Davis Polk

Elliot Moskowitz

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

212 450 4241 tel
212 701 5241 fax
elliot.moskowitz@davispolk.com

April 1, 2013

Re: In re Patriot Coal Corp. et al., Case No. 12-51502-659 (Jointly Administered)
Response to Motion to Intervene [ECF No. 3444]

The Honorable Kathy A. Surratt-States
United States Bankruptcy Court
for the Eastern District of Missouri
Thomas F. Eagleton US Courthouse
111 S. 10th Street
St. Louis, Missouri 63102

Dear Judge Surratt-States:

Along with Bryan Cave LLP, we represent the Debtors in the above-referenced action. We write in response to the Motion to Intervene by the United Mine Workers of America 1974 Pension Trust and the United Mine Workers of America 1993 Benefit Plan (the "**Funds**") [ECF No. 3444] (the "**Intervention Motion**"), and in response to the various letters that have been submitted to the Court in response to the Debtors' letter dated March 28, 2013.

Lost amid the Funds' lengthy Intervention Motion and the letters is the reality that the parties are largely in agreement as to the role of third parties at the Section 1113 and 1114 hearing that will commence on April 29, 2013 (the "**Hearing**"). All sides agree that third parties should be permitted to submit pleadings to the Court (though the Debtors believe page limits are appropriate given the volume of material that is being presented to the Court by the primary litigants). All sides also agree that third parties may participate in depositions and question witnesses after the Debtors and UMWA. And all sides agree that third parties may appear and be heard at the Hearing to present their views to the Court. Accordingly, the sole issue in dispute is whether third parties, in addition to all of the above, may also introduce their own fact and expert witnesses in addition to the dozen or more fact and expert witnesses that will be presented by the Debtors and the UMWA during the time set aside by the Court for the Hearing. The parties appear to agree that no court has ever permitted this to happen at a Section 1113 or 1114 hearing. The Debtors believe that this Court should not be the first.

The Funds' primary basis for intervention is that they are an important party in these bankruptcy cases and that the Debtors' Section 1113 proposal would have a significant impact on them. See, e.g., Intervention Motion ¶ 31 (the Funds' "pecuniary interests are threatened by Debtors' request for a complete termination of contributions to the Plans"). But if that is the standard for intervention in a Section 1113 or 1114 proceeding, then any number of parties could hijack the

proceedings by introducing their own fact and expert witnesses, because many parties believe they are important and would be affected by the outcome of the Debtors' motion. Indeed, the Court has already heard from several parties that believe they are just as important as the Funds, and should have the same right to present their own fact and expert witnesses. See Letter dated March 29, 2013 from Counsel to the Creditors' Committee (seeking the right to introduce testimony because "[t]he Committee – the principal fiduciary for unsecured creditors – has a profound interest in participating in the hearing"); Letter dated March 29, 2013 from Counsel to Wilmington Trust Company (seeking the right to introduce testimony because "[t]he relief sought by the Debtors . . . would have a significant impact on Wilmington"). As the Seventh Circuit stated in UAL, if "any person with a financial stake in the employer's performance of the collective bargaining agreement" could participate in the hearing, "that would make § 1113 proceedings unmanageable" and "the list would go on and on." In re UAL Corp., 408 F.3d 847, 851 (7th Cir. 2005). Here, where the Debtors have agreed that third parties may participate in the Hearing and oppose only the introduction of extensive third party fact and expert testimony, the Debtors have adopted a balanced view that will allow all important constituencies to "appear and be heard," in full conformity with the Section 1113 and 1114 statutes.

The 1974 Plan (but not the other Funds) also bases the Intervention Motion on the need to advance argument to the Court about the impact of the so-called "Evergreen Clause" and ERISA's imposition of withdrawal liability on a party that withdraws from a multi-employer pension plan. See, e.g., Intervention Motion ¶¶ 3-5, 27-38. But these points are purely legal arguments that can and should be advanced in a pleading and in oral argument, which all parties agree the 1974 Plan should be permitted to do. There is simply no basis to use these technical legal points as a reason to allow all of the Funds to introduce fact and expert testimony at the Hearing, let alone allow other parties to do so. To the extent there is any basic factual groundwork that is needed, the Debtors have committed to work with the 1974 Plan to stipulate to such non-controversial evidence.

The Intervention Motion also makes crystal clear that the Funds will introduce testimony that is duplicative of the presentation to be made by the UMWA. Although the Funds state that they "do not intend" to present duplicative testimony, they concede that their fact and expert witnesses will present evidence on such broad topics as "whether the proposed modifications are necessary to permit reorganization" and "whether the proposed modifications ensure that all affected parties are treated fairly and equally." Intervention Motion ¶ 45 & n.10. Needless to say, these subjects go well beyond the legal points (see above) that are the alleged basis for the Funds' need to intervene.

Finally, the Funds (and to a lesser extent, certain other parties) attempt to argue that the Seventh Circuit's UAL decision is not applicable and was wrongly decided. This argument is misplaced for at least three reasons.

First, the Funds argue that Section 1109(d) provides an independent basis to intervene. However, the Funds provide no support for the proposition that Section 1109(d) applies in the instant context and the cases upon which they rely are inapposite. For example, the Funds cite In re Shelby Motel Group, Inc., 123 B.R. 98 (N.D. Ala. 1990), a case that never mentioned Section 1113, Section 1114, or the concept of "interested parties." Intervention Motion ¶ 34. The issue on appeal was whether an individual creditor – as opposed to a creditors' committee – could prosecute claims on behalf of the estate under Section 1109(b). Id. at 101. The Shelby court held that the creditor could take such action because "the pertinent statute, § 1109(b), has been interpreted broadly to include an implied right to bring adversary proceedings when the

trustee and/or debtor-in-possession fails to do so." Id. at 103. While courts have held that Section 1109 confers a broad right to intervene in bankruptcy proceedings, nothing in Shelby addresses the distinction the UAL court recognized between the broader right of intervention in other bankruptcy proceedings and the more narrow right under Section 1113.

Second, the Funds argue that the phrases "parties in interest" under Section 1109(d) and "interested parties" under Sections 1113(d) and 1114(k) are the same, notwithstanding the Seventh Circuit's conclusion to the contrary. Intervention Motion ¶ 36. In advancing this argument, the Funds rely on In re Sandhurst Sec., Inc., 96 B.R. 451 (Bankr. S.D.N.Y. 1989), a case that does not support the asserted proposition. The controversy in Sandhurst related to a disputed election for a chapter 7 trustee. Id. at 452-53. In Sandhurst, one of the two trustee candidates filed a motion in which he challenged the claim of a creditor, which would cause him to be elected trustee. Id. at 453. The court ruled that a candidate for trustee had no interest in the underlying bankruptcy case, that a reference to "interested parties" in the advisory notes to the Bankruptcy Rules did not expand upon the concept of "parties in interest" under Section 1109(d), and that the movant lacked standing. Id. at 455-57. Again, nothing in Sandhurst indicates that UAL is inapplicable or wrongly decided.

Third, the Funds argue that even if UAL applies, the Court has discretion to authorize intervention under Bankruptcy Rule 2018. Intervention Motion ¶¶ 42-47. The Funds, however, rely on cases that *deny* motions to intervene. See In re Kujawa, 112 B.R. 968, 972 (Bankr. E.D. Mo. 1990) (McDonald, J.); In re Ionosphere Clubs, Inc., 101 B.R. 844, 853-54 (Bankr. S.D.N.Y. 1989). Moreover, as Ionosphere Clubs makes clear, "the extent to which permissive intervention will be permitted is limited and should not be given if (1) the intervenor's interests are already adequately represented and (2) intervention would result in undue delay or prejudice to the original parties." 101 B.R. at 853 (internal quotations omitted). Here, the Funds admit that they want to prove two elements of the statutes – the necessity element and the "fair and equitable" element – which the UMWA itself is certainly well positioned to address. More importantly, intervention by the Funds threatens to make completion of the hearing, and a timely ruling, impossible and, in light of the Debtors' financial distress, such a delay will threaten their survival.

For all of these reasons, UAL should govern the analysis here and the Intervention Motion should be denied.

* * *

In short, the Seventh's Circuit's precise concern in UAL is present here: numerous third parties have expressed their intent to submit objections, submit declarations, call their own witnesses, cross examine the witnesses offered by the Debtors and the UMWA, and otherwise participate in the hearing. This degree of proposed third-party participation is not only unprecedented, but it is unworkable where, as here, the statute itself anticipates expedited briefing, expedited discovery, an expedited hearing, and an expedited ruling. Indeed, the Debtors and the UMWA – who have been working cooperatively to identify appropriate procedures and interim deadlines – expect to call collectively a dozen or more witnesses at the five-day hearing. The position of the third parties – which wish to introduce additional fact and expert witnesses – threatens to make it impossible to conclude the hearing during the time allocated by the Court.

Despite the clear holding of UAL, the Debtors have offered third parties a reasonable middle ground *which would allow third parties to participate in the Hearing in every way save the introduction of witnesses*, subject to the Court's approval.[1]

The Debtors have responded to the Intervention Motion in the first instance by letter to avoid the delay and expense of protracted litigation on this subsidiary issue. The Debtors also believe that this matter can be timely resolved during a teleconference that precedes – and possibly eliminates the need for – further briefing. However, the Debtors are prepared to file a more detailed opposition to the Intervention Motion if the Court desires a formal objection.[2]

Respectfully yours,

E Moskowitz /ZMS

Elliot Moskowitz

Via CM/ECF

[1] The Debtors take the position that the parties that may participate in the fashion set forth above include: the Office of the United States Trustee; the Creditors' Committee; the Funds; and the DIP Agents. The Debtors do not believe there is an independent basis to permit Wilmington Trust Company to participate separately from its position as a member of the Committee, nor do the Debtors believe that there is an independent basis for The Ohio Valley Coal Company and The Ohio Valley Transloading Company to participate.

[2] There are numerous statements in the Intervention Motion with which the Debtors disagree but which are not important to the instant dispute over third-party witnesses. For example, the Debtors do not necessarily agree that any withdrawal liability must be paid in a "lump sum" and "cannot be paid in installments, nor reduced to reflect the discounted present value of such installments." Intervention Motion ¶ 16. The Funds' description of its discussions with the Debtors prior to filing the Intervention Motion and of what occurred at the Chambers conference before the Court are likewise inaccurate. In fact, as the Court may recall, the Debtors anticipated that the Funds would desire an outsized role at the Hearing and advised the Court and the parties that, if that were to occur, the Debtors would likely turn to the Court for further guidance. For the time being, it is enough to say that the Debtors reserve the right to dispute any of the factual or legal assertions contained in the Intervention Motion.