherwise they're going to stay with -- with the company that's giving them a check, that is not in bankruptcy.

So we've had great difficulty filling these positions. In some cases, quite honestly, we determined that we were not able to fill them, and we've reorganized internally to try to do without that position.

A good example would be our vice president of operations for West Kentucky. We lost him to a competitor, and we, frankly, couldn't find an opportunity to replace that talent. So we rearranged the operating reporting to put two wide regions under one senior vice president; didn't have a choice. So we now have more people covering broader areas than they were asked to do when they were hired on initially.

We've also done a lot of internal promoting. When we can't find someone to join the company to fill a critical position, we've often had to promote internally from a subordinate level. And generally, the cost to the company, the sacrifice, quite frankly, is that we have a less capable, a less-experienced person running the department or running the mine, and doing our best to try to fill a lower slot below them. So it's all been a continuing diminution, frankly, of effectiveness for the business.

Q. And have you ever had to hire outside consultants, and what's the effect on the company of using outside consultants?

A. In several high-level cases, particularly the high-level financial positions in St. Louis, we have had to bridge the talent gap with hired consultants. A good example would be the chief accounting officer position that was vacated in June of 2012. We had to hire a consultant to come in and work. This is a job that would normally pay maybe 200 or 220,000 dollars a year. We had to hire a consultant at an annualized base of about 450,000 dollars a year until we could come up with a replacement. After about eight months we found an individual who was between jobs who agreed to step in and take the position. He's able to do about two-thirds of what the former position filled. So that's not the only case. Other financial reporting positions in St. Louis, we've also had to bridge with consulting help.

Q. And the consulting help costs more than the people that they're replacing?

A. Yes, typically.

Q. Now, how does the rate of attrition Patriot is currently experiencing compare to historical levels?

A. It's increased dramatically.

Q. Have you prepared a slide that reflects that information?

A. Yes.

Q. Is that slide 4?

A. Yes, slide 4.

Q. And if you could please tell the Court what's depicted on slide 4.

A. Slide 4 illustrates the attrition that we're seeing in June to December of 2012 on the far right -- the far right red bar. And next to that, January to May of 2012, in the smaller red bar, and compares that to 2011 attrition and 2010. And you can see 2010 and '11, we were looking at seven to eleven percent attrition level for corporate employees. That increased to thirteen percent in the first half of 2012. And in the second half of 2012, it's at twenty percent.

Q. And just to finish the picture, how are you doing in the first few months of 2013?

A. I would say it's worse. I don't have a statistic readily available, but based on my -- the number of personnel resignations I have seen and learned of, it's higher.

Q. Now, what do you think the impact on the debtors would be if the Court does not approve the proposed compensation plan?

A. Quite frankly, I think we have chaos. I think it threatens the successful reorganization of this business. We -- if you just look at the corporate office as a snapshot and ignore the damage at the mine level, we depend on the corporate office to get our taxes paid, to have our benefit plans administered, to get our payroll service, to keep our information technology system up and working, to do all those functions. And that's the area where we're having the most dramatic attrition. So that's our SEC reporting, that's our litigation service, that's everything that we need to maintain our corporate functions.

At the mine level, every time we lose a person, we have to replace them with a more junior person, a person that's less experienced, generally less capable. So if we continue on that path, and frankly, if we don't come out of this hearing with an answer very promptly, I think we see chaos, I think we see more resignations, more people going to work for competitors, for certainty of a future job, and I think a very troubling outlook for this company.

Q. Okay. You heard Mr. Perillo, a little while ago, talk a lot about sacrifice and equity and how dare they, in light of what's happening with the unions. Did you hear Mr. Perillo's opening remarks about that?

A. Yes, I did.

Q. And is it a fair characterization to say that why should we be giving bonuses to these people when -- and only seek sacrifice from the union employees?

A. The statement reflects a serious misunderstanding of the facts or a misrepresentation of the facts. We have already gone to every segment of our work force, frankly, before we went to the union, and asked for substantial cuts. We have -- our salaried employees have received salary cuts. Our nonunion and our salaried employees have seen substantial changes in their benefits. They're all paying ten percent of the cost of their health care now. Before filing they didn't pay any of that. And they don't even have as rich a program as the UMWA has. Their program was much more economical than the union workers, but now they're even paying ten percent of that cost. They've lost -- they've had reduced vacation time. They've had elimination of retiree benefits. There are retiree medical that's been promised to the non -- to the salaried work force for years and years, but they've been put on notice that we plan to terminate it. So there's been sacrifice called for from every segment of this company, and I don't think it's fair at all to say that the UMWA is the only place where we've gone to ask for relief or to demand an accommodation to help this company emerge.

Q. Well, let's unpack that a little bit. Let's go slow, because I think this is an important point, since Mr. Perillo began and ended his opening with it. Let's talk -- well, could you turn to page 5? Is this a slide that you prepared in connection with your testimony?

A. Yes.

Q. Okay. Could you explain to the Court-- you know, kind of unpack this slide for the Court and show -- and explain to the Court what it depicts?

A. Slide 5 illustrates the dramatic reduction in compensation for the proposed plan participants. It makes the point, if you look at the 2010 and '11 two-year average, that this group of employees would have been paid a total of 29.2 million dollars; that's the blue bar on the left. That compares to if we don't approve these programs, this same group of -- that same group of individuals, for the 2012 and '13 period, would receive twenty percent less, 23.5 million dollars, on the far right of the graph.

Q. So that's a twenty percent pay cut if these proposed plans aren't approved --

A. Yes.

Q. -- is that what you're saying? Okay. Could you explain, then, what the middle graph shows?

A. The middle bar illustrates that if these plans are approved, there's still an eleven percent reduction in the two-year average for 2012 and '13 compared to 2010 and '11.

Q. Okay. So just so it's clear, so if the plans aren't approved, it's a twenty percent pay cut, and even if they are approved, it's an eleven percent pay cut?

A. That's correct.

Q. Okay. And is that -- do you consider that sacrifice?

A. Yes, it is.

Q. And does slide 5 depict all the sacrifice that you've asked for and implemented with respect to your nonunion work force?

A. No. This simply captures the payroll impact and the cost of the health care benefits. It doesn't capture a host of other programs, changes that have been made.

Q. And have you prepared a slide that depicts those additional -- that additional sacrifice?

A. Yeah, slide 6.

Q. And could you please explain to the Court what's shown on slide 6?

A. Slide 6 highlights the point that the plan participants have suffered significant additional reductions in compensation and benefits since the Chapter 11 filing. And it -- the bullet -- bullets there outline various program cancellations or eliminations.

The first bullet describes the -- our discontinuing the long-term equity incentive program, which paid out approximately three million dollars to the plan participants in 2011 alone.

The second bullet references the termination of the supplemental 401(k) plan; that was worth approximately 350,000 dollars to proposed plan participants, substantially more to the executive team, obviously, but they're not among the proposed plan participants.

The third bullet, no payment of approximately three million of earned amounts under the 2012 incentive program. This is money that had been earned, that these people, for the second half of 2012, thought they were going to get. And then we had to tell them at, you know, the end of 2012, that because of the cash needs of this company we simply can't pay it, and we terminated the program without any payment; three million dollars of 2012 incentive not paid.

The fourth bullet, elimination of eight traditional retiree health care plans and the medical payment reimbursement program, often referred to as our MPR program. That has an impact of at least nine million dollars. All of our salaried retirees and planned future retirees are being told that their programs are -- are plans to be terminated.

The next bullet references elimination of life insurance benefits upon retirement for active salaried and nonunion employees, reduced holiday, personal leave and vacation time, adjustments made in each of those categories through the course of this reorganization.

The next bullet eliminated deferred vacation balances from Peabody and Magnum employees worth approximately one million dollars. That's often referred to as bank vacation time that these people had been anticipating a payout for, for years, going back to the days of the Peabody spinoff, and they've now been told it's not going to be paid.

And the last one is termination of the Peabody pension shortfall and Magnum-defined contribution retirement plan payments that are longstanding programs that have been terminated.

Q. And just so the record's clear, and the items, the cuts, the sacrifice depicted on page 6, are in addition to the pay cuts we talked about on page 7, is that correct?

A. Yes.

Q. Now, has Patriot's union employees made similar sacrifices to those depicted on pages 5 and 6 of the slides that you just talked about?

A. No. To this point, they've had no sacrifice at all. Indeed, the union employees got a dollar-an-hour raise January 1, 2013, because that's in the contract. Now, as you know, and I'm sure other attorneys in this building know, we can't make any alteration of the contract until we've completed the negotiating process as defined in 1113, and for retiree medical, 1114, and so no alteration or compromise of their compensation benefit programs has occurred at all to this point.

Q. And my final question, Mr. Hatfield -- and thank you for your time -- what would be the effect, in your judgment, of delaying approval of the proposed program?

A. I think delaying approval of the programs runs the substantial risk that the reorganization will fail from a loss of key talent that is critical to this business emerging as a viable reorganized business. I think loss of key talent poses just as much threat to us as loss of cash, because this company can only emerge if we can hold a management team together that directs the mines, that keeps the equipment running, that manages our business, takes care of our employee human resources programs, and keeps this business viable throughout the process. I think we have chaos, we have substantial increase in attrition and resignations if we don't -- if we aren't able to provide prompt communication that these programs are going to get approved.

Q. Thank you, Mr. Hatfield.

MR. KAMINETZKY: That's all I have.

THE COURT: All right. Mr. Perillo, did you have some cross-examination for this witness?

MR. PERILLO: I do, Your Honor.

CROSS-EXAMINATION

BY MR. PERILLO:

Q. Good afternoon, Mr. Hatfield.

A. Good afternoon.

Q. It's a pleasure to see you again. Mr. Hatfield, would it be fair to say that Patriot has about 4,000 active employees currently?

A. Yes.

Q. And of those, 1,800 are represented by the United Mine Workers?

A. I believe the numbers are about 1,615; it's close to that.

Q. We represent roughly sixty percent of your hourly work force?

A. That's close.

Q. And about 1,300 or so are your nonunion miners?

A. Yes.

Q. And then the balance of 900, or so, are salaried workers?

A. I believe it's about 1,100 balance.
Q. 1,100?
A. Yeah.
Q. And 225 of those are in these programs we're discussing today?
A. 225 are in the incentive program; only 110, I believe, are in the retention program.
Q. And combined, that is what, approximately 274 unique individuals?
A. No, I believe it's 225 or less, because some people are in both programs. So --
Q. And now, everyone who is in the incentive program is also in the retention program?
A. I'm not sure that's accurate, but I think it's accurate that there's approximately 225 or 250 individuals.
Q. Patriot is the sixth largest coal company in the Appalachian basin, is that true?
A. Ranked on revenues, I believe -- yes, I believe that's true --
Q. And you have --
A. -- we're about the sixth largest.
Q. Excuse me, I'm sorry. I thought you were finished with your answer. Go ahead.
A. I believe you're approximately correct.
Q. And you have about fourteen competitors?

A. We probably have more than that. Are you referring to the Appalachian region only?
Q. Well, in the Appalachian basin you have approximately fourteen competitors?
A. That's probably reasonable.
Q. And those are all coal companies or energy companies?
A. Generally speaking, yes.
Q. You think you have more competitors than the people in the Appalachian basin?
A. I think there's more numbers than that, because a lot of independents are out there that aren't necessarily represented as a publicly traded coal company, so the number is probably larger. But if you look at publicly traded coal companies, there's probably eight or so, but your number, in terms of substantial competitors, is probably a reasonable number.
Q. All of your competitors are feeling the same market forces from the recession that Patriot is feeling, is that correct?
A. I think that's generally the case. Some companies are obviously more capable of withstanding the downturn than others.
Q. You indicated --
MR. PERILLO: Excuse me. Strike that.
Q. The biggest reason that Patriot filed for bankruptcy was its so-called legacy costs, its retiree costs; is that not correct?

A. I believe that was cited as one of the largest reasons. There are other factors, obviously. We had some underwater contracts that were problematic that were a drain on the business, and -- but the single biggest issue was the retiree medical obligation that's very substantial.

Q. And Patriot, for the first time, had a corporate-level retention plan in June of 2012, is that correct?

A. I'm sorry; could you repeat your question?

Q. The first time Patriot attempted to implement a corporate level retention plan was in June of 2012, is that not correct?

A. That is correct.

Q. You had told participants in that plan that court approval is necessary, correct?

A. Yes, we told them upon filing that it was our understanding that the court would have to approve the retention program and any future incentive program for that group.

Q. There was nothing stopping you from having a corporate-wide retention plan in 2009 or 2010 or 2011, correct?

A. I don't think there was any prohibition. If you'll recall, the motivation for what happened with the corporate retention program in second quarter of 2012 was we were getting to see dramatic attrition and concern because of the financing crisis. It became common knowledge to the news media that Patriot was at risk of not having its needed financing approved, and that once that became a point of media speculation, we began to have some -- some serious concerns about keeping the work force, particularly the corporate work force together, because of fear that we would be filing for bankruptcy. So that's the first time we launched the initiative of considering a corporate retention program.

Q. That's very interesting. The answer to my question, however, is you could have such a plan in 2009, 2010, 2011, had you so chosen?

A. Yes, we actually had programs, but they weren't corporate-wide. They were generally focused on specific operating personnel. But, yes --

Q. And you did not have the corporate-wide program that you've attempted to implement now?

A. Correct.

Q. I want to talk to you about some of the individuals who are in the program. Let's first talk about the retention plan. The CERP is, admittedly, a retention plan, correct?

A. That's correct.

Q. And the purpose of that plan is to encourage people to stay employed at the debtor?

A. That's correct.

Q. By paying them more money.

A. By giving them more than just their base salary. Otherwise, all they are assured of receiving is a base salary.

Q. And as you sit here today, none of the participants -- proposed participants have an actual current job offer in hand of which you are aware?

A. Well, presumably, some of them that are no longer with us received those job offers and left, but I'm not aware of anyone that's on the list today that has a job offer that hasn't acted on it, except the one that resigned this morning.

Q. Well, you're not proposing to pay anything to people who have already left --

A. No --

Q. -- so we understand?

A. -- I'm not.

Q. So of the people who remain at Patriot, to your knowledge, none has a job offer.

A. To my knowledge, I'm not aware of any.

Q. The practice in the coal industry of recruitment has been, for a long time, that competitors try to attract away a leader, somebody who is a title officer, and then when they get that person away, to have him go and try to recruit his former subordinates to come over to the other company. Is that a fair statement?

A. That does happen sometimes, yes.

Q. And Patriot uses that practice too, does it not?

A. I don't know if I would call it a practice, as such, but it is common, when you hire a senior manager, that if he likes the job, he can sometimes to talk to people where he used to work and encourage others to join the company. So I wouldn't call it a focused practice as much as just something that's just a normal chain of human events.

Q. And your competitors are doing it, too?

A. They're --

Q. Correct?

A. They're hiring good talent when they see the opportunity; I believe that's true.

Q. That's not something that happened just since July 9 of 2012, is it? That's been going on for a long time.

A. The rate of deterioration that we've seen since July of 2012 is dramatic compared to what we have seen historically.

Q. I understand that that's your position, but I would like you to answer my question. My question was that the practice of recruiting people away from competitors has gone on for a very long time, is that not true?

A. I think that's true.

Q. And in fact, when we previously spoke about this subject, you told me it was eons old; wasn't that your phrase?

A. The practice of hiring people when you have the chance, and building on a hire by recruiting folks that they used to work with, that is a fairly well-established practice, yes.

Q. Now, the retention program includes, even after the change that was made on -- what was it, the 6th of March, when you

made the change where you moved seven people out of the CERP?
A. Yes, at the urging of the U.S. Trustee, we did make that change, to move seven people out of the retention program into the incentive program.
Q. Even after that change, there are still nine vice presidents, people with the title of vice president in the program?
A. That may be correct; I'm not sure. There are certainly some vice presidents in the program.
Q. Eleven general managers?
A. That may be correct; I don't have a list in front of me, but without question, we have eleven mining complexes, and I believe all of the general managers are in the program.
Q. You testified previously, on direct examination, that you were the one who made the decision who to include in the program, did I not understand that?
A. No, that is correct, but I don't know all 4,000 employees personally. I do rely on others who work for me, and those who work for them, to help me frame the list. But I am, without question, the one who approved the constituents on the list.
Q. I can understand you wouldn't know all 4,000 employees personally. How about the nine highly compensated vice presidents who run your mining operations; you honestly don't know who they are?
A. I believe I know everyone that runs mining operations for

me. Is there a question about an individual?

Q. Well, we'll get there in just a moment. Doesn't the group in the CERP include the vice presidents who run your mining complexes?

A. The regional vice presidents -- and that would be the people responsible for the West Virginia North region, the West Virginia Central region, and Kentucky, and West Virginia South, yes, those -- those regional operating vice presidents are in the program.

Q. And if I understand it, the way Patriot is organized, there are eleven mining complexes?

A. That's correct.

Q. And nineteen mines?

A. That's probably correct.

Q. Okay. And over each one of those complexes and mines there's a general manager or a vice president or both, is that not correct?

A. For each mining complex there's a general manager who is responsible, yes.

Q. And they are all in this program?

A. Yes. The general managers generally report to a regional operating vice president.

Q. And if I remember correctly, you used the colloquial phrase, in your direct testimony, these are the people driving the bus. That's what you said?

A. Yes, managing the operations, making a difference.
Q. In addition to those people that we've just discussed, there was a vice president of human resources who worked with the compensation committee on the development of the program. That individual is also in the program, is he not?
A. I disagree with your characterization of the individual -- individual's responsibilities, but the vice president of human resources, who provided data to us with respect to payroll and historic compensation, he provided data to the executive team, he is a participant in the program.
Q. And he attended meetings of the compensation committee?
A. He may have attended one or more meetings where he was called to be available with respect to data on historic compensation.
Q. And he also worked with your consultant, who was employed by Towers Watson?
A. Yes, he worked with Towers Watson, again, with respect to providing them with data for their analysis.
Q. The senior manager of employment relations, she also attended at least one of those meetings of the compensation meeting, did she not?
A. I'm not certain about the title. You said senior manager employee relations?
Q. Isn't that her title?
A. I don't recognize the title, to be honest.

Q. Okay. There was a female employee who was a senior manager of compensation and employer relations. Do you recall that person?

A. You may be correct; I believe I know the individual you're talking about. I'm not certain about the title, but she would have been there, again, with the payroll data, looking at historic compensation and answering compensation committee questions on current salaries and job position.

Q. And she also worked with the Towers Watson consultant, correct?

A. She would have been part of the team providing data to Towers Watson.

Q. And you're also aware that one of the subsidiary debtors has a member of its board of directors who is included in the compensation program, is that not correct?

A. I'm not certain who you're talking about.

MR. PERILLO: May we go off the record for a moment, Your Honor?

THE COURT: You may.

(Recess from 2:42 p.m. until 2:44 p.m.)

MR. PERILLO: Will my voice carry?

THE COURT: Well, we need you at -- will it pick up; we probably prefer that you be at the podium and then you can approach the witness.

MR. PERILLO: I'll handle it this way.

RESUMED CROSS-EXAMINATION
BY MR. PERILLO:
Q. Mr. Hatfield, in an off-the-record discussion, we agreed that in order not to use this individual's name, I'd write it down on a piece of paper and then I'd walk across the room and give it to you to try to refresh your memory as to who this person is. I'm about to do that.
A. That's fine. Okay, thank you. Yes, I'm familiar with the individual.
Q. You were able to read the name that I just showed you?
A. Yes, I was.
Q. That person is, in fact, a member of the board of directors of that company that I wrote on the piece of paper?
A. I believe that's an accurate statement, but that would be one of the subsidiary companies, by no means a member of the board of directors of Patriot Coal Corporation.
Q. He's a member of one of the ninety-nine debtors, however -- a board of directors member of one of the ninety-nine debtors --
A. Yeah --
Q. -- correct?
A. -- specifically, if you look at your list of employees, he's a general manager at one of the mining complexes that includes that subsidiary. That's why he's on the board of directors.

Q. In fact, he has the title president of that subsidiary, a member of the board of directors of that subsidiary, and also a general manager --
A. That --
Q. -- isn't that all correct?
A. That would be correct, I believe.
Q. There are no foremen in the CERP, is that true?
A. No.
Q. It's not true, or there are no foremen in the --
A. It's not true.
Q. Why don't we see the job title "foreman" on any of the exhibits listing the participants in the program?
A. It -- again, foreman is kind of a generic term in the industry, and it's used to cover a variety of jobs. There's a section foreman who's responsible for ten -- ten to twelve people at the working phase, and then there's sometimes a shift foreman and a mine foreman, and there's also sometimes, in large mines, a transportation foreman or a belt conveyer foreman. And I know from memory there are at least two people in a position of either a longwall foreman or a belt conveyer foreman that are in the CERP. So it would be correct to say that all foreman are not in the CERP, but there are some foremen that are in the CERP.
Q. And what job titles do those people have?
A. I believe something like -- one of them is director of

underground belts; do you see that on your list? That's essentially a belt foreman at a large mine. And the other one may have some sort of a director of mine operations or some title of that nature. I didn't create all of these titles, but some of them can get a little bit confusing because they vary across the industry.

Q. All of the people who have the job title of "General manager 1", with a suffix "UG", those are actually all people who are indeed the general managers of underground mines or mining complexes, is that not true?

A. That's correct. And that would include the individual who's on the piece of paper you just showed me, general manager.

Q. And then all of the people with the title "General manager 1 SF", those are all people who are actually general managers of surface mines, correct?

A. Yes, generally -- generally that would be a mining complex that's primarily surface mines. Sometimes there's a mixture.

Q. So none of those people have morale booster titles that say they're the general manager of a mine when they're really not?

A. That's correct. If they have the title "General manager", that means they're responsible for a mining complex.

Q. And the regional VPs, they actually are all VPs that have jurisdiction over an entire region of Patriot, correct?

A. A regional VP would be responsible for something between two and four mining complexes, depending on the respective regions.

Q. And those people don't have a morale or booster title that just suggests they control a mining complex when they really don't?

A. No, I think the title is descriptive of the job they do.

Q. And they are in the CERP?

A. Yes.

Q. You testified that the incentive plan -- I'm moving to the other plan for a moment -- applies to most people in the corporate office and many people in regional offices, is that accurate?

A. Yes, I believe that's accurate. It's --

Q. And --

A. More generally, it's people that are not covered by any of the mine-level bonus programs.

Q. And that now includes the seven individuals that were removed from the CERP and then moved over to the AIP as a result of the U.S. Trustee's colloquy with you?

A. Yes, I believe those individuals would have already been in the AIP, but their award level was increased because of their removal from the retention program.

Q. And so what was done is all the money that they were going to make under the CERP was just added to their AIP bonus.

A. Yeah, I would say their maximum eligible bonus was essentially the retention amount padded onto their incentive program, so a hundred percent of their award is at risk and requires that we meet all of the targets that I described on finance -- financial and safety and so forth.

Q. Now, these people include the corporate secretary, the seven people that we're talking about?

A. Yes.

Q. That's a named officer in the bylaws?

A. Yes. As I explained in our dep -- in the deposition, eighty percent of her job is managing litigation, as the second ranking attorney in our corporation. The corporate secretary job is less than twenty percent of her role. She just takes minutes there.

Q. I realize you and I may know this, but not everyone present has read the deposition; that's why this may seem a little repetitive to you, but I hope you'll indulge me. It also includes the senior VP of operations north?

A. That's correct.

Q. The senior VP of operations south.

A. Yeah. I would say West Virginia north, senior VP of operations, West Virginia operations south.

Q. And the corporate treasurer?

A. That's correct.

Q. The vice president of safety?

A. Correct.
Q. The vice president of investor relations?
A. Correct.
Q. And senior counsel?
A. Correct.
Q. Now, I think you testified that you made the determination of what amount was necessary to -- you'll pardon me using the word -- incentivize people in the AIP, is that true?
A. Yes, it was my determination as to what the final award level or maximum eligibility would be.
Q. And these seven people that we just discussed, they originally had bonuses, AIP bonuses, that range from five percent to fifteen percent, correct?
A. I believe that's correct.
Q. And you determined that five to fifteen percent was an adequate amount to give them incentive to perform to achieve the targets that you hoped they would achieve?
A. Yes, we believed that was the case when they were also participants in retention as well.
Q. And now you are telling the Court, I believe, that those amounts need to be increased to forty to sixty percent of salary?
A. Yes, we put the entire amount at risk in the incentive program, obviously unsuccessfully, since one of the seven resigned this morning.

Q. Which one of the people was that?
A. That would be the -- the last general -- the assistant general counsel position that you referenced.
Q. The person who's a senior counsel?
A. I believe senior general counsel was how he appeared on your list, if I understood you correctly. Or maybe it was assistant general counsel. I think that's correct.
Q. Now, the -- I believe in your testimony you recounted a number of people who you believe had left because of concerns over security; they feel insecure at Patriot because it is a bankrupt corporation.
A. Yes.
Q. And you were proposing that giving them money as of specific dates -- and you testified as to what the dates are in your direct testimony -- will give them that additional security?
A. Correct.
Q. And on the day after they receive that money, they could leave and just take that money with them?
A. That's generally true; the day after they get the check, if they get the twenty-five percent check, they could leave, having stayed only that long and not stayed through the end of the award period. That's obviously why we backloaded most of the award.
Q. Do you know --

MR. PERILLO: Strike that. Permit me for a moment.

Q. The incentive plan we are talking about, apart from the individuals that we've been discussing, the seven individuals, there are also fifteen other vice presidents that make 160,000 dollars or more per year in that program, is that correct?

A. I'm not certain if that's true or not. There are -- I would agree that there are several other people with a title vice president. Some may be vice president of purchasing and some may be vice president of middle or large coal sales, some may be vice president of former coal sales. So some have vice president in their title. I -- I don't know if your number's correct --

Q. Those --

A. -- or not.

Q. Those people who are, let's say, for example, vice president of sales, coal sales, are they important people to Patriot's operation?

A. Yes.

Q. They actually have authority over coal sales?

A. They have limited authority with respect to a particular segment of coal sales. They generally meet with customers and try to structure transactions to market our coal.

Q. Coal is a major asset of the Patriot corporation, isn't it?

A. Yes, it is.

Q. There are also eleven general managers in the program that are making 146,000 dollars or more?
A. That's probably the right area. That's generally the salary range for a general manager in the Appalachian region, whether it's Patriot or one of our competitors.
Q. The chief information officer is in the program?
A. Yes.
Q. The two senior VPs who are in the program make between 230 and 350,000 dollars, roughly?
A. That sounds correct.
Q. And that's the base salary that they're guaranteed to receive regardless of these programs, correct?
A. Yes, which as noted earlier, is still substantially less than what they've made historically or would be paid by a competitor.
Q. But that's their base salary. That doesn't include the bonus?
A. That is their current base salary, yes.
Q. With the bonuses -- for example, the fellow making 340-some thousand dollars would go up to something in the neighborhood of 550,000?
A. I can't do my math -- the math in my head, but the incentive payments, if they get the maximum award, would be additional to base salary.
Q. The VP and controller is also eligible for the AIP

program, is that correct?

A. I believe that's correct.

Q. And that person is also appointed by the board of directors, is he not?

A. I believe that's correct, technically appointed, but he's in the same category, I think, as the other seven, but nonetheless, I don't disagree with your technical point.

Q. Okay. And even though he was in the same category with the others appointed by the board, he -- was he originally in the CERP?

A. No, he was not.

Q. Okay. So he stays in the AIP?

A. Correct.

Q. I understand, Mr. Hatfield, that the way reporting works at Patriot, there are a number of people who report directly to the board of directors. Can you categorize those people for me?

A. The only person that reports directly to the board of directors is me; that's my boss, essentially. And the other members of the executive team, as I call it, which, with me, total six people that remove themselves from either of the programs, those are my direct reports. And that would include -- I could name them, if you wish.

Q. No, that's quite all right. You are the only person, though, who directly reports to the board of directors, and

then the other people, who have removed themselves from the program, report to you?
A. They do.
Q. And then the next level of people down from them, they report to one of those six people?
A. Yes --
Q. And --
A. -- generally speaking.
Q. In general, those would include your senior VPs?
A. It would include senior VPs, some department heads, some lead attorneys, a wide variety of talents.
Q. A wide variety of, sir?
A. Of talents, of positions.
Q. The senior VPs who report to -- would they report to you or the chief operating officer?
A. They would currently report to the executive VP of mining operations. We've essentially changed that position and did not hire a chief operating officer.
Q. And how many people are in that tier?
A. In the tier of people reporting to --
Q. Well, there's --
A. -- who?
Q. -- you, who report to the board, and then there's the other five people who are your reports. And now we're talking about the next tier down; these are the people who report to

those five. How many people are in that tier?
A. I can't recall the number from -- from memory, but in some cases there are as many as five to seven direct reports for each of the five people that report to me.
Q. So that's roughly thirty -- thirty to forty people?
A. Probably.
Q. Okay. And those are -- every one of them is either in the CERP, the AIP or both?
A. I think, generally speaking, that would be accurate.
Q. And does that include the CIO as well?
A. Yes, he would report to the CFO who reports to me.
Q. Now, the general managers, are they in the next level down?
A. Yes, the general managers report to the regional operating vice presidents. So they would be one level below the level we just described.
Q. And those general managers, what numbers do they comprise roughly another --
A. There're approximately eleven of those.
Q. All together?
A. Yes.
Q. I think you told us previously that everybody in Patriot's salaried workforce has some level of spending authority, correct?
A. Yes, I think that's accurate. In some cases, it may be a

very modest level of spending authority but I think that's generally accurate.

Q. I can appreciate that. Of the tiers that we're talking about, however, the regional VP tier that has roughly thirty-some-odd people in it who report to your reports and the general managers who are below them, that eleven or so people, what level of spending authority do they have?

A. As I sit here, I really don't know. There is a defined level per corporate policy but I just don't remember the number. I think I characterized it for you earlier as certainly being less than a million dollars but I don't remember the number.

Q. And so they have spending authority of up to one million dollars?

A. I believe I said less than. I'm not sure what it is.

Q. Is that consistent across the group or does it vary person by person?

A. I think it varies by position in the company.

Q. That's according to title then, from your job title?

A. Well, position in the company would be more representative because sometimes a job title it's more focused on experience in a job. For instance, two people that are regional operating vice presidents, one may be called senior, one may just be a regional operating vice president, and they do the same job but one has been in the business for thirty years and the other one

maybe only five or ten.
Q. And so let's take, for example, a regional vice president who is long experienced and long tenure with Patriot. What's his level of spending authority?
A. Again, I do not recall.
Q. You don't know?
A. But it's defined. I just don't recall.
Q. How can you state with confidence that he's not an insider if you don't know how much money he can spend?
A. Because I know he has no ability to -- to shape the policy and direction of the company. That's done by the executive team that works with me. I know that he doesn't attend board meetings -- board of directors meetings with -- with input on the policy and direction of the company. So I know what his job is. That's why I can respond.
Q. And yet he still runs an entire -- or several entire mining complexes of Patriot?
A. Yes, he does. And I would say he's very good at it.
Q. Do you still have your exhibit in front of you?
A. Yes, I do.
Q. If we turn to page 3 of that exhibit. In July of 2012, the VP of Kentucky operations left the company. Do you see where that's reflected?
A. Yes.
Q. That's the individual you told us previously was not

replaced and his position was accommodated by internal restructuring?
A. That's correct.
Q. With the exception of the person that is two down from that person, general manager one of surface mine, do you see that?
A. Yes.
Q. There are none of the other general managers of mining operations who have departed. Is that correct?
A. I believe that's correct. I believe the one you referenced is the only general manager that has resigned.
Q. I'd also like you to flip to page 5 while you have that document in your hand. I notice that the -- on the far right of the graph, the red bar that represents eighty percent of the person's compensation is actually shown smaller than the twenty percent that's in the gap above it. If we actually adjusted these bars to reflect their true height relative to a hundred percent, that line would go up to maybe a quarter of an inch or so below the dotted line. Is that true?
A. Yeah, I'm not sure what point you're making. The numbers are labeled quite clearly on the tops of the bars. It's twenty-three --
Q. Sure, but --
A. -- and a half million is essentially six-and-half million less than what those people would've made in 2010, 2011.

Q. But if we glance at the chart, though, it actually shows that the twenty percent that's missing on top is greater than the eighty percent that's shown which is impossible, correct?
A. Well, the --
Q. Eighty percent is bigger than twenty percent, isn't it Mr. Hatfield?
A. I'll agree with your mathematical conclusion. I think the point of the illustration is that the base isn't zero. It's just easier to illustrate the difference when you don't start at zero because it's a tall bar.
Q. Now, this represents a twenty percent loss in compensation?
A. I believe that's correct.
Q. Okay. If we talk for a moment about what you're asking rank-and-file employees to accept, your typical rank-and-file unionized miner makes twenty to twenty-six dollars, something in that neighborhood?
A. Yeah. There's a wider range but for illustrative purposes that's fine.
Q. And that the concessions you're seeking from them just in their regular compensation, amount to six or seven dollars an hour, more than twenty-five percent, don't they?
A. Actually it varies by position. With respect to wages we're not proposing to change underground miners much at all but there are more substantial changes with surface miners and

preparation plan employees because we believe they're more significantly out of line with market, market being the point of reference that's relevant here, I think.

Q. The value of the retire -- excuse me, of the pension contribution, you're taking -- you're proposing to take away from those people -- it's about eight dollars an hour, is it not?

A. Yeah, I'm not certain what math you're referencing there. Could you --

Q. Isn't that --

A. -- enlighten me?

Q. -- the hourly value of the pension contribution?

A. I don't know.

Q. You do not know?

A. Well, I know what we spend annually on pensions for -- let's go to a point of clarification here. The -- under the contract, I believe, the payment into the pension plan is about $5.50 per hour. That's for each active worker going into a fund that then pays the pension. So yes, we are proposing that that -- that that payment be terminated but that's not eight dollars. There are other per hour payments for different purposes that we are proposing to change.

Q. When you add to that the change to health insurance, doesn't that amount to roughly another three dollars an hour?

A. The health insurance would be an additional cost,

certainly. It would be generally in line with the adjustment that we have asked our nonunion miners to make on health care.
Q. So that the pay cuts that rank-and-file employees will take amount to something in the neighborhood of fifteen dollars per hour --
A. Yeah, I --
Q. -- if you add all those things together?
A. Yeah. I'm not certain of the math. I think the key point is in each case everyone is taking a cut versus their historic compensation. I think that's demonstrated across the board. But also in each case, we don't believe anyone has asked -- is being asked to work appreciably below market. And in every offer that we have advanced to the UMWA, I don't believe we have ever suggested a payment that is out of line with regional market as we measure it.
Q. So it's your position that for the five years prior to the bankruptcy, you simply paid the union miners more than the market would've demanded?
A. Under contract we had no choice, actually.
Q. But you negotiated those contracts, did you not?
A. I didn't at all. I got here nine months before we went into bankruptcy. But my predecessors negotiated contracts.
Q. Yes. Real officials of Patriot with the power to negotiate negotiated that, correct?
A. They did agree to -- they came to agreement on a contract.

I will acknowledge that point.

Q. Was I wrong in my opening statement to say that you have asked for about 150 million dollars of annual concessions from unionized miners and retirees?

A. I believe that's an accurate description of the total savings that we're asking for under 1113 and 1114.

Q. And the total concession from retirees when you go into the outer years, would number well over a billion dollars, almost two billion?

A. It's a large number. It's also the largest reason that we're in bankruptcy.

Q. Let me ask you, what other constituency besides the retirees is taking a 1.6 billion dollar cut for Patriot?

A. I don't think there is another constituency that is receiving that much that can give it up. Again, what we're trying to do with Patriot is emerge and avoid liquidation because in liquidation everyone loses. And I think there's a consensus generally on both sides of the table in that regard. Union losses job rights. Retirees lose value in the company because they are going to be the largest portion of ownership in this reorganized company. And the stronger we make this company, the better off the retirees are. So it is my goal to make this company as strong as we can and make it viable.

So I believe that is the path that has the greatest reward. We can't measure from where we are cutting because

where we are today is simply not viable and has nothing but a path to liquidation.
Q. I can understand why you didn't want to answer my question, so I'll remind you of what it is. I asked who else besides the retirees is giving you a concession of that magnitude. The answer is there is no one.
A. Well --
Q. Isn't that correct?
A. -- I believe the answer was no one because no one else is receiving that level of benefit.
Q. And besides the active unionized employees, who else is giving you annual concessions in the seventy-five million dollar range?
A. No other group is being asked to give that level because no other group has that level of pay above market.
Q. And together those make up the 150 million plus, correct?
A. The total 150 includes both what we're proposing for retiree medical changes and for the 1113 co-bargaining agreement changes.
Q. Now Mr. Hatfield, you've been at the bargaining table with the UMWA for a couple of months -- longer than a couple of months?
A. Since November 15th, yes.
Q. And you've been consistently told by the UMWA that there won't be a consensual resolution to this case if bonuses are

paid to managers as you've proposed. That's been told to you, has it not?
A. Actually in those terms, no, I haven't heard it. I -- the UMWA has been very clear that they oppose the bonus program that we have outlined. That's -- I don't dispute that point at all. But as you just characterized it, I don't believe I've heard in that context, no, sir.
Q. Hasn't every single proposal made to you by the UMWA included a proviso in it that while UMWA members are paid below their contract, no bonuses would be paid to managers?
A. Yes. Each of their proposals has essentially mandated that there would be a salary freeze, no bonuses, until the union is restored full pre-filing benefits and compensation. That's been a key requirement of each of the proposals they've given us which is a good reason we felt like it wouldn't work.
Q. I want to turn to -- oh, before we leave that subject, if the inability to reach agreement -- and I will just pause to say we are all hopeful that we will, but if the inability to reach an agreement continues, and causes labor unrest, how will that effect your ability to achieve the metrics in this program?
A. A labor unrest would be the equivalent of jumping up and down on broken ice and we all know what that outcome is. Everybody falls into the pond and it's a really bad outcome.
So labor unrest is -- could indeed be the ultimate path

that could force this company into liquidation.
Q. And that would cause there to be no bonuses?
A. It could cause everyone to lose bonuses and all.
Q. Are your managerial employees aware of this?
A. I believe the management employees are painfully aware of the challenges this company faces going forward and the high risk that we may not emerge successfully. I think that's why we're losing as many as we are losing.
Q. And specifically, they're aware of what I just mentioned?
A. They are aware of the risk of labor unrest. I think that's again, a key feature of -- of the pattern in recent departures and resignations.
Q. I want to turn now to a slightly different subject. You talked in your direct testimony about selecting individuals for the program. You didn't make an individual assessment of each employee in the program, is that correct?
A. I relied heavily on input from the executive team and they, I'm sure, relied on input from people that report to them as we framed the final list. But in the end, I scrutinized the list. I changed some levels; changed some individuals and made the final approval.
Q. I think you would agree with me that you did not actually conduct an attrition analysis of Patriot prior to your creation of the original corporate CERP, is that correct?
A. I'm not sure as to the effectiveness of an attrition

analysis. The attrition analysis is easily measured at the front door with people leaving.
Q. Well, that may be so but my question was did you or did you not make the analysis? And I think you probably answer that either you did or you didn't.
A. Yeah. We did not make a --
Q. Okay.
A. -- ask for an attrition analysis study, as such.
Q. Thank you very much. Nor did you compare your program to retention programs in the coal industry generally?
A. We called on our advisors to gather information on comparables, particularly with respect to companies that were in reorganization -- Chapter 11 reorganization. And that's what we felt like was the relevant metric.
Q. Okay. But again, going back to my question, do you even know if there are retention programs in the coal industry?
A. I'm not certain. I suspect that they are -- they are there in some component, but more typically the industry relies on the incentive program framework much as Patriot relied on theirs prior to the filing.
Q. And so the answer to my question is you're not even aware if there is a coal company that has a retention program?
A. Yeah. I'm not certain whether there is or is not.
Q. Okay. And the list of names of individuals that were put into the program -- both programs, essentially was carried over

from prior incentive programs at the mine level?

A. No. With respect to the incentive program, you're statement is correct. The incentive program was essentially framed up as a participant list that would normally be eligible for incentive consideration. The retention program was built up more or less from -- from a blank sheet of paper on who are the critical employees, who do we have the greatest risk of losing.

Q. So for the larger of the two programs, the incentive program, you simply carried the names over from existing programs pre-bankruptcy?

A. It's a matter of position eligibility. As I described, that program covers people that aren't covered by mine-level incentive programs so it captures corporate office, regional offices, both in Kentucky and West Virginia, and those positions define who is a participant.

Q. I want to go over some things in your testimony which caught my ear. In describing personal goals, you told us that there were some lower-level employees, for example, who would check to make sure that no uninsured drivers carried loads for Patriots. Do you recall that testimony?

A. Yeah. I was giving an example of what might -- what individual goals may look like for, for instance, a vice president of purchasing or a manager of contract services. And the example you're describing in a manager of contract

services.
Q. And that's just one example, granted, but was it the practice of Patriot, prior to being in bankruptcy, to allow uninsured drivers to haul its loads?
A. No, it's always been our practice to try require that they have insurance coverage and we have procedures in place. But sometimes an audit may determine an area of particular weakness. If there's a high turnover of truckers or change in ownership of the trucking company, sometimes the insurance certificates are no longer valid.
So when we do an audit, we see a weakness, we try to respond to that by stepping up the standard.
Q. So isn't that individual that you mentioned, this safety compliance fellow, he's doing exactly what he did in 2010, 2011. I mean that's just his job, isn't it?
A. Well, the purpose of the performance review is to try to do your job better each and every year. So in each performance appraisal we try to describe where they fell short in the prior year where things could've been done better. And we set goals for making that improvement in the coming year. I think that's not only typical for the coal industry; it's fairly common in the broader U.S. industry.
Q. But if I'm correct, though, and I think I am, wasn't it always Patriot's goal, irrespective of bankruptcy, to achieve certain minimal levels of performance like let's not use

uninsured drivers? That's not a new goal, is it?
A. No. It's always a goal to the best job one can. I may be missing your question here but do you think it's unreasonable to set standards for improvement each and every year? Is that a point I should respond to?
Q. No. No one suggests that.
A. Okay.
Q. But that was true in 2007, 2008, 2009, 2010, 2011. Always true, correct?
A. It's -- and it's our determination to try to continue to improve. That's why the safety target gets -- gets more rigid each and every year. Every year the target safety performance is stronger. We drop the accident rate. Same way with compliance; the target gets lower every year. We don't ever stop at one year and say that's as good as we're ever gonna get, let's stop now.
Q. Another example you gave was an administrative assistant who might be able to control costs by frugally purchasing office supplies. Do you recall that example?
A. Yes.
Q. But again, wasn't that always the pre-bankruptcy practice of Patriot as well?
A. It is their job, but I believe incentive programs can sometimes motivate more -- more aggressive pursuit of excellence. I think it can motivate a stronger performance.

Extra time and initiative invested in a better outcome.

Q. When we spoke about this issue in the discovery phase of this litigation, one of the things you told me is the extra work that such administrative assistants were doing were things like setting up dinners with your bankers, is that true?

A. I believe your question was how can someone like an administrative assistant contribute to financial performance or liquidity or safety? And I used the example that even on liquidity, an administrative assistant may be setting up dinners for the bankers but there's some cost involved which contributes to the EBITDAP component. And on safety meetings, it wouldn't be uncommon for the administrative assistant to prepare the presentations that'll go to the mines that -- that help encourage them to improve safety.

So I believe every member of the team can make a contribution. It's simply a lower contribution in some levels than others.

Q. One more question along this line. In the course of your testimony, I think you also mentioned that one of the things you were doing -- you, Patriot, was doing, in order to get past the difficulties created by people leaving your organization was to promote from within. Do you remember that?

A. Yes. I described that as how we're filling some of these openings.

Q. Yeah. And isn't promotion of talent from within something that typically happened at Patriot throughout its existence?

A. To the extent we can. It's always a good thing when you have the talent on the bench to fill position with a junior person. But that doesn't mean that you're stronger because a twenty year old experienced superintendent left and you would up with someone who's only been in the mines for five years. I don't think that necessarily makes us stronger. Indeed quite to the contrary.

Q. In your direct testimony, I think you testified that some of the people who are leaving Patriot are leaving because they want a certainty of a future job. Do you recall the --

A. Yes.

Q. -- I wrote down the phrase because it was so fetching: "Certainty of a certain job."

A. Yes.

Q. Does this program give people certainty that they will have a job in the future?

A. No, it does not. But it does give them the incentive to take some risk that the job may disappear.

Q. Thank you. And there's actually not been any particular person who's told you -- told you personally, I would've stayed if only you'd given me a sixty percent bonus. There is no such person who's told you that. Isn't that correct?

A. Actually there are people that have told me that they are leaving despite the retention bonus because they don't believe it'll get approved.

Q. And there are people who are leaving even though you offered them money to stay?

A. Yes. We have offered promotions in some cases, to one young mining engineer in Kentucky and he left because he didn't believe the company was going to be secure.

MR. PERILLO: Permit me a moment to confer, Your Honor.

THE COURT: Yes.

MR. PERILLO: Thank you.

Your Honor, in order not to belabor the Court with repetitive questioning, I've divided up the topics with the other objecting counsel. And so I'm going to turn over the witness at this point and I simply would say that the UMWA would adopt the examination that Ms. Hillyer is about to make. Thank you.

THE COURT: All right.

MS. HILLYER: If I may, Your Honor, have one moment?

(Pause)

MS. HILLYER: Thank you, Your Honor.

THE COURT: Uh-huh.

CROSS-EXAMINATION

BY MS. HILLYER:

Q. Good afternoon, Mr. Hatfield.

A. Good afternoon.

Q. You mentioned --

MS. HILLYER: Sorry, yeah, go ahead.

We have some documents that we've prepared that we may use during cross-examination. We put them into binders --

THE COURT: All right.

MS. HILLYER: -- to make that easier. We may not use them all but -- you want to give one to the witness?

May I approach the witness?

THE COURT: I assume Mr. Kaminetzky has seen these?

MS. HILLYER: Yes. They're mostly from Mr. Kaminetzky.

THE COURT: Oh. All right. Yes --

MS. HILLYER: May we approach the witness?

THE COURT: -- you may approach the witness.

THE WITNESS: Thank you.

MR. KAMINETZKY: I received them eight -- Your Honor, I received them eight seconds ago, so I reserve the right to object as they come up.

THE COURT: Absolutely.

MR. PERILLO: Yep.

BY MS. HILLYER:

Q. Mr. Hatfield, on cross-examination you testified that the targets related to safety and the safety compliance, your targets get lower every year, is that correct?

A. Generally speaking that's been the case. I can speak with certainty on that for the last three years where I've -- I've had some immediate recollection. I believe that's also the case historically.

Q. And when you say lower, given the nature of these targets, that means better, right?

A. Lower accident performance means better safety, yes.

Q. And you testified that you're working to improve on those targets and get better every year, isn't that right?

A. Yes, we try to lower the accident rate -- that's probably the easiest way to frame it -- each and every year so the target of accident frequency generally gets lower each year.

Q. The MSHA compliance rate, the environmental incident rate, and the safety incident rate in the proposed AIP, those target numbers are actually worse than Patriot's actual numbers in prior years, isn't that right?

A. They're actually lower than the target for the prior year. They are less favorable than our actual accomplishment in 2012 primarily because we had the best safety performance on record and the best compliance performance on record.

Q. And you're not striving to get better than that?

A. We are, but we don't penalize people if they don't hit a home run every time they're at bat. In the case of 2012, we probably had ten mines that had zero accidents which is a remarkable accomplishment in our business. And so we try not to put people in a position where if they don't hit a home run each and every time they are at bat, they are going to lose out. So we try to lower the target each year. That doesn't necessarily mean that the target each year will be better than the home run accomplishment of the prior year.

Q. I'm going to ask you to turn to tab 11 in your binder, just for a reference point. We don't need to put this up. Do you recognize this document, sir?

A. Yes, this appears to be Patriot's presentation to the unsecured creditors' committee on December 5, 2012.

Q. You attended that meeting?

A. Yes, I did.

Q. And you presented part of the slide deck; isn't that right?

A. Yes, I did present part of the slide deck.

Q. You turn to page 48, please -- titled Covenant Analysis, 2013; do you see that?

A. Yes, I do.

Q. That's Patriot's most recent forecast for projected 2013 performance, correct?

A. No. This would be the October bank plan numbers, which were prepared in October. The most recent would be the January forecast for 2013.

Q. The January -- that was -- there is a January 2013 forecast?

A. Yes.

Q. And your counsel, Davis Polk, had that information?
A. I'm not certain what my counsel has, but there's a January 2013 forecast. There's an update to this, if you will, but this is the last presentation that I believe was formally presented to our lenders and to the creditors' committee.
Q. Well, I can represent to you that in the context of this motion, we were told that these were the most recent numbers of the forecast. But be that as it may, the financial targets in the AIP, as proposed, for EBITDAP and liquidity -- those were based on these numbers on page 48; isn't that correct?
A. At this time, that would have been the case, yes. What would have been presented to the creditors' committee at this time -- that would have been the case, yes.
Q. Patriot's forecast of liquidity for June of 2013 -- that's the same liquidity target it must hit for payments to issue under the 2013 AIP; isn't that right?
A. I'm sorry, I'm not understanding your point. What was your question?
Q. The forecast of liquidity for June of 2013, that's the same liquidity target for the January to June AIP target; isn't that right?
A. Yeah, as I sit here, I'm not certain what the AIP target is. I don't know if it was updated for the January forecast or not.
Q. But they're the same as the number on 48, correct? As of

this forecast that was presented to the UCC?

A. Yeah, again, that was the case on December 5; I'm not certain if that's the case today or not.

Q. Take a look at tab 9, sir. This was a document that was provided to us in the context of this motion, as well. Looking at the number, as of February 14th, for liquidity -- February 14th, 2013 -- Patriot is already exceeding its liquidity target for the AIP; isn't that right -- as of the date of this document?

A. Yeah, I believe, as I've noted earlier, that we are currently in compliance on liquidity. We are missing on EBITDAP; we are missing on safety. But if the rate of deterioration of the liquidity from -- through the course of February continues, we would fail the liquidity test as well.

Q. The individual qualitative goals, under the 2013 AIP, those are established during an employee's annual performance review with his or her supervisor, correct?

A. That's correct.

Q. And those goals are set in the immediate supervisor's discretion, correct?

A. Correct. I believe there is a review by the next level of supervision. I think they technically have to be approved by the next supervisor up, but I think that's generally just a review for appropriateness.

Q. And these goals are set every year as part of employee

performance reviews, correct?
A. Yes.
Q. It's what the employees are expected to do, correct?
A. That's generally the plan.
Q. And these goals are set every year, regardless of whether the company's in bankruptcy, correct?
A. Yeah, again, it's the normal plan. Whether it's on time or not this year because of the bankruptcy, I couldn't -- I couldn't say. But generally speaking, it is the annual performance review, and it's -- you both review the last year's performance and the projection goals for the coming year.
Q. You were not involved in setting any of those goals, correct?
A. For the individuals, I -- no, except for the people that report to me.
Q. And you did not review or evaluate each of the individual's goals when preparing and finalizing the 2013 AIP, correct?
A. I did not.
Q. So you're not able to testify about the details of those individual goals, correct?
A. No, I am not able to provide details on this.
Q. And you're not able to testify about whether they're aggressive or not, correct?
A. No, I can only share the illustrations for those that I am

familiar with from past reviews.

Q. The 2013 AIP participants, those are chosen employees by title, not by individual, correct?

A. Yeah, it's essentially the positions in the corporate and regional offices, as -- as described. It's the group that is not eligible for any participation in the mine-level bonuses.

Q. And if an employee in the AIP left the company and was replaced, that replacement employee is automatically eligible for payment under the AIP; isn't that right?

A. That would generally be the case. That would be part of the compensation. It would be described to them at the point of hiring.

Q. Even if that replacement started with the company a few weeks ago?

A. That would generally be the case. That would also be consistent with what our competitors do.

Q. Regarding the participants in the CERP, as proposed, Patriot has already found replacements for some of those individuals who have left the company; isn't that right?

A. We found some replacements and promoted others internally.

Q. And some of those replacements' base salaries are lower than the employee who left, correct?

A. I wouldn't say that's representative at all. I can only think of one example where that was the case. It was somewhat less-experienced person.

Q. And the replacement hire, in certain instances, is eligible for payment under the CERP as well, correct?
A. Under the CERP, no. CERP is a specific list of individuals. It's not a pot of money.
Q. If that person had been in the CERP before?
A. No, if someone's in the CERP, and they leave, that doesn't mean that the person that gets hired in their position goes into the CERP. That would not be the case.
Q. If that person was a replacement from within the company who had already been in the CERP?
A. Only if they were already in the CERP would they remain in the CERP.
Q. Only half of the CERP payments are tied to emergence from reorganization, correct? Fifty percent?
A. That's correct.
Q. And if a person is employed -- an employee's employed on the trigger date for payment under the CERP but left before the payment issue date, they still get a payment, correct?
A. It's my recollection, as the program is drafted, that they are -- the award is granted if they remain with us through the defined period. I don't believe there is a requirement that they remain through the date of getting the check. So I think your statement is correct.
Q. And they wouldn't have to give back any amount of that money just because they've since left the company, correct?

A. That would be correct because they would have satisfied the test that, essentially, triggered the award.

MS. HILLYER: I have no further questions at this time, Your Honor. Thank you.

THE COURT: All right, thank you.

Mr. Kaminetzky, if you have some brief --

MR. KAMINETZKY: Very brief.

THE COURT: -- redirect.

MR. KAMINETZKY: I think under ten questions for both. And, Your Honor, I apologize in advance. I'm going to be jumping around because this is redirect, so --

THE COURT: Not a problem.

MR. KAMINETZKY: -- although I try to weave a beautiful garment, this is going to be kind of random.

REDIRECT EXAMINATION

BY MR. KAMINETZKY:

Q. Which company will be paying incentive or retention plans, the parent company or a subsidiary company?

A. The parent company, Patriot Coal Corporation.

Q. Now, Mr. Perillo spent a long time with you, talking about general managers, vice presidents, senior vice presidents. Talked about this seven -- now six people that were moved from -- were moved from the CERP and shifted to the AIP. Does any of that colloquy change your testimony with respect to slide number 1 of your testimony? Based on anything you've

heard, or any of the positions that Mr. Perillo went through with you, would you change any of these Xs to checks?
A. Absolutely not.
Q. Is the goal of 1113 to take anyone to pay below what you believe to be market-level compensation?
A. No. It would be foolish if we did; we wouldn't be able to keep good people. The goal is to -- is to match the regional market and be able to compete with others that are paying at that level.
Q. And is it your belief that if the proposed participants in the AIP and the CERP make every dollar under these plans, as likely or unlikely that that is, that then they'll be at market level?
A. Yes. I'm not sure I understood that question correctly. Could --
Q. In other words --
A. -- you reframe it?
Q. -- would implementation -- is implementation of the AIP and the CERP, if all that money is earned under those plans, will the participants then be at market level or still be below market level?
A. I think we can retain them, but they will still be somewhat below market by our measure -- with few exceptions. There are a few individuals that were promoted during the interim that, on a Towers Watson analysis, they said were

slightly above market, but if you look at the overall group, in my assessment, they're below market. That's why we started out with a stronger incentive program and a stronger retention program, to try to meet market.

Q. Again, just so it's clear, and I'm sorry for the inartful question -- so even if every dollar's earned, you still think they'll be below market -- the participants in the plan?

A. Yes.

Q. Okay. Now turning to Ms. Hillyer's questioning, Ms. Hillyer pointed out that the financial incentives, or the -- sorry -- the financial metrics, that's the EBITDA, or now EBITDAP and liquidity are consistent with the forecast. Do you recall that exhibit?

A. Yes.

Q. Okay, now could you explain to me, if all you're asking these people to do, or the company to do, is to hit forecast, how is that not a "give me" or a "layup" -- in Mr. Perillo's parlance?

A. It's not a layup because the forecast is -- is already a stretch forecast because we've saw so much weakening on coal prices. We've lost on the revenue side, and we've had two months in a row with significant problems at our longwalls that have driven us well below year-to-date pace for EBITDA already, on top of marketing actually forcing us to close one of our major mine complexes at Rocklick for -- for a couple of months.

So we've had a huge number of disadvantages, and that on top of the market weakness makes this a stretch forecast, at best, from the financial perspective. And as I spoke to safety earlier, we've had a terrible year -- terrible year thus far on safety performance. And so we're -- we're -- we will be doing a remarkable job if we can come close to those targets.

Q. And just my final question, and this is based on the questioning of Ms. Hillyer, I guess what Ms. Hillyer was asking is a pretty good question. Why isn't it a good thing if you're able to replace someone at a higher salary with someone at a lower salary? You've just saved money for the company; sounds great.

A. It's not great because you don't have the equivalent experience; you don't have the equivalent skill set. There were things that that twenty-year superintendent knew how to do that the five-year superintendent may not, or may not do as well. That's not to sound age discriminate, but certainly there's some value with their experience, and losing the people at that level to our competitors is damaging to the business.

MR. KAMINETZKY: Thank you, that's all I have, Your Honor.

MR. PERILLO: May I?

THE COURT: All right. Mr. Perillo, briefly?

RECROSS-EXAMINATION

BY MR. PERILLO:

Q. Mr. Hatfield, you testified that you believe your managerial employees are below market. In 2007, 2008, 2009, 2010, 2011, when you didn't need bankruptcy court approval for anything, were these employees paid below market?

A. No, I believe with the incentive programs they were receiving in that time frame, they were generally at market.

Q. So their basic salary, then, you believe was satisfactory to hold them, with the other programs you had in place?

A. Only with the other programs because our competitors pay incentive programs just like we've described here. So you have to capture the incentive program benefit, along with the base salary to say it's at market. I think that was the case historically.

Q. And you testified for me before that until June of 2012, the company never had a corporate-wide retention program?

A. That's true, a retention program was specific to mine locations and specific skill sets during that period.

Q. Now, your counsel just asked you about these forecasts, and I want to ask you something that I neglected to, but I'll take the opportunity now. Can you meet those forecasts, in particular for EBITDA and liquidity, without the 1113 or the 1114 relief?

A. No.

Q. So you could reduce the relief you were requesting from us by six or seven million dollars, change the forecast, and meet those forecasts. Is that not true?

MR. KAMINETZKY: Your Honor, I'm going to object. This is well beyond the scope of my redirect.

MR. PERILLO: I'll withdraw the question.

THE COURT: All right. Thank you.

MS. HILLYER: I have nothing further, Your Honor.

THE COURT: All right, thank you.

Thank you, Mr. Hatfield, you may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mr. Kaminetzky, do we have any other witnesses this afternoon?

MR. KAMINETZKY: Yes, Your Honor, we have one more witness who should be substantially shorter than Mr. Hatfield, the CEO.

THE COURT: All right, you may call your next witness.

MR. KAMINETZKY: Okay, Your Honor, with your permission, I'm going to turn the podium over to my colleague, Michael Russano.

THE COURT: All right.

MR. RUSSANO: Good afternoon, Your Honor.

THE COURT: Good afternoon. You may call your next witness.

MR. RUSSANO: Thank you. I'd like to call Nick Bubnovich to the stand.

THE COURT: Mr. Bubnovich, if you'd step up to the podium first, to be sworn.

MR. BUBNOVICH: Yes, Your Honor.

(Witness sworn)

THE CLERK: Please have a seat in the witness box, sir. There's a step up.

VOIR DIRE EXAMINATION

BY MR. RUSSANO:

Q. Good afternoon, Mr. Bubnovich.

A. Good afternoon.

Q. Could you please state and spell your name for the record?

A. Yes. My name is Nick Bubnovich, B-U-B-N-O-V-I-C-H.

THE WITNESS: Michael, before we go any farther, could I get some water? I'm going to --

MR. RUSSANO: Oh, sure.

THE WITNESS: -- need it to get through this.

MR. RUSSANO: Sure. I think we're actually out of water over here. If I can indulge my worthy adversaries for some water?

MR. WILLARD: Your Honor, may I approach?

THE COURT: You may. Thank you, Mr. Willard.

MR. RUSSANO: Thank you very much.

THE WITNESS: Thank you.

BY MR. RUSSANO:

Q. Could you please describe your current employment status?

A. Yes, I retired from Towers Watson in July 2012, but at the same time I entered into a consulting agreement with Towers to provide consulting services to certain of the firm's clients, including Patriot.

Q. And before your retirement, where did you work?

A. From January 2005 until the date of my retirement, I was a director at Towers Watson in the Chicago office. Before that, from May 2002 until December 2004, I was a partner at Deloitte & Touche in its Human Capital consulting group. And before I joined Deloitte & Touche, I was a partner in Arthur Andersen's Human Capital consulting group.

Q. Could you please briefly describe for the Court the subject matter of your specialty?

A. Yes, I provide a wide variety of compensation consulting services and benefit services to compensation committees, boards of directors, and management.

Q. And how long have you been practicing in this field?

A. Over twenty-five years.

Q. Have you ever provided compensation consulting services for companies in bankruptcy?

A. Yes, I have. I've been the compensation advisor on a number of large and complex bankruptcy restructurings, including, for example, Delphi Automotive, Delta Airlines, Winn-Dixie, TWA, and most recently, Hawker Beechcraft, which recently exited from Chapter 11.

Q. Have you ever provided consulting services with respect to annual incentive programs?

A. Yes, I have. I've provided consulting services to hundreds of incentive programs.

Q. Have you ever provided consulting services with respect to retention programs?

A. Yes. I've worked on a number of retention programs -- forty, fifty, possibly more.

Q. What academic degrees do you hold, and from where?

A. I have a bachelors from Hanover College in Hanover, Indiana and a JD from the University of Georgia School of Law.

Q. Have you ever written and published articles on compensation issues?

A. Yes, I've published a number of articles on compensation issues. I wrote three of the chapters in the National Center for Employee Ownership's book, "Beyond Stock Options".

Q. Have you ever served on any boards or participated in any professional organizations with respect to compensation issues?

A. Yes, again -- a number of different situations. The most relevant would be, I was a member of the Executive Compensation Committee of the American College of Bankruptcy, and in 2006, we published an article on the compensation provisions in BAPCPA.

Q. Have you ever taught or lectured in the field of corporate compensation?

A. Yes, I participated in many seminars and presentations given by the American Bar Association, ALI-ABA, and any number of other professional groups.

Q. Have you ever testified as an expert witness in corporate compensation issues in bankruptcy?

A. Yes, I have, approximately fifteen to twenty times.

Q. Have you ever submitted any expert declarations, where you didn't testify as an expert?

A. Yes, I have. Probably another fifteen to twenty times.

Q. And of all those times, has a court ever rejected your expert analysis regarding a corporate compensation issue?

A. Yes, once. In Delphi Automotive, the court rejected my analysis concerning the emergence bonus program.

Q. In that case, did you offer any other expert opinions?

A. Yes, I testified three or four other times concerning the six-month annual incentive program as well as the severance program.

Q. And did the court accept that expert testimony?

A. Yes, it did, on each occasion.

MR. RUSSANO: Your Honor, at this point, I'd like to tender Mr. Bubnovich as a qualified expert witness in the field of corporate compensation, including the design of incentive and retention programs for companies in and out of Chapter 11.

THE COURT: Mr. Perillo or Ms. Hillyer, any objection?

MR. PERILLO: No.

MS. HILLYER: No, Your Honor.

THE COURT: Thank you.

All right, so the witness will be qualified as an expert.

DIRECT EXAMINATION

BY MR. RUSSANO:

Q. Mr. Bubnovich, when were you retained by Patriot and for what purpose?

A. Patriot's compensation committee retained Towers Watson, in January 2008, to provide compensation consulting services to the board compensation committee and, with the committee's approval, to management.

Q. And since the point of that retention, what has been your personal role?

A. Well, since the beginning of the engagement, I've been the lead consultant.

Q. Has that role changed at all since your formal retirement?

A. No, I continue to be the lead consultant.

Q. Did you have any role with respect to the design of the critical employee retention plan, which I'll call the CERP, that is the subject of this hearing?

A. Yes, I did.

Q. And could you please describe to the Court what that role was?

A. Well, my role was somewhat narrow and specific. I provided advice to the compensation committee and management in four general areas. I recommended competitive compensation levels for participants in the plan. I made some recommendations concerning the timing of payments under the plan. I also suggested some criteria for selection of participants, and, finally, I provided information with respect to other companies' CERPs.

Q. When you mention compensation levels in the CERP, what do you mean by that?

A. Well, in these sorts of situations, I generally recommend amounts that, based on my experience, have worked in the past. Accordingly, I generally recommend a range of retention payments that correspond to competitive annual incentive opportunities. But you have to remember that in each case, that is, each employee, you would expect that adjustments would be made, based on each employee's potential contribution, experience, and performance.

Q. And whose job is it to make the final determination as to what those compensation levels should be?

A. That's management's.

Q. Do you have an understanding what management ultimately decided to do in this matter?

A. Yes, I do. The ultimate decision reached, after discussions with the UCC, were to provide levels under the plan equal to eleven to forty-five percent of salary, depending on the individual participant.

Q. And was that decision consistent with your general advice?
A. Well, yes. I would say, yes.
Q. Moving now to the timing of payments. What recommendations did you make to management regarding that issue?
A. In these sorts of situations, my recommendation is always that a substantial portion of the payment be held back and not paid until emergence. Additionally, I also believe that it's important that interim payments be made along the way. And so in this case, I advised the committee and management that there should be a substantial payment at the back end, along with interim payments.
Q. When you say substantial payment at the back end, why didn't you recommend that all the payment be at emergence?
A. In these sorts of circumstances, where there's not a lot of certainty about the duration of the program, and where it's not expected to be modest -- and by modest I mean, you know, less than six months -- most employees, you know, don't want to wait that long. Also, I think that most employers, or most companies that have adopted CERPs find it promotes retention if you make a payment along the way for employees, you know, who have made substantial contributions along the way.
Q. Turning now to selection criteria for the CERP, what recommendations did you make to management on that issue?
A. Well, in general, I recommended to management that the

participants should include those critical employees who can affect the company's business operations and are also critical to the restructuring effort.

Q. And whose job was it to make the ultimate decision about which employees should participate in the CERP?

A. That's the province of management.

Q. Why is that?

A. Well, management is best positioned to know who's a critical employee and, for that matter, who might not be meeting expectations. Someone like me does not have any access to confidential data about performance reviews. And again, management best knows its workforce, and thus it's management's job to make that determination.

Q. Was your role on this assignment, with respect to the CERP, consistent with your role in other assignments where you consulted on the design of a CERP?

A. Yes. Now again, I provide information about competitive practices, information about design features under the program, you know, but ultimately, it's up to management to take that advice and tailor it to the particular circumstances of the company.

Q. In your opinion, is the design and structure of the CERP consistent with market practice?

A. Yes, it is.

Q. Turning to the annual incentive plan, which I'll refer to as the AIP, did you have any role with respect to the design of the AIP that is the subject of this hearing?

A. Yes, I did.

Q. And can you describe to the Court what that role was?

A. Again, my role was somewhat limited and similar to the case of the CERP. Initially, my recommendation to the company was that we pretty much stay the course and continue the plan substantially along pre-petition lines. So I recommended to the company that the metrics that it ought to consider would be EBITDA; cash flow; continued use of the operational metrics that have been discussed, safety, MHSA and environmental. And additionally -- no; stop; end of sentence.

Q. Okay, and whose job was it, ultimately, to decide which metrics would be used in the AIP?

A. Well, again, that's management's province.

Q. Do you have an understanding of which metrics management ultimately decided to use?

A. Yes. Management eventually decided on six metrics -- again, rather similar to what existed in the pre-petition plan. As has already been discussed, the metrics are: EBITDAP, liquidity, mine safety, safety, environmental incidence, and the sixth, if you will, is individual performance objectives.

Q. In your opinion, is it common for incentive programs to include a metric for individual performance?

A. Yes, it is. Companies across the country, you know, want supervisors and managers to have some influence over the performance of their subordinates and thus an annual incentive plan is an ideal mechanism in which to drive the appropriate behavior.

Q. In your opinion, is it common for the actual incentive plan to describe each and every individual performance goal for each and every plan participant?

A. No, that's absolutely unworkable, given the number of participants we're talking about here, as well as in other plans. That kind of detail doesn't belong in the plan itself.

Q. Did you have any role in deciding what the actual targets would be for the particular metrics?

A. No, I did not.

Q. Who did?

A. That's management's province.

Q. And did you have any role in deciding who would actually participate in the AIP?

A. No; again, that's management's province.

Q. Was your role in this assignment consistent with your role on other assignments where you consulted on the design of an AIP?

A. Yes, I provide advice and data to compensation committees or management, but again, in the end, it's up to either the committee, the board, or management to make the decision concerning the incentive program.

Q. Does the design of the AIP here differ in any way from the design of AIPs in other Chapter 11 cases that you have consulted in and that you have studied?
A. Yes, I would say that, in general, the design here is more conservative than you would see in other Chapter 11 incentive programs.
Q. Have you prepared an exhibit to illustrate this point?
A. Yes, I have.
MR. RUSSANO: Your Honor, if I could approach?
THE COURT: You may. I assume the other side has seen this as well?
UNIDENTIFIED SPEAKER: Excuse me, could copies be provided to counsel? Thank you.
Q. Do you have the exhibit now in front of you, Mr. Bubnovich?
A. Yes, I do.
Q. And is the point on page one of the exhibit?
A. Yes it is. There are --
Q. Could you walk us through this?
A. Yes. There are four bullet points on this first page, which illustrate how the proposed Patriot AIP differs from other Chapter 11 AIPs.
First, as has been previously discussed, all six members of the executive management team have voluntarily removed themselves from consideration in not only this plan, but also

the CERP.

Second, this program is more egalitarian than a lot of other incentive programs. It includes a substantial number of corporate employees, you know, not just a privileged few.

Third, the incentive compensation opportunities under the program are capped at threshold levels. Stated another way, you know, there's no upside or additional payments that would be made to any of the participants if the debtors exceed its business plan.

And then finally, there's no opportunity for a partial payment if a metric is not hit. So for example, if a metric is -- financial metric -- is not met by ten dollars -- if it falls ten dollars short -- then there would be no payment made whatsoever and certainly no partial payment.

Q. Thank you. You could put that aside for the moment. Mr. Bubnovich, in your opinion, is the overall design and structure of the AIP consistent with market practice?

A. Yes, it is.

Q. After management decided upon which metrics and targets and participants to use in the actual plans, did your role end there?

A. No, it did not. I was asked to undertake a benchmarking project to determine the cost of the plans relative to the marketplace.

Q. Could you briefly describe to the Court what the term

"benchmarking" means in this context?
A. Yes. Benchmarking simply refers to the process where we compare the total compensation for the participants in the AIP to the market. And in this particular case, the market would be the data that we gathered from the different surveys that we used.
Q. I see. So you benchmark the pay of all employees that are participating in the plans; is that right?
A. Not quite. When you're trying to benchmark over 200 jobs, it never shakes out that you're able to benchmark all the positions, for a number of reasons. But as it turned out, we were able to benchmark, with our initial pass at the survey data, 109 positions out of 225.
Q. And are those positions -- are you referring to the AIP?
A. Yes, I am.
Q. What about the CERP?
A. Well, keep in mind that there's a number of people who participate in both plans and we were able, as part of the process, to benchmark a significant number of the CERP participants, as well. We ended up benchmarking 56 of the 110 or so CERP participants.
Q. Okay. But by my rough math, that equates to approximately half the participants in both plans. Does it concern you at all that you were only able to benchmark half and not more?
A. Not in this case, at all. The reason for that is we were

able to benchmark a real solid cross-section of participants in the AIP. We benchmarked a number of high paid participants, a number of the middle managers or middle paid participants, and also a significant number of the lower participants.

Now, those that we weren't able to benchmark, are not situated very differently than those we were able to benchmark. You know, it's not as if their salaries are significantly different or they had substantially different opportunities under the AIP or the CERP. So the fact that we're able to do half is appropriate under the circumstance.

Q. Turning now to the actual data that you used to conduct your analysis, could you describe to the Court what those data sources were?

A. Yes. We initially used two data sources. The first one was the Towers Watson compensation database, which is a survey that covers -- covers companies with revenues from one to three billion dollars. And then we also used a Mercer executive compensation survey and the Mercer cut we used was for employees with revenues from 1 to 2.5 billion dollars.

Q. Could you tell us a little bit more about the surveys themselves?

A. Yeah. These are both what I would call nationwide, robust surveys which cover hundreds of companies and obviously, you know, hundreds of positions.

Q. When you say "nationwide survey", did that also include various industries across the nation?

A. Yes. The surveys were not limited to one particular industry, as you just suggested; instead, it was what we call "all industries", although "all industries" as defined as not including finance, health care, and not-for-profit, because those three industries tend to have different pay models than others.

Q. Wouldn't it have been better to just use the coal industry?

A. No. I don't believe so; let me give you a couple reasons why.

The first reason is I don't believe employees at Patriot are restricted to finding jobs solely in the coal industry. I mean, if you work in human resources, legal, finance, information services, technology, or accounting, or any one of a number of other functions, you have skills that are transferable; you can find jobs in other industries. And as far as I'm concerned, you know, even if you look at some of the mine-level jobs, I'm not even sure that those jobs or those people holding those positions would be restricted to finding jobs in the coal industry. I mean, take a mine superintendent, for example. Here's a person whose skill set is manages a lot of people, knows how to supervise the handling of dangerous equipment under -- or large equipment under dangerous conditions, and knows how to move a lot of material from one place to another. Now, to me, that's a skill set that a lot of employers would covet and it might easily lead to positions in other industries.

Secondly -- and somewhat oddly enough, perhaps -- the national pay average in St. Louis is slightly higher than the national average. So certainly, the use of national data in the case of the St. Louis-based employees is fine.

And then the third reason is that I know -- I believe that if I added the coal, the special -- the coal industry-only survey data, it would not affect the data significantly.

Q. Did there come a time where, in spite of everything you just testified to, you actually looked at coal industry-specific data?

A. Yes, I did. The UCC asked that the benchmarking analysis include data from coal survey. And as it turned out, Patriot participated in an industry survey so it had the data.

Q. And what impact, if any, did that have on your overall conclusions?

A. Well, there were a couple of modest changes, if you will. The first, because the coal survey -- as you might imagine -- covered a lot of coal-specific jobs that weren't covered by the Towers or the Mercer data, we were able to increase the number of positions that we benchmarked to 151.

And then secondly, the numbers moved down a little bit when we added the coal survey in, but again, not in a way that would significantly change my conclusions regarding the data.

Q. Just so the record's clear, when you say "the numbers moved down a little bit", does that mean it showed that the plan participants were slightly more undercompensated or less undercompensated?

A. More undercompensated.

Q. I do want to get to the specifics of your conclusions in just a moment, but first let me ask you about another thing that you mentioned regarding the Mercer and Tower surveys being nationwide. Does that mean that it would include data for places like, let's say, Southern California, where obviously the cost of living is higher than it is here in St. Louis, and in West Virginia?

A. Sure, that's quite likely.

Q. And doesn't that trouble you in terms of the reliability of your analysis?

A. No, not at all. If you're going to call out Southern California because it's part of a nationwide survey, well, then you have to realize that there's data that's being collected from companies in a lot of other areas where the pay might be a lot lower than the national average; it would offset any increase there might be because of companies from Southern California. Now, there are places in the south, the mid-west, and even parts of the west where the cost of living is a lot lower than the national average, and certainly lower than

Southern California.
Q. Moving into the actual results of your benchmarking analysis, could you describe for the Court what the results were of your initial analysis, using just the Mercer and Tower survey data?
A. Yeah. Well, the initial analysis was that the participants in the AIP were substantially undercompensated versus the market.
Q. Have you prepared an exhibit to illustrate those results?
A. Yes, I have.
Q. And is that on page 2 of the packet you have?
A. Yes, it is.
Q. Could you just walk us through those results?
A. Sure. Looking first only at the Towers and the Mercer data -- and assuming that there is no adoption or implementation of the proposed plans -- the AIP participants are underpaid by twenty-seven percent, versus the market median. Now, that translates to about the fifteenth percentile.
Q. What do you mean by -- when you say "fifteenth percentile", what does that actually mean?
A. Well, in this case what it means is that eighty-five percent of the survey peers are more highly compensated than the AIP participants.
Q. And what are results look like if we assume that the plans

are approved and that there's maximum payouts under the plans?
A. Well, if you add in approval of the plans and assume that all payments are made under the CERP and that all dollars are earned under the AIP, the participants would be thirteen percent below the market median, which in this case translates to about the twenty-fifth percentile.
Q. And what do those results look like when you add in the coal industry survey data?
A. Well, when I added in the coal survey, as I already mentioned, the numbers moved down a little bit. It was from minus thirteen to minus seventeen percent.
Q. You can put that aside, thank you. Mr. Bubnovich, based on your benchmarking analysis, what conclusions did you draw?
A. No matter how you slice and dice the data, the AIP and CERP participants are paid at levels substantially below the market. Now, this is true no matter how you analyze it or what data you use to determine the market. Whether you use just the Towers and the Mercer data; whether you use Towers, Mercer, and the coal survey; whether you use coal survey only; whether you use national data; or even if you used only regional adjusted data, the result would be the same.
Q. Thank you. Did you look at any other data to assess the reasonableness of the plans, other than what you've already testified to?
A. Yes, we did.

Q. Can you elaborate?

A. Sure. Towers maintains a database of information about other Chapter 11 incentive programs and CERPs. And so I used the data from that database to compare Patriot's proposal to the information that we had in that database.

Q. Could you tell us a little bit more about what information you had in that database?

A. Well, in that database we had sufficient cost information on twenty-three other annual incentive programs, and thirteen other CERPs.

Q. Why isn't there more data than that?

A. Well, we all know that bankruptcy courts have approved a lot more than twenty-three annual incentive plans and more than thirteen CERPs. But the data can be very difficult to come by; in some cases, these programs are part of the first-day motions, so there's no disclosure. A lot of times the disclosure that you will find in a motion or in a judge's order approving the plan isn't totally complete; there might be key missing cost data. So it's not perfect, but it's what we got and so I thought it would be appropriate to, again, compare what Patriot proposed to the information that we had in the database.

Q. So given that it isn't -- I think you described that it's not a perfect data set -- why did you consider it useful to look at?

A. Well, again, I think it was directionally -- I think it would -- I think it would show directionally whether Patriot's proposal was in line with what other Chapter 11 companies have done. And I think, as I said, we had the data, so I wanted to use it.

Q. Were your overall conclusions that we've talked a little bit about in the context of your benchmarking analysis, was that dependent upon your assessment of the Chapter 11 database data?

A. No. As I've already testified, I think the benchmarking analysis by itself supports my conclusion, but I also think that the data in the database also supports the conclusions.

Q. And did you reach any conclusions as a result of your review of the Chapter 11 data?

A. Yes, I did.

Q. Have you prepared an exhibit to illustrate those conclusions?

A. Yes, I have.

Q. And is that on page 3 of your packet?

A. I believe it is; yes.

Q. Great. If you could just walk us through your conclusions?

A. In the case of the AIP, it turns out it's the fifth cheapest plan in the aggregate out of the twenty-three comparables. It's the second cheapest plan as a percentage of pre-petition revenue. And it's the cheapest plan on a per-participant basis. And in the case of the CERP, the aggregate cost is slightly above the median cost of those thirteen companies, but the per-participant cost is a little below the median.

Q. Thank you. Mr. Bubnovich, are you aware that subsequent to your analysis, the debtors reached an agreement with the United States Trustee, whereby seven individuals were removed from the CERP and at that point were solely in the AIP?

A. Yes. While I wasn't a part of any of those discussions, I am aware of the change.

Q. Could that change have any impact on your benchmarking analysis?

A. No, because when we did the benchmarking analysis we included both the annual incentive plan opportunity and the CERP opportunity for the participants. And so what's happened here is it's just moved from one pocket to the other. It had absolutely no effect on the -- on the benchmarking analysis.

Q. Did that change as a result of the settlement with the United States Trustee have any impact at all on your overall conclusions regarding the reasonableness of the plans?

A. Well, the only potential effect it could have is that since a substantial number of dollars, if you will, were moved from the CERP to the annual incentive plan, to the extent the metrics under the AIP are not achieved, Patriot will, in fact,

pay out fewer dollars than it otherwise would have.
Q. Just a few more questions for you. Did Patriot have a pre-petition, long-term incentive plan?
A. Oh, yes.
Q. And did that plan involve the vesting of equity over time?
A. Oh, yes; definitely.
Q. And did the vesting of equity over time have a retentive affect, in your opinion?
A. Oh, sure.
MR. RUSSANO: I have no further questions, Mr. Bubnovich.
THE COURT: All right, thank you.
Mr. Perillo, do you have any cross-examination for this witness?
MR. PERILLO: Thank you, Your Honor.
CROSS-EXAMINATION
BY MR. PERILLO:
Q. Good afternoon, Mr. Bubnovich; it's good to see you again.
A. Good afternoon, Mr. Perillo.
Q. You testified you were hired in 2008 -- or rather, Towers was hired in 2008, correct?
A. Yes.
Q. I believe that you were paid approximately 150,000 dollars -- by "you", I'm talking Towers, not you personally -- 150,000 dollars to design the compensation programs in 2012

that are at issue in this case?
A. Well, I think when you asked me about this during my deposition, the question was how much was Towers paid over a twelve-month period, and the answer I gave was 150,000 dollars. So for 2012, Towers was paid for its assistance in designing the 2012 annual incentive program, the 2012 long-term incentive program, you know, attendance at meetings, telephone calls, and then, additionally, work on the CERP and the AIP.
Q. And I think you told me that that was typical; that in 2008, 2009, and so forth, it was roughly that same amount of money each year?
A. Yeah, I would think on average our fees have been 125- to 150,000 dollars per year.
Q. And you told us that you spent roughly seventy-five hours since the filing of the Chapter 11 working on the two bonus programs, up through the date of your deposition?
A. I actually don't remember that, but if you say so, I'll take it as correct.
Q. Well, I'm not trying to catch you on something --
A. No, no; it sounds right to me.
Q. It's a reasonable estimate --
A. Yes.
Q. -- of the amount of time? You characterize the plan, I think, as being a bit beyond the executive level, at roughly 225 employees; do you remember that?

A. Well, there are 225 participants in the AIP.
Q. But the phrase you used was that it goes a bit beyond the executive level?
A. Again, I don't remember using that phrase, but yes.
Q. Okay.
A. It certainly goes beyond the executive level.
Q. Take your deposition at tab 3, please. It's on page 9 of your deposition; would you turn to that please, at line 15? I asked you if that -- i.e., the plan -- was limited executives or for all employees of the debtor, and you said it was essentially -- it was limited, it was essentially limited to approximately 225 employees, which I would describe as a little bit beyond just the executive level; do you see that?
A. Yes, I see it.
Q. Is that still your belief today?
A. Well, I don't -- you know, if I had it to do over again, I don't know that I would have used the phrase "little bit", but I said it.
Q. Okay. The original post-bankruptcy plan that you conceived as a retention plan was limited to about sixty to seventy employees, correct?
A. The pre-petition CERP? Yes.
Q. That would be the June 2012 CERP you're speaking of?
A. Yes. Is that what your question was about?
Q. Yes. And you characterized that as applying to select

corporate employees?
A. Yes.
Q. Somewhere along the way that 60 to 70 grew to 119?
A. Not really. What happened was the mine-level retention program which was adopted in 2009 was just consolidated with the pre-petition corporate CERP into, you know, into one new post-petition CERP.
Q. And that is how the plan grew from the original 60 to 70 to 119 or -- today, I guess it's about 112?
A. Right. Well, I don't know that "grew" is exactly the right word because again, the two pre-petition totaled about 110 to 120, and really for administrative reasons, the plans were combined, after the Chapter 11 filing, into one plan. So the numbers -- or the total -- remains essentially the same.
Q. Now the forty or so people that were in the mine-level plan, that was a plan that preexisted, correct?
A. It was adopted in 2009, yes.
Q. Okay. So it had existed for several years prior to the contemplation of the CERP?
A. Yes.
Q. Okay. Now, the people that you worked with in order to design these programs, was Mr. Hatfield, correct?
A. Yes.
Q. The board of directors' compensation committee?
A. Let me stop here; when you say "these plans", are you

talking about the proposed AIP and the CERP? Are we going all the way back to what has transpired since 2008?
Q. I'm talking about the plans that Patriot is asking the --
A. Okay.
Q. -- Court to approve.
A. Okay; okay. Can you ask your question again for me, please?
Q. The people that you worked with when you consulted with Patriot included Mr. Hatfield, for one?
A. Yes.
Q. The board of directors' compensation committee?
A. Yes.
Q. The VP of HR that was mentioned during Mr. Hatfield's testimony?
A. I think I was out of the room at the time, but yes, I talked to that individual.
Q. And the senior manager of compensation and employee relations?
A. Yes. Again, I had several conversations with her, but same as the immediate preceding person; you know, their roles were largely ministerial; their job was to get me data. And in the case of the VP of HR, he was new to the position so he really didn't have a whole lot of background about some of the stuff we were doing. And that's why I worked primarily with the woman who was the manager of compensation. I can't quite

remember her exact title.
Q. Besides those four groups -- Hatfield, the board of directs' committee, VP of HR, and the senior manager that you just mentioned -- is there anyone else that you consulted with?
A. Oh yes, I had a number of conversations with Mr. Bean about the process of getting the programs approved.
Q. Anyone else?
A. None that I can think of at the moment.
Q. Now, if I understood your testimony, you made no judgment whatsoever about whether any particular participant ought to be included in the program?
A. That's correct.
Q. Or how long a tenure an employee should have before they would be included in the CERP?
A. That's correct. I made no judgment about that.
Q. Or their job duties?
A. That's correct. I made no judgment about that.
Q. Or their job duties?
A. Correct. I made no judgment about that.
Q. And you made no judgment about how likely they were to leave Patriot?
A. True.
Q. Or whether they had job opportunities elsewhere?
A. True.
Q. Or whether they had transferred from other coal companies?

A. Sure. True.
Q. You also indicated that the threshold level was intended to provide the same level of compensation as if the company had not gone into bankruptcy, and the person had achieved their old incentive rates. Is that correct?
A. I'm not sure I said that, but I answer the question as such because I'm not sure I understood what you said. So why don't we see if we could clarify your question?
Q. Well, is it true that the thresholds were set -- and by the thresholds, I mean these percentages that people are going to earn just by staying with the company through certain dates. Those were set to give them the same level of compensation that they would have had pre-bankruptcy if they had hit the targets on their old incentive.
A. Well, in the AIP, the payment levels were substantially reduced by, you know, seventy-five or eighty-three and a third percent.
Q. I'm asking you now about the sixty-percent level set at the top end of the CERP -- excuse me, the forty-five percent level set at the top end of the CERP. That number, you believe, was set to give people the same level of compensation as if they hadn't been in bankruptcy?
A. I think what I testified -- if this is what you're driving at -- that I recommended to the company that it consider as appropriate compensation levels an amount equal to competitive

annual incentive levels. But I also testified that it's up to the company, in this case, to make the determination as to what the actual levels ought to be.
Q. But your recommendation to them was to give people cash compensation essentially equal to what they had prior to the restructuring or the Chapter 11. So that would suggest, for the most senior participants in the CERP, an opportunity of approximately sixty percent of salary. Isn't that what you told me?
A. Yes. That -- yeah, that would be, essentially, the equivalent of my advice.
Q. That was your advice, wasn't it? That was the advice --
A. Well, again --
Q. -- you gave the company?
A. -- again, it's what I told management to consider. And, yes, if you take what I recommended or told them to consider, and, you know, apply it to a Patriot employee who had a sixty percent target annual incentive, there would be a sixty percent retention incentive.
Q. And the way we would know what that percentage should be, is we'd look at the pre-bankruptcy target incentive program, then?
A. Well, yeah. That'd be one place to start, sure.
Q. You made no determination that some people ought to participate at either a higher or a lower percentage level.

You left that all to management, correct?
A. That is correct. That's what I testified to.
Q. And your sole guidance to them in terms of selecting employees was to tell them to choose people you think are critical to restructuring. Is that true?
A. I said critical to restructuring, and also, you know, important to the business operations of the company.
Q. And, again, as I asked you previously, you didn't give them suggestions about who should be included by pay grade?
A. I don't remember doing that in this particular context, no.
Q. Or by tenure?
A. No, I don't believe tenure is that important.
Q. You made no analysis whether the CERP participants have realistic opportunities elsewhere?
A. No, except to the extent I answered certain of the questions that Mr. Russano proposed to me.
Q. And even assuming that people did have opportunities elsewhere in the country or in another industry, you made no attempt to ascertain whether such opportunities exist, also true?
A. That's true.
Q. You did not check whether attrition in late 2012, post-bankruptcy -- whether those people had been included in the plan or not, correct?

A. Correct.
Q. You didn't do any study of attrition yourself, also correct?
A. Well, let me answer that one this way. You know, as the song says, you don't need a weatherman to know which way the wind is blowing.
Q. I am glad to know you are a fan of Bob Dylan, Mr. Bubnovich, and thus you betray your age. But --
A. We discussed that during my -- my deposition, didn't we?
Q. I think we traded on that, and you gave as good as you got. But just to get to the answer to my question, though. You didn't actually do a study of attrition?
A. No, we did not.
Q. And you didn't study whether the plan is top heavy or bottom heavy?
A. No.
Q. I think you also told me you don't know if there has ever been a CERP in a mining concern?
A. I don't remember that, but okay, yes.
Q. Well, I mean, if one comes to mind --
A. No. No.
Q. -- tell us right now.
A. No.
Q. And you don't know if Patriot's range of eleven to forty-five percent of compensation compares to other plans in the

mining industry?

A. Well, obviously, I can't know that, since I said that I didn't know of any such programs at other coal companies.

Q. You were not involved at all in selecting the goals or the targets in the AIP, is that correct?

A. That's correct.

Q. You made no analysis whether the targets are actually aggressive or not?

A. That's correct.

Q. You made no effort to determine whether individual levels of efforts were geared toward the targets?

A. Again, of course not. That -- there's --

Q. Or even if --

A. -- no possible way for me to do that.

Q. Or even if the particular individuals in the incentive program had a function that could affect the target?

A. That's correct. I relied on management's judgment for that.

Q. And you don't have any information about the personal goals that make up the twenty-five percent of the program?

A. That is correct.

Q. Now, you mentioned in your direct testimony a hypothetical that actually came up during your deposition. This is the example of an industry supervisor who had the skill set of managing a lot of people and knew how to use heavy equipment and so forth. What about the people that we've been discussing today who are general managers of underground or surface mines and who have held those positions for a substantial period of time? If you're correct that they have other industry opportunities and were undercompensated, why didn't they just go to other industries?

A. I don't know. You'd have to ask them.

Q. Because there apparently is something keeping them at Patriot despite the levels of compensation. Is that true?

A. I don't know.

Q. If you have not examined where Patriot gets its executives from or its high-level managers, how do you know that they can cross industry lines with this facility?

A. I certainly don't know that for a fact, and I was just suggesting in my testimony that certain skill sets would transfer from one industry to another.

Q. Were you in the courtroom when Mr. Hatfield testified about the eons-old practice of coal companies swiping each other's employees?

A. Yes, I was.

Q. You don't have any reason to doubt that he's correct about that, do you?

A. Well, I don't have any reason to doubt that it's limited to the coal industry, no.

Q. Your familiarity with the coal industry is that you have some knowledge about Peabody. You've done some work for them, I take it?

A. Peabody -- Alpha.

Q. Besides those -- and Alpha is an energy company?

A. No, no. Alpha is a -- Alpha Natural Resources, primarily coal company.

Q. Okay. Beside Alpha Natural Resources and Peabody, do you have other experience in the coal industry?

A. No.

Q. Now, you talked a little bit about these Chapter 11 plans that you built into this database of approximately thirteen companies, and you said we all know that there have been more plans approved other than just those thirteen. But you're also aware that there have been plans that have been disapproved?

A. Oh, yes.

Q. Did you check Patriot's plan against any of them?

A. No, I did not.

Q. And in fact, some of the companies that are listed in that thirteen had their plans disapproved in part, is that true?

A. I believe that's true.

Q. Did you take out the disapproved parts when you did the comparison?

A. Well, I assume that the disapproved parts were taken out. As I testified during my deposition, you know, the database is maintained in our Washington, D.C. office. You know, it's their job to gather the data and put what's appropriate into the database. I did not gather the data.

Q. In the Delphi case that Mr. Russano questioned you about where the court rejected one of your recommendations -- the one that the court rejected regarding emergence bonuses. The court cut the amount by eighty percent. Is that true?

A. I believe that's true.

MR. PERILLO: Your Honor, I'm going to -- pursuant to the same arrangement we had with Mr. Hatfield, just adopt the additional questioning that Ms. Hillyer will make --

THE COURT: All right.

MR. PERILLO: -- rather than be repetitive.

Thank you.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MS. HILLYER:

Q. Good afternoon, Mr. Bubnovich.

A. Good afternoon.

Q. I'd like you to turn to tab 13 in your binder, please. These are the companies' incentive plans to which you compared Patriot's 2013 AIP, is that correct?

A. Yes.

Q. And the title on top: Chapter 11 Incentive Plan Market Data, the market you're referring to there is the companies you selected from Towers Watson's database, not the entire universe

of Chapter 11 incentive plans ever approved, correct?
A. Correct.
Q. The range of employees eligible for the incentive plans on this list varies quite a bit, from 5 to over 3,000, isn't that right?
A. Well, I don't -- I wouldn't describe them as -- are you talking about the third column?
Q. The fourth.
A. Well --
Q. Oh, yes -- number of participants.
A. -- oh, well, I'm sorry. I was in the wrong column. Yes -- the answer to your question is yes.
Q. And these aren't -- these companies identified here -- they're not limited to the regions in which Patriot does business, correct?
A. That's correct.
Q. And none of these are mining or coal companies like Patriot, correct?
A. That's correct.
Q. And you didn't choose these companies based on whether they have a unionized workforce like Patriot does, correct?
A. That's correct.
Q. And you didn't choose these companies based on whether they were in distressed industries, did you?
A. That's correct.

Q. And you didn't choose these companies based on whether they filed for bankruptcy before or after October of 2005, did you?
A. That's correct.
Q. And you didn't choose these companies based on whether they were liquidating or reorganizing, did you?
A. That's correct.
Q. And the page following that, the other Chapter 11 CERP programs?
A. Um-hum.
Q. Again, you only looked at retention plans of the companies in Towers Watson's database, and the market that you referred to -- that is the market, correct?
A. Yes, in this circumstance. Yes.
Q. And the number of CERP participants under these programs varies significantly from 5 to over 400, correct?
A. Correct.
Q. You did not investigate whether any of these companies are unionized either, did you?
A. That's correct.
Q. Or whether they're located in the same geographic region as Patriot, correct?
A. Correct.
Q. You also didn't investigate the circumstances of each retention program at each of these companies, did you?

A. Correct.
Q. And you didn't look into whether -- when these companies filed for bankruptcy either, did you?
A. Correct.
Q. And you didn't analyze the percentage of base salary awarded under each of these retention plans, did you?
A. Correct.
Q. So you can't say whether Patriot's eleven to forty-five percent of base salary under the CERP is comparable to these retention programs in terms of percentage of base salary, correct?
A. That's correct.
Q. You didn't study other coal company incentive plans, correct?
A. In what context?
Q. Why don't we turn to your declaration, which is tab 1B? In paragraph 17, your declaration states -- references --
A. Hold on a second. I'm not there yet.
Q. -- "the breadth of the participant" -- I'm sorry?
A. I'm not there yet. I'm not there yet.
Q. Okay. I'm sorry.
A. I don't have it.
Q. Let me know when you're there.
A. Again, what paragraph?
Q. 17 --

A. Okay.
Q. -- second line. "The breadth of the participant pool is typical by coal industry standards" -- do you see that?
A. Yes.
Q. You did not study other coal company incentive plans, did you?
A. Well, I happen to know that within the coal industry, the annual incentive plans tend to be what I'll call deep, or they reach deep into the organization. I didn't do a formal study.
Q. You testified during direct about the benchmarking analysis that you performed in connection with the CERP and the AIP. And you testified that you could only perform benchmarking for approximately half of the employees eligible for the AIP, correct?
A. When I was using the Towers and Mercer data only, yes.
Q. And you concluded that Patriot's total pay to its employees was, on average, below market, correct?
A. Correct.
Q. And your average included only those you could benchmark, correct -- about half?
A. Correct.
Q. And you just assumed that the others for whom you couldn't benchmark wouldn't affect that average?
A. Correct.
Q. The benchmarking that you did for the CERP -- the data

that you used -- that was not controlled by geography, correct?
A. Correct. I so testified.
Q. It was not controlled for cost of living, correct?
A. Correct.
Q. And you testified about the cost of living in St. Louis, but that's not the only place where the AIP and CERP participants reside or work, correct?
A. Correct.
Q. The benchmarking data that you used is also not controlled to account for a particular employees' level of responsibility or the size of the company, correct?
A. Not true. As I testified, we used data from companies whose revenue range -- depending on which survey -- 1 to 3 billion or 1 to 2.5 billion, is similar to Patriot's projected 2013 revenue. So yes, it does take into account size.
Q. And they include companies that are larger and smaller than Patriot, correct?
A. Correct.
Q. None of the companies in the Towers Watson or Mercer surveys were in bankruptcy like Patriot when they reported the data for the survey, correct?
A. That's true. Those companies' data is generally thrown out.
Q. And you also used coal industry survey information, you testified, correct?

A. Correct.
Q. And you don't know whether those coal companies were limited to the eastern basin, do you?
A. I do know.
Q. I'm sorry?
A. I do know.
Q. During your deposition, you testified you did not, and you know now?
A. Yes, I know now.
Q. At the time you used the data, you didn't know that, did you?
A. Yes, that's true. I did not know that.
MS. HILLYER: If I may confer, Your Honor, for a moment?
THE COURT: You may.
MS. HILLYER: No further questions at this time, Your Honor. Thank you.
THE COURT: All right. Thank you.
Is there any brief redirect for this witness?
MR. RUSSANO: Very brief.
REDIRECT EXAMINATION
BY MR. RUSSANO:
Q. Mr. Bubnovich, you made recommendations with respect to the CERP regarding the ranges -- the appropriate ranges, is that right -- incentive ranges?

A. Yes, I did.

Q. Sorry?

A. Yes, I did.

Q. And it was up to management to decide whether or not to follow your recommendations to the -- down to the specific exact point of your recommendation, is that right?

A. That's right. And I think I've testified to that effect a couple of times already, but yes.

Q. And in this particular instance with respect to the CERP, did management follow your recommendation exactly with respect to the ranges and the CERP?

A. No.

Q. Is it typical and necessary to conduct an attrition study in order to perform a benchmarking analysis and provide consulting services?

A. No.

Q. Is it typical to challenge management's selection of participants for inclusion in a retention program?

A. By me as the consultant?

Q. Correct. Is that typical?

A. No.

Q. Would it be typical for you, as the consultant, to assess whether or not management's targets for a particular metrics and incentive plan are aggressive enough?

A. No. That's based on, in many cases, confidential

information that I, of course, would have no access to.
Q. In your opinion, are the employment opportunities of the participants in the AIP -- are they limited to the coal industry?
A. My opinion, as I believe I've testified, is no.
Q. Thank you very much. No further.
THE COURT: All right. Thank you.
MR. PERILLO: Just one, very briefly, Your Honor?
THE COURT: Briefly.
RECROSS-EXAMINATION
BY MR. PERILLO:
Q. Okay. Mr. Bubnovich, I think in -- just to summarize a colloquy we had in our deposition, briefly, you told me that management shouldn't be "a slave to the data"?
A. Oh, yeah, I --
Q. It's a favorite -- favorite phrase of yours, isn't it?
A. -- that is true.
Q. And when I asked you -- so they could choose anything inside the parameters, you told me, or outside"?
A. That's true.
Q. Thank you.
THE COURT: Anything else?
MR. PERILLO: No further for the witness.
MR. RUSSANO: Your Honor, that's our final witness.
THE COURT: All right. You may step down. Thank you,

Mr. Bubnovich.

All right. Then are we ready to proceed with a brief closing statement?

MR. RUSSANO: I think the -- do you have a witness? I think the objectors have a single witness.

THE COURT: All right. Let me take a five-minute recess, and then we'll pick up with that witness.

MR. RUSSANO: Okay.

THE COURT: We'll be in recess for five minutes.

MR. RUSSANO: Thank you.

THE COURT: Don't go far.

(Recess from 4:53 p.m. until 5:05 p.m.)

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

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

All right, then, Mr. Perillo or Ms. Hillyer, do you all have a witness this afternoon?

MS. HILLYER: Yes, Your Honor. We'd like to call David Juza. And just so Your Honor is aware, his testimony will be a counterpart to Mr. Bubnovich's testimony.

THE COURT: All right. All right, then, Mr. Juza, will you step up to the podium first, please, to be sworn?

(Witness sworn)

THE CLERK: Please have a seat in the witness box, sir. There is a step up.

MR. KAMINETZKY: Your Honor, Benjamin Kaminetzky with

Davis Polk for the debtors. Just one note -- we're going to be challenging whether Mr. Juza can be an expert in this matter. We don't think he's qualified at all. I don't know if you want me to do that voir dire first or wait until Ms. Hillyer tries to qualify him, and then I should do it at that time. Whatever your preference is.

THE COURT: Well, probably I want to hear what Ms. Hillyer has to say first --

MR. KAMINETZKY: That's fine.

THE COURT: -- and then we'll -- all right.

MS. HILLYER: Thank you, Your Honor.

THE COURT: Thank you.

VOIR DIRE EXAMINATION

BY MS. HILLYER:

Q. Would you please state your full name for the record?

A. David Juza.

Q. Mr. Juza, where are you presently employed?

A. With Navigant Consulting.

Q. And how long have you been with Navigant?

A. Since September of 2012.

Q. What is your job title at Navigant?

A. Director of human capital management.

Q. And what are your duties as director of human capital management?

A. I work closely with the business leaders to understand

their business objectives and then craft human capital workforce and compensation-related strategies to support achievement of those objectives.
Q. Do you deal with anything related to talent acquisition or retention there?
A. On a constant basis. The primary business of Navigant is providing human capital talent in support of consulting engagements.
Q. And where did you work before you started at Navigant?
A. For Sevatec Incorporated.
Q. And what clientele does Sevatec serve?
A. Sevatec's primarily a federal consulting company.
Q. During what period were you with Sevatec?
A. I started in December of 2010, and my employment ended in September of 2012.
Q. And what was your job title there?
A. Director of consulting services for human capital management.
Q. And what were your responsibilities in that role?
A. I worked very closely with a variety of federal clients on their human capital-related initiatives associated with talent acquisition, talent retention, how they would ultimately develop their work force members, and, subsequently, incentivize them to achieve the business objectives for those federal agencies.

Q. Where did you work before Sevatec?
A. Interactive Technologies Group.
Q. And how long were you there?
A. For approximately two and a half years, ending in November of 2010.
Q. And what was your most recent role when you left Interactive Technologies Group?
A. Director of human capital consulting services.
Q. And were you promoted to that role?
A. Yes.
Q. What was the role you had before that?
A. Prior to that, I was the senior subject matter expert in human capital management.
Q. What does it mean to be a senior subject matter expert in human capital management?
A. I was specifically hired by the company to support the Department of Defense with many of their human capital-related concerns and issues. I was identified on the contract as a key -- key member by virtue of my background and expertise in human capital management.
Q. And what were your responsibilities as senior subject matter expert in human capital management?
A. The client was the Department of Defense, and primarily, that entity -- the entity that I worked with -- was focused on the defense acquisition workforce, which is about a 140,000-

member community. In working with the senior executives at the Department of Defense, I looked at that population in terms of their ability to attract and retain talent, their ability to compensate, and subsequently, retain that workforce over time. I helped to identify different incentives that would encourage those workforce members to achieve the business objectives for the agencies across the department.

Q. And what were your responsibilities as director of human capital management at Interactive Technologies Group?

A. Very similar, except that I worked with a broader -- I guess a broader swath of clients. In addition to the Department of Defense itself, I also worked with the Defense Acquisition University, the Defense Media Activity, and one or two small private clients.

Q. And where did you work before Interactive Technologies Group?

A. I was with Accenture for approximately eight years.

Q. And what period were you there?

A. I started in May of 1998 and concluded my employment in February of 2006.

Q. And between Accenture and Interactive Technologies Group, where did you work?

A. My apologies. I was with Lockheed Martin for approximately one year, and prior to that, a company that was acquired by Lockheed Martin, Management Systems Designers.

Q. And what was your title at Lockheed Martin?
A. Director of human resources.
Q. And what were your responsibilities as director of human resources?
A. I oversaw the workforce in terms of how they were hired, retained, compensated for the company.
Q. And did any of your work for Lockheed Martin focus on any business divisions or entities that were shutting down or distressed?
A. It did. In fact, the acquisition that Lockheed Martin executed of the company that I worked for resulted in the elimination of a variety of management positions.
Q. And you mentioned that before Lockheed Martin, you were at Accenture, correct?
A. Yes.
Q. Okay. And what were your responsibilities at Accenture?
A. Over time, they changed. I started as a generalist from a human resources perspective, so focused on workforce-related support activities, helping to attract and subsequently retain talent for the organization. Over the course of my eight years, the role changed from my transactional one, primarily early in my career, to a more strategic one, helping to work with the executives to understand the business objectives of the company and also our clients and then position the workforce subsequently to achieve those objectives.

Q. And where did you work before Accenture?
A. With Express Human Resources.
Q. During what period were you there?
A. For approximately two years, from May of 1996 through May of 1998.
Q. And what were your titles there?
A. I started as a -- just a staff member doing recruiting-related work and talent identification and attraction for the company. The second half of my tenure with the company, I was an office manager overseeing the consulting to -- to private-sector businesses, specifically on their talent acquisition and retention strategies.
Q. And what were your responsibilities, in general, at Express Human Resources?
A. Again, really, in the consulting space focused on helping those clients achieve their business objectives.
Q. And in the course of your roughly sixteen-year career, it sounds like you've been a consultant to external companies and you've been in-house as an HR employee. What portion of your career have you done one versus the other?
A. It's about fifty-fifty, actually.
Q. And what is the difference, in terms of your role and responsibilities, between being a consultant and being an in-house HR employee?
A. I think in many respects they're similar. The -- the

opportunity to work internally gives me a chance to see recommendations in action up close, understand the risks inherent in different strategies that might be employed from a retention or performance-incentivizing perspective. As an external consultant, oftentimes you're turning over those recommendations to internal staff members for execution.

Q. And do you believe that your role as an in-house HR employee has helped you in any way to be a consultant?

A. Yes. It makes my recommendations, I think, significantly more realistic, puts me in a position to be able to understand the implications of the things that I'm suggesting, and also understand the risks inherent in those suggestions.

Q. And you've testified that you've done some work for public sector companies and some work in the private sector. Are there any differences between working for either of those?

A. There are certainly some differences. But in general, those companies are trying to attract and retain people from the same pool out there in employment land. So while the federal sector might be somewhat more prescriptive about what you can do in terms of either compensating or retaining individuals than the private sector, for the most part, the objectives are the same. You're still trying to keep people in jobs. You're still trying to attract them into your organization or incentivize them to achieve the business objectives that organization has established.

Q. Do you have experience performing compensation benchmarking?
A. Yes.
Q. What are your roles in carrying out compensation benchmarking?
A. It would really involve research from -- from every perspective of employment. So it would start with understanding the nature of the positions that are to be benchmarked and how those compare to the broader marketplace, be that either locally or nationally, depending on the nature of the company in question.
Q. Do you have experience preparing employee-retention plans?
A. Yes.
Q. And what are your responsibilities in preparing such a plan?
A. Well, first of all, it's to understand what the business objectives are for that organization, relative to retaining its talent. From there, it's making determinations about what ultimately will be successful in retaining the talent necessary to achieve those business objectives.
Q. Do you have experience preparing employee-incentive plans?
A. Yes.
Q. And what are your responsibilities in preparing those plans?
A. Very similar. The objective, again, is to understand the

business targets for that particular business, and design a program that elicits the type of behavior in the employees that support those business objectives.

Q. What is your educational background?

A. The bachelor of science degree in psychology.

Q. You testified earlier about your experience working with distressed companies. Have you ever worked with a company in bankruptcy?

A. I have not.

Q. Do you believe that your human capital experience is applicable in the bankruptcy context?

A. I think behavioral performance by a workforce is not specific to the type of reason that the company is going through change or the workforce itself is going through change. People's behavior is tied to the risk associated with the job that they're in or the business that they're in.

MS. HILLYER: Your Honor, the funds offer Mr. Juza as an expert on the subjects of human capital, compensation principles, talent acquisition, and talent retention.

THE COURT: All right.

Mr. Kaminetzky?

MR. KAMINETZKY: Your Honor, as previously noted, the debtors object. And if you will, I just have a few voir dire questions which I think could easily show the nature of our objection and why we believe Mr. Juza -- while a perfectly nice, honest, good, smart fellow -- is not appropriate for expert testimony in this case.

VOIR DIRE EXAMINATION

BY MR. KAMINETZKY:

Q. Mr. Juza, my name is Ben Kaminetzky of Davis Polk. I represent the debtors. I just have a few questions for you about your qualifications to serve as an expert in this case.

Is your job at Navigant to consult with companies in Chapter 11 regarding compensation issues?

A. It is not.

Q. Okay. So you're not employed at Navigant as a consultant, are you?

A. Correct.

Q. You're in the -- you're an internal human resources employee, isn't that correct?

A. Yes.

Q. And Navigant doesn't hold you out in its Web site or its marketing materials as a professional. Is that correct?

A. True.

Q. What percentage of your time at Navigant is devoted to compensation benchmarking?

A. Not really any.

Q. So you don't do compensation benchmarking at Navigant. But does your work at Navigant involve helping to design employee incentive and retention programs?

A. I participate from an execution perspective, not in the design.
Q. How about the designing? Have you ever designed for Navigant a retention or incentive program?
A. No.
Q. Have you published articles on incentive or retention compensation?
A. No.
Q. Do you have any graduate degrees?
A. I do not.
Q. And you've mentioned that your one undergraduate degree is in psychology. Is that correct?
A. Yes.
Q. Do you have any other degrees whatsoever?
A. I do not.
Q. And how much experience do you have working on compensation issues in the coal industry?
A. The coal industry specifically?
Q. Yes.
A. None.
Q. How many incentive plans have you helped develop for companies in Chapter 11?
A. In Chapter 11?
Q. Yes.
A. None.

Q. And how many retention plans have you helped develop for companies in Chapter 11?
A. Again, in Chapter 11, none.
Q. Okay. Before this case, how many times have you been hired by either a debtor, a creditors' committee, a bank lender, a creditor, a union, or any other party-in-interest to give advice or testimony with respect to a Chapter 11 retention or incentive plan?
A. I have not.
Q. You've never had, have you?
A. No, sir.
Q. This is your first time.
A. Yes.
Q. Have you ever performed an analysis of how one Chapter 11 incentive or retention plan compares to another Chapter 11 incentive or retention plan?
A. Prior to looking at the circumstances of this --
Q. Yes. Prior to this engagement.
A. I have not.
Q. You've never done that before.
A. Correct.
Q. How many times have you submitted an expert report to a court?
A. To a court I have not.
Q. How many times has a court certified you as an expert?

A. It has not.
Q. Has an authoritative organization of any kind recognized you as an expert?
A. Again, as I stated earlier, I've been identified as a key staff member on federal contracts in the human capital management space, which would have included compensation and/or retention programs.
Q. Was your deposition taken last week?
A. Yes.
Q. Were you under oath at the time?
A. Yes, sir.
Q. Did you truthfully testify?
A. I believe so.
Q. We asked you the question is there an authoritative organization that has certified you as an expert. You answered no. Was that correct? You want me to show you that testimony?
A. No, I believe you, sir.
Q. Okay. Was that honest testimony?
A. It is.
Q. Did you make any effort, in connection with the preparation of your declaration, to identify authors who are authorities in Chapter 11 incentive programs?
A. I think in my testimony last week I -- I indicated that I researched authors that provided information, but not specifically Chapter 11s, no.

Q. So, in other words, you didn't attempt to identify any literature specifically related to Chapter 11 incentive programs. Is that correct?
A. Well, again, in -- in the materials that we provided there's people who commented on Chapter 11s, but --
Q. Okay. Do you want to, again, in your deposition last week a question was asked:
"Q. Did you make any effort, in connection with the preparation of your declaration, to identify authors who are authorities in the area of Chapter 11 incentive programs?
"A. I did not."
Was that truthful testimony?
A. Yes, sir.
Q. Did you make any effort to identify, in connection with the preparation of your declaration, authorities in the area of Chapter 11 retention programs?
A. No, sir.
Q. And you testified under oath last week that you are not an expert on Chapter 11 retention and incentive plans, correct?
A. Yes, sir.
Q. That was your testimony, that you're not an expert on Chapter 11 retention and incentive plans, correct?
A. Yes, sir.
MR. KAMINETZKY: Your Honor, based on this, the debtors move to strike the declaration David Juza and to

preclude him from offering any expert testimony or opinions. Under Federal Rule of Evidence 702, made applicable by Bankruptcy Rule 9017, Mr. Juza is not qualified as an expert. Under the plain terms of 702, expert testimony is only appropriate and admissible if the expert witness is qualified as an expert by knowledge, skill, experience, training or education.

And the Supreme Court has spoken on this issue and has said that a Court should only admit expert testimony if it would help the Court understand the evidence or determine a fact in issue. Mr. Juza lacks any expertise that will help the Court's evaluation of the debtors' proposed compensation plan.

As you just heard, this is about the debtors' proposed Chapter 11 incentive and retention plans, areas where Mr. Juza, quite honestly and quite frankly, just testified that he has no knowledge, skill, or experience, training, or education. He admitted he's not an expert in the design of compensation programs for companies in bankruptcy. He never analyzed retention plans or incentive plans of companies in bankruptcy. He has no experience whatsoever in designing compensation programs for companies in bankruptcy. He has never before worked on any case related to a company in bankruptcy.

He has never performed any work related to the coal industry. He's not published in the area of incentive or retention compensation. He has no degree that would make him an expert in retention and compensation issues in Chapter 11. He has no relevant educational background. And quite frankly, as he's testified to last week, he made no effort to even educate himself about the relevant issues. He testified, both today and last week, that he didn't even make an effort to identify authorities on Chapter 11 incentive and retention plans.

Now, Mr. Juza seems like a wonderful guy. He's a great internal HR person. If he wants to get into this business, I wish him luck. But the first time you're asked to do something, Your Honor, it's not to be an expert witness in a litigation. It's like saying that I'm going to take up skiing, and I'm going to all of a sudden be an instructor. That's not the way it works.

For the reasons, Mr. -- for these reasons, Mr. Juza is not qualified. His opinions are not reliable. And his testimony would be of no assistance to the Court. If there was ever a case that called for a Court to invoke its "gatekeeper function", in the words of the Supreme Court, this would be it. And I understand there's no jury here, and it's just a bench trial, but I think in this case, given the witness' utter lack of knowledge in the relevant areas, I don't think it's appropriate for this testimony to go any further.

Thank you.

THE COURT: Ms. Hillyer?

MS. HILLYER: Thank you, Your Honor. In brief, Mr. Juza has significant knowledge and experience that qualifies him as an expert in the field of human capital management. He has over sixteen years of applicable human resources experience consulting for both internal and external clients. He regularly advises companies on matters related to compensation and talent acquisition and retention, as well as organizational and performance improvement.

He has significant experience benchmarking salaries and preparing and reviewing incentive and retention plans. He is very knowledgeable about the considerations for those projects as well as the various methodologies and approaches to them.

His testimony and opinions go directly to the heart of whether the proposed AIP and CERP were diligently researched and are necessary or appropriate at this time in the debtors' case. The Court should qualify Mr. Juza as an expert and treat his testimony accordingly. And further, should the Court take any issue with Mr. Juza's credentials, such concern should not be the basis to exclude his testimony altogether but should go to the weight this Court should accord his testimony.

Thank you, Your Honor.

THE COURT: Ms. Hillyer, I'm a little concerned about the witness' experience with, I guess, the creation of the compensation programs. Whether in or outside of bankruptcy, it appears as though his experience is somewhat limited more towards, as he indicated, I believe, in his questions by Mr. Kaminetzky, about more actually executing but not the actual design of the program, and that seems to be more the question that we have here is the design: Is this the appropriate kind of program that is going to meet the goals that the debtor has indicated? So I would be inclined to grant the request and not qualify Mr. Juza as an expert.

MS. HILLYER: Thank you, Your Honor.

THE COURT: Thank you.

THE WITNESS: Am I excused?

THE COURT: Yes, you are. Thank you.

MR. KAMINETZKY: Your Honor, I guess that brings us to brief closing remarks, if that makes sense to the Court. Would it make sense for the Court now to hear if there's other constituencies other than the debtor and the objectors that want to make some statements to the Court in support or whatever? Could we do that now, and then we'll conclude with the objectors and the debtor?

THE COURT: Yes. That's certainly fine. If there are other parties here that wish to be heard briefly in support of the motion?

MR. WILLARD: Your Honor, may it please the Court, Greg Willard on behalf of the official unsecured creditors' committee. My co-counsel, Tom Mayer, has been the person on our team directly involved with these discussions, and I think it would be most appropriate if he shared some observations with Your Honor from the committee's standpoint, so I'll cede the podium to Mr. Mayer.

THE COURT: All right. Mr. Mayer?

MR. MAYER: Thank you, Your Honor. Again, for the record, my name is Thomas Moers Mayer of the law firm of Kramer Levin Naftalis & Frankel LLP, as counsel with Carmody MacDonald to the official committee of unsecured creditors.

Your Honor, the committee supports the debtors' motion for approval of these management compensation plans, and we didn't start out that way. We started out as skeptics, as our papers indicated. In our own manner, we tried to analyze these programs the way that we think the Court should analyze them today, and the first time we looked at them we said no.

The debtors came and they presented to us, and the committee deliberated, and they sent me back to tell the debtors no way. Start over. But the debtors kept working, and we kept commenting, and they kept making changes, and we support the plans today, because they got to where we think they make sense. Their cost has been cut by forty-four percent.

Very important to us, the management compensation plans were delinked from retiree sacrifices on medical benefits, which -- this is further explained in our papers, I won't take more time; the hour is late -- but that was important. We wanted to make sure that if retiree medical benefits were cut, that cut wouldn't boost management's compensation, and that goal has been achieved. These plans are delinked from the sacrifices that retirees may be called upon to make.

And we extended the time that managers had to stay in order to get the biggest piece of their payment under the retention plans, so we think we got a lot in these negotiations, and we got the plans to where we could support them. And we didn't just rely on the debtors' business judgment. We made our own judgment.

You've heard testimony today. It's not seriously contested that the debtors need managers to run the debtors. Mines don't run themselves. Computer systems don't run themselves. Sales don't get made without sales managers. Vendors don't ship. Service companies don't provide service without managers to make sure payables get paid. The accounting department can't keep the books that we need to keep the DIP lenders happy and to get out of Chapter 11. And managers will not stay around if they don't get paid.

Now, I'm a great admirer of Section 503(c), and I think Congress put it there for a reason, to make sure that the insiders who brought us this bankruptcy don't profit from the bankruptcy. But none of the managers here fit that description. First, the top executives aren't in the program. The men and women who weren't in the program were doing their jobs and got caught up in this Chapter 11.

Second, they're in no sense profiting from the bankruptcy. You've already heard testimony. The total compensation for the management has, in fact, gone down.

But the third, with respect to the incentive targets -- Mr. Perillo referred to them as "gimmes" -- we think the debtors are right about this. The committee's economic professionals spent a lot of time looking at those targets, and you heard the testimony. The debtors are on pace to miss at least one of their targets, and if things continue as they were in February, they're on pace to miss another one.

I won't speak to safety, because that's not something that the committee looked at, but these do not look to us to be easy targets to make. We, frankly, will be thrilled if the debtors get their EBITDA up to the point of the targets in the DIP loan agreement.

We understand the position of the union and the pension plan. To union members facing the prospect of lower wages and eliminated benefits, 6.9 million looks like a lot of money, and the payments promised to individual managers look like a lot of money. But in the context of this case, spending 6.9 million as a percentage of total revenues, as a percentage of the claims in the case, as a percentage of just about any other metric in terms of case significance, it's not an enormous amount of money. And we thought that there was a substantial risk of damage to the company if management attrition continued to happen.

So that's why we ended up supporting this. And Your Honor, I want you to think about who's not present in court today, because you've heard objections from the union and the union pension plan. And as I've said, we understand their position. But there are thousands of creditors who aren't in court today. There are thousands of nonunion employees. There are thousands of trade creditors and bondholders. There are lots of creditors, and the committee represents them as well, and that's why we're here supporting the debtors' compensation programs. We think they make sense. We reached our own judgment as to whether or not they made sense, and we hope and ask that this Court reach the same judgment.

And unless the Court has questions I have nothing further.

THE COURT: I don't. Thank you.

MR. WILLARD: Okay.

THE COURT: All right. Are there any other parties that wish to be heard in support of the motion?

MS. ALFONSO: Very briefly, Your Honor. Ana Alfonso for Bank of America, which is the second out DIP agent. We filed a statement of support for the plan. And I don't want to repeat anything that's been said; it's late in the day. But we join with the debtors and the committee in asking that the plan be approved as soon as possible so that it can be implemented and announced to the personnel as soon as possible.

Thank you.

THE COURT: All right. Thank you. Are there other parties that wish to be heard in support of the motion? All right. And on the telephone, was there anyone who wished to say anything in support of the motion? Hearing none. All right.

And are there any parties in the courtroom that wish to be heard in opposition to the motion, other than the union and the union funds? All right.

Then hearing none, Mr. Kaminetzky, then, would you like to proceed at this time?

MR. KAMINETZKY: Yes. Yes, Your Honor. Very briefly. I just have a couple of remarks, and then I've asked Mr. Walsh from Bryan Cave to give the brief closing. I just wanted to note five, again, very brief bullet points, I think there are, and if there are six, you'll forgive me.

One way to gauge who wins and who loses is to see who keeps their promises from the opening statements. And I wrote down very carefully the main points that Mr. Perillo made in his opening statement. The first thing he said, and I don't have a transcript so I apologize if I'm paraphrasing, is that there's something, quote, "unseemly" about the efforts to insulate management from sacrifice. I think you heard the testimony of Mr. Hatfield, summarized in slides 5 and 6 of his presentation, that sacrifice is exactly what management has done, and continues to do, and will continue to do even if every one of these dollars are earned under these very modest programs. And quite frankly, it doesn't look like every dollar's going to be earned, given where we are with a number of the metrics.

Mr. Perillo then kept on talking about necessary and equitable: Are these programs necessary and are they equitable? The problem is that that's not what we're talking about, here. I understand that that's the standard for, perhaps, 1113 and 1114, but this litigation is not about 1113 and 1114. Here, as we'll talk about in a second, the standard is very clear. It's 503(c)(3), business judgment.

And, quite frankly, Your Honor, if the union truly believed that this very modest program was unfair and inequitable, they would be sending the debtors flowers instead of objecting to this motion, because that would make their 1113, 1114 litigation a lot easier. If this program, in fact, lines the pockets of managers at the expense of the union, they get to win their 1113 and 1114, and this little retention plan, they wouldn't be here objecting. They'd be here jumping up and down in excitement, because we've just given them a huge bullet in their 1113 gun.

We've also heard -- Mr. Perillo then talked about insiders. Well, unfortunately for them, this is a very well tread area of law. We spent a lot of time in both our initial brief and our reply going through almost every case that has considered what is an insider and what is not. And what the cases consistently say is you don't look at the title; you look at their function. As we saw in slide number 1, which attempts to summarize that case law, of Mr. Hatfield's testimony, that simply the shoe doesn't fit with respect to the participants in the plan. They're not insiders under the law.

Next, Mr. Perillo said well, these are gimmes. These aren't really -- this incentive program is a ruse, it's a farce, because these hurdles, these metrics are nothing more than a bunch of gimmes. Well, I think Mr. Hatfield testified that that's absurd, and I think, quite frankly, he was being kind. How could something be a layup if you're missing it as we speak, and we're missing it by a lot with respect to some metrics. And, as you heard Mr. Hatfield say, with respect to the other financial metrics, liquidity, if we continue on the current course, we're going to be missing that as well.

Mr. Perillo then talked about the lack of diligence and said that Your Honor's going to be surprised by the lack of diligence. Well, as you heard the testimony, since Thanksgiving we've been meeting with the unsecured creditors' committee. I would say that they're the body that has the most at stake, as fiduciaries for the creditors, with respect to letting dollars leave the door that aren't absolutely necessary.

As you heard the testimony, we met with the committee and its professionals repeatedly since November in trying to get them on board with these plans; as you just heard from Mr. Mayer, we've gotten them there.

In addition, we met with the DIP lenders and the U.S. Trustee, and we made the suggestions -- and we met the suggestions and demands of those constituencies. And that's in addition to the consultation that the debtors did with Towers Perrin, Mr. Bubnovich, and Blackstone.

Next, Mr. Perillo called these plans enormous. Well, nope. They're, as Mr. Mayer said, under any measure whatsoever, they're teeny. We're talking about one-half less than one-half of one percent of revenue.

A judge I know once said to me that this job would be a lot harder if it wasn't for the burden of proof. And the issue here, again, is business judgment. And under the Eighth Circuit that means the Court should approve it if it's, quote, "not manifestly unreasonable or made in bad faith and appears to enhance the debtor's estate". I think it's pretty clear that that is not the case, and therefore it comports with the business judgment.

And one more word, Your Honor. We heard -- and I want to be very sensitive to this, but I think it's extraordinarily important, because this has come up a couple of times in this case already. The debtors are going to fulfill their fiduciary duty. They're not going to respond to threats. Period. They're not going to respond to threats in court, and they're not going to respond to threats at the bargaining table. Threats about shutting down the company, Your Honor, if you do this we'll do that, is not the way that this debtor can function under its duties as a fiduciary to all constituencies, and, quite frankly, of course it's not the way judges decide cases, with a gun to their head. And that's not how we're going to work here, and that's not how we're going to work in the future.

We are embracing our duty to meet and to try to hash out an agreement with the union. We expect there to be agreement. We hope there'll be an agreement. But the agreement's going to become, as all agreements come, with people meeting at the negotiating table and trying to hash out their differences in good faith.

Before I turn it over to Mr. Walsh, I just want to make a statement that the committee asked us to make. The debtors have agreed to give the committee five days notice of any payment under the financial metric of the AIP as well as the calculation for determining the EBITDAP and liquidity numbers. We have agreed to work with the committee in good faith to address any question they may have.

Mr. Walsh?

MR. WALSH: Your Honor, Brian Walsh, again, for the record, on behalf of the debtors. Your Honor, I have an eye on the clock, and so I will keep this brief; some things are in my notes that I'm going to skip over or short-circuit.

I want to talk about three things. First is what this hearing is not about. It's not about providing bonuses to management. You'll hear the term bonus, I think, frequently, from those who speak next. Senior management is not participating at all, as the Court has heard. Those who are participating in these proposed programs had their compensation reduced. You saw the bar chart earlier. I'm not going to put it up on the ELMO again and take time to do that. The question here is whether those who are participating in this plan will have an opportunity to earn back a portion of what they have lost because of this bankruptcy case if they continue to work hard and if the debtors achieve the particular goals in the AIP program.

This motion is not about providing retention payments to insiders. Mr. Kaminetzky covered that. I will move on.

This motion is not about disguising retention payments as incentive payments. The targets will not be easy to meet. The testimony is uncontradicted on that point. Choose your metaphor, Your Honor; it's not a layup, it's not a gimme, it's not a cakewalk, it's not a milk run -- which I think is a metaphor, but I should have looked it up before I said it, frankly, Your Honor.

No one is getting an incentive payment in this case just for hanging around or just for being in the right place at the right time. It's not that easy. And this hearing is definitely not about whether collective bargaining agreements should be rejected or retiree benefits should be modified. That's coming soon, but that's not today, and the fair and equitable language used by the objectors in their pleadings is for another time, as well.

The second point, Your Honor, is the deferential nature of the business judgment standard, which is the governing test here. Management is in the best position by far to determine what is likely to work for the debtors in their business. The Food Barn test, which Mr. Kaminetzky covered, emphasizes this. Is the debtors' request manifestly unreasonable? I submit that it's not. Is it made in bad faith? I submit that it's not. Does it appear to enhance the debtors' estate? I submit that it does appear to do that, Your Honor.

Now, the objecting parties disagree with the debtors' judgment. They say, in effect, that it would be better to do this differently, structure these plans differently. Maybe not have plans at all. But that's a long way from the showing that's necessary to defeat a motion that's governed by the business judgment rule.

At most, viewing things very charitably, Your Honor, we have a situation in which reasonable people would disagree about what precisely is best for the debtors, and that's no justification for denying a motion governed by business judgment.

And most important of all, the creditors' committee supports the motion for the reasons that Mr. Mayer has outlined. If the debtors have misjudged the circumstances here, if this money does not accomplish what it's intended to accomplish, the creditors will bear the loss here. They have concluded, they've weighed the alternatives and concluded that this is the better way to go. And as you consider whether the debtors' request is manifestly unreasonable, the support of the unsecured creditors fiduciary is a critically important fact.

And the third issue is timing, Your Honor. The motion includes a request for a waiver of the fourteen-day stay of Rule 6004(h), and the reason is simple; the debtors need to get on with their reorganization. Management needs to focus on mining coal, selling coal, rationalizing liabilities, formulating a plan, and emerging from bankruptcy. Mr. Hatfield and his management team need to stop worrying about who's going to be around to execute from the business plan and, instead, execute from the business plan.

As a result of the emergency motion for a continuance we've had twenty additional days built into this process. Your Honor, at our last omnibus hearing, David Sosne requested that Your Honor enter an order promptly on a particular motion that was uncontested, and he characterized that request as impertinent. I don't know that it was really impertinent; his client was facing a statutory deadline, and he had a good reason to make that request. But, just to be safe, I'll ask Your Honor to excuse me if I am impertinent in requesting a prompt ruling on this motion, including a waiver of that fourteen-day stay, so the debtors can implement their plans and inform their employees what to expect.

As I mentioned, debtors need to get down to business. Get down to business, and the employees need to be focused on the business as well. And Mr. Hatfield's uncontradicted testimony was that his belief is that a delay in approval of the motion means that there is a substantial risk that the reorganization will fail.

For these reasons, Your Honor, we respectfully request that the motion, as modified, to remove seven participants, or now six participants from their retention program, be granted.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Walsh. Mr. Perillo or Ms. Hillyer?

MR. PERILLO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. PERILLO: I agree with Mr. Kaminetzky about one thing. Both of us promised you wine; let's see who brought lemon juice.

Mr. Kaminetzky says that the business judgment standard applies. Well, it does if you assume the conclusion, but the burden of proof is on the debtor, not on the objector, to show who is an insider, who is not an insider. As you sit here, you have zero evidence as to what the job duties of any plan participant are -- zero evidence, other than what I elicited from Mr. Hatfield on cross. You don't even have a one-sentence job description for the people in the program.

The debtor asks you to believe something that's breathtaking in its audacity, that a mining company -- with 19 mines, 11 complexes, 4,000 employees -- is run by just 6 people. Just six. And that nobody else -- nobody else -- is a "person in control of the debtor", even though the debtor has given them titles, lofty titles. And I asked Mr. Hatfield, with respect to the general managers and the regional VPs, were those just morale boosters, fake titles to make them feel good about themselves, or did they reflect their real duties. And he said they reflected their real duties.

What do they do? Well, they have authority to spend up to a million dollars, small change like that. I realize that there has been a kind of conspiracy today to tell you that millions of dollars are small sums of money. And maybe at JPMorgan Chase, where they lose six billion in a trade and shake the world financial markets, it is. But here, this is a substantial authority to spend the money, commit the resources of the debtor. It couldn't be otherwise. How else could Mr. Hatfield say these are the people driving the bus? If the people driving the bus are not insiders, than who are?

It is clear beyond, I think, any cavil that general managers, the VPs that we've identified, the chief information officer, the man who is a member of the board of directors, the people who were involved in the design of the compensation program itself, those are insiders, and for that reason this program should not be permitted to go forward as to either the CERP or, as I'll explain in a moment, the AIP. But on this issue, where the debtor has the burden of proof and there isn't a word in the record about what the actual function of any specific employee is, the debtor promised you wine and brought you lemons.

Now, is the AIP a retentive program or is it a true incentive? Let's begin with what it does. Like the retention program, it makes three payments over time. Like the retention program, they're spaced throughout the case. And like the retention program, you can't get them unless you stay put long enough to hit the trigger gate. So it looks like a retention program.

But -- the debtor says -- we have these high and aggressive hurdles. Very high. These are stretch goals. Except that for twenty-five percent of the bonus, no witness has testified that they even know what the personal goals are or that they can be characterized as aggressive. So there's zero testimony in the record on that.

And whose burden of proof is this again? Is it my burden of proof to go out and find the personal goals for these hundreds of people? No. It was the debtors' burden of proof to show you that that was an aggressive goal. And Mr. Hatfield admitted on the stand he can't say that they are. So there's no evidence in the record on that.

Now, as to the other two main metrics there, I characterize them as gimmes, and they are. And I will explain why, and no one can dispute this. These goals are either not going to be achieved at all, or they're going to be achieved totally. It's an either/or proposition, like two sides of a coin. And how do we know this? Well, because if the union employees do not give these concessions, as Mr. Hatfield forthrightly admitted, Patriot is kaput. There won't be payments to anybody. And so sixty percent of that metric is gone, gone, gone.

Did I threaten to strike? I don't think you heard those words from my mouth, Your Honor. I'll tell you why. I don't get a vote on that proposition, and, in fact, with the exception of, perhaps, some of the people sitting in the back of the courtroom today, nobody here gets a vote on that proposition. Nobody at the debtor does; nobody at the committee does. And with all due respect, Your Honor, you don't.

This is a democratic organization. It is a fiercely militant union, and it is democratic right to its core, and it is required by federal law that it be run as a democracy, and it is. When the day comes that Patriot makes its final offer to the employees, they will vote whether to accept it or reject it, and nobody but them -- and I mean nobody but them -- will make that determination.

If they decide to give 150 million dollars to Patriot, there isn't any question, no serious question, that those metrics are going to be achieved just like a threshing machine, and what's literally happening is those employees will be voting to take money out of their own pockets and handing it over to managers.

So, a gimme? You bet it's a gimme. An enormity? You bet it's an enormity. I cannot speak for them. They will decide, when the day comes, whether to make that transfer payment or not, but if they do, there isn't any question the metrics will be met, and if they don't, there's no question that they can't be met.

What the debtor has done is to set up that old bankruptcy two-step. First the managers give themselves bonuses, and then they balance the budget on the backs of the workers, just like I said in the opening. So I did bring you the wine, and the debtor brought you the lemons.

Now, I want to pause for a moment and shed some tears for the sacrifices made by management for that poor administrative assistant who has to set up luncheons with bankers that Mr. Hatfield told us about, for all the people who are losing two and a half percent and getting forty-five percent back. That's sacrifice. No one is offering the people in the back of this courtroom a forty-two and a half percent bonus. Nobody is offering them this kind of sacrifice. The kind of sacrifice they're looking at is called poverty. It means not having even the median income in the United States, the average income in the United States, having something tens of thousands of dollars less than that, losing their pension, losing their healthcare, and for the retirees, looking into the abyss. That is sacrifice. Taking a two and a half percent wage cut and getting an eleven percent wage increase or a forty-five percent wage increase is not sacrifice.

I promised you that there would be a lack of diligence. Well, did you hear anyone -- anyone who testified that they've studied the attrition at this company? Did you hear anyone say that they have checked whether or not other people, these managers, have job opportunities at other companies or are likely to leave or that anybody knows that anybody who actually would have changed their mind if money had been thrown at their feet? No such person testified to that today. This is all pure speculation that there is some type of bankruptcy magic that giving people huge bonuses keeps them around.

Mr. Bubnovich gave away the game. I asked him did you look to see if Patriot's program compares with programs that haven't been approved by courts? No. Nobody's bothered to look at that. Nobody's bothered to look and see what programs have succeeded and what programs have failed and how this program compares to them. I couldn't imagine, Your Honor, what would be less diligence than this?

I could imagine someone bringing a program to the Court that tells the judge oh, here are the job functions of these people and here's why they're not insiders. But that wasn't done. Or bringing to the Court a program that has targets that don't depend on one event in the case, that is whether the 1113 or 1114 motion succeeds. But that's not the case. Or bringing to you a program that was deeply researched, that has examples that show this type of incentive has kept this particular type of employee in place. But that wasn't done.

So once again, Your Honor, I wish I could say that the debtor promised you wine and brought you lemons, but this time they brought you nothing. If this program can be achieved on the statement, nothing more, than that management shouldn't be a slave to the data and that they can pick anything that's either inside the parameters or outside the parameters, which raises the question, Your Honor, why do we have parameters if you don't even have to be inside them? If this program can pass, what program will fail?

There has been practically no proof brought to bear on this question that is relevant to whether or not this program is covered under 503(c)(1) or 503(c)(3). Because there is no proof that these are not insiders -- and they apparently are, they presumptively are, because they are officers or people in control of significant parts of the debtors' operations, virtually all of them -- the standards in 503(c)(1) command that these people can get the bonuses if, and only if, they show up in court with a job offer in hand. That wasn't done. That part of the program must be denied.

With respect to the AIP, I've already addressed that it's obviously a retention program rather than an incentive program. And there is the barest of evidence -- I mean, hardly anything other than just the normal tendency that people will stick around for money -- that suggests that the retention program actually would fulfill its function. But even there, the evidence produced by the debtor is actually significantly contrary to that conclusion. The people who talked to Mr. Hatfield told him there wasn't any amount of money that would have kept them to stay, because they're afraid that Patriot will collapse. What is the justification, then, for taking the money out of my members' pockets and handing it over to people making 340,000 dollars a year or 236,000 dollars a year or some other great sum of money? There is no such justification.

Now, Your Honor, I just have a couple of other things. Mr. Mayer told you something I think you probably already knew, that unless there is a vice president of coal sales probably coal sales will suffer, and unless there are other people in charge of the various functions of Patriot -- yes, right, the debtor has to have employees to do its business. And I have another shocking revelation. Coal doesn't leap out of the ground by itself. It takes miners. Why, alone, amongst the debtors' constituency, is the presumption that miners will bend their knee and suffer, take less, and do the same or more but that everybody else will do nothing unless they get more? This is class warfare on stilts, and the stilts are not very tall.

Now, one last thing, Your Honor. I never said that fairness and equity ought to rule your decision. I said that the program was unfair, and it is. I said that if you do this, you are setting up a catastrophic collision between the workers and management, and that is my guess. But as I said before, they, and only they, know if they will vote whether to withhold their labor from this company, and the future hangs upon that as it does upon a nail.

But at the end of the day, Your Honor, this is the same old wine. Management lines its pockets. It takes the money off the back of the worker. It's the oldest story in mining. It's the reason why these workers have chosen a strong union and have bargained hard and have achieved what they have achieved. Over decades they've taken less money on the check so that they would have more money for pension and health and welfare and for the care of the old and retired miners, who are sick.

These things are now being used as weapons against them. Sheep, Your Honor, sometimes devour men, as Thomas More told us. As if you'll pardon me to mix the metaphor, I will tell you at least once more in this case that the hammer has not yet been made that can break an anvil. As George Orwell reminded us, it is always the reverse, and so the various creditors and others who attended this proceeding today and are currently enjoying the prospect of how these concessions will be hammered out of workers may get a surprise.

Thank you, Your Honor.

THE COURT: Thank you. Ms. Hillyer?

MS. HILLYER: Your Honor, the funds fully support Mr. Perillo's statements, and I have nothing further to add to his closing.

THE COURT: All right. Thank you.

MR. KAMINETZKY: Your Honor, do you have time for three points, or have you completely had it and you're going to shoot me? Here we're in the West and there might be a gun behind you.

THE COURT: No, I promise I won't shoot you. Briefly. You got about --

MR. KAMINETZKY: That's about it.

THE COURT: -- two minutes.

MR. KAMINETZKY: Okay. Just I want to clarify something that Mr. Perillo said that's just factually false. The forecasts at issue with respect to the financial metrics assume 1113 relief will be achieved by April of this year. So it's not like the 1113s would be incremental to the forecast. They're already baked in.

Again, I just want to, kind of, maybe state the obvious. We have two objectors here. How many law firms -- I think there's four law firms on the other side, right? Can't count how many different lawyers have showed up to the various depositions. They couldn't find one witness, not a single expert witness, which I think is a first in the history of any litigation, that would do a benchmarking study that would show that our benchmarking study wasn't one hundred percent correct. They couldn't find any witness to compare our plans to other Chapter 11 plans. Where is their witness? They tried to put someone up that had absolutely no experience in bankruptcy retention and incentive plans, and Your Honor excluded their testimony.

Talking about lemon juice or no lemon juice or whatever soft drink Your Honor wants to indulge, there's nothing there. Where's the beef? They have absolutely no evidence. All our evidence is a hundred percent uncontroverted.

They then start talking about insiders. You heard testimony from Mr. Hatfield that he looked at the criteria set out in the case law and none of these people qualified. Period. That's unrebutted at all.

And, again, I don't think I have to respond to the last ten minutes of Mr. Perillo's argument, which is exactly the closing argument for 1113 and 1114 litigation, which, again, is not for today.

Thank you, Your Honor.

THE COURT: Thank you.

All right. Thank you all for appearing here today. I have been impressed of the urgency of the nature of this matter, and I will take that into consideration, but I'm going to take the matter under submission, and I will rule as quickly as possible.

All right. Is there any other request, then, this afternoon, on behalf of the debtors?

MR. KAMINETZKY: No, Your Honor. Thank you.

THE COURT: All right. Thank you. Any other requests on behalf of the union or the funds?

MR. PERILLO: I have one, Your Honor, but it doesn't relate to today's motion.

THE COURT: Okay.

MR. PERILLO: I understand that we're going to have a conference either tonight or tomorrow.

THE COURT: Not tonight. I can assure you that.

MR. PERILLO: Would you kindly tell us when we should reappear?

THE COURT: The conference, I was under the impression, will be tomorrow at the end of the docket that's set for tomorrow. That was --

MR. PERILLO: I thought the hearing for tomorrow cancelled, however.

UNIDENTIFIED SPEAKER: Yes.

THE COURT: Is everything off the docket? I thought there was something left.

MR. KAMINETZKY: I think at most it'll be a very short docket.

MR. HUEBNER: Yes. Your Honor, let me jump in, if I may, just to help. This is Marshall Huebner of Davis Polk here by remote. There is one emergency motion that was filed by Arch on Friday.

THE COURT: That is correct. Right.

MR. HUEBNER: And I am not quite sure what the current status on that motion is.

THE COURT: Oh.

MR. HUEBNER: I think from the debtors' perspective, the good news, we promised you early on that our MO is to cancel every omnibus hearing we possibly could by settling everything with everyone, and it does look from where we sit this evening that with the possible exception of Arch's emergency motion that arrived rather by surprise on Friday, the matters that the debtors have currently scheduled or continued to tomorrow's hearing have all been resolved, so I think that this probably could be taken up at the open of business tomorrow to allow the various parties to make their exits as to this would be convenient for the Court.

THE COURT: All right. Mr. Huebner, Mr. Hall, who has filed that emergency motion, happens to be here in the courtroom and is at the podium. Mr. Hall?

MR. HALL: Thank you, Judge. Yes. Just to confirm that we have scheduled an emergency hearing for tomorrow at 10 a.m., and, as I understand it, that is set for hearing, and so we intend to present our motion at that time.

THE COURT: That is my understanding. Your motion to expedite the hearing is on, and we'll take that up, and then based on that we'll take up the actual motion.

MR. HALL: Correct. Thank you, Your Honor.

THE COURT: All right.

MR. KAMINETZKY: Okay. Just so it's clear just for everyone here. So we're going to do the docket first and then have the meeting with Your Honor in chambers. Is that correct?

THE COURT: Yes. Yes. Mr. Hall, you don't anticipate that the hearing is going to be lengthy tomorrow?

MR. HALL: No. No. There's --

THE COURT: Okay.

MR. HALL: -- no evidence and --

THE COURT: All right. That's what I assumed; it would be argument.

MR. HALL: Correct.

THE COURT: So, yes. So we'll take up -- then we'll take up the conference at the end. So come at 10 o'clock, Mr. Perillo, tomorrow.

MR. HUEBNER: Thank you, Your Honor.

THE COURT: And shortly thereafter we should be able to discuss the other matters then.

MR. KAMINETZKY: Thank you, Your Honor. That should do it for today, and we appreciate your indulgence.

THE COURT: All right. No problem. Are there any other requests by any other parties present in the courtroom? And are there any requests by any other parties on the phone? All right. Then hearing none, we'll be on recess until tomorrow morning. I have a matter at 9 o'clock before I see you all at 10. Thank you.

(Whereupon these proceedings were concluded at 6:06 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

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PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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Date: March 19, 2013

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

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12−51502 −A659

CHAPTER 11

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

To: All Persons of Record at Hearing

A transcript of the proceeding held on March 18, 2013 was filed on March 19, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: March 26, 2013. Personal data identifiers include: **social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice:April 9, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no Statement of Transcript Redactions is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

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

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: April 19, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: June 17, 2013, unless extended by court order. However, during this 90−day period the transcript is available for viewing only during normal business hours at the Clerk's office.

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

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 3/19/13

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Rev. 12/10