

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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: **Chapter 11**
In re: : **Case No. 12-51502-659**
: **(Jointly Administered)**
PATRIOT COAL CORPORATION, et al., :
: **Objection Deadline:**
Debtors. : **April 12, 2013 at 4:00 p.m. (CST)**
: **Hearing Date:**
: **April 29, 2013 at 11:00 a.m. (CST)**
: **X**
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OBJECTION OF WILMINGTON TRUST COMPANY, AS INDENTURE TRUSTEE, TO THE DEBTORS' MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§ 1113, 1114 OF THE BANKRUPTCY CODE

Wilmington Trust Company ("Wilmington"), in its capacity as indenture trustee for \$250 million principal amount of 8.25% Senior Notes due 2018 (the "Senior Notes") issued by Patriot Coal Corporation ("Patriot" or the "Corporate Parent") and unconditionally guaranteed by each of the other above-captioned debtors and debtors in possession (together with Patriot, the "Debtors"),¹ for its Objection to the Debtors' Motion to Reject Collective Bargaining

¹ In addition to Patriot Coal Corporation, the Debtors are as follows: (1) Affinity Mining Company; (2) Apogee Coal Company, LLC; (3) Appalachia Mine Services, LLC; (4) Beaver Dam Coal Company, LLC; (5) Big Eagle, LLC; (6) Big Eagle Rail, LLC; (7) Black Stallion Coal Company, LLC; (8) Black Walnut Coal Company; (9) Bluegrass Mine Services, LLC; (10) Brook Trout Coal, LLC; (11) Catenary Coal Company, LLC; (12) Central States Coal Reserves of Kentucky, LLC; (13) Charles Coal Company, LLC; (14) Cleaton Coal Company; (15) Coal Clean LLC; (16) Coal Properties, LLC; (17) Coal Reserve Holding Limited Liability Company No. 2; (18) Colony Bay Coal Company; (19) Cook Mountain Coal Company, LLC; (20) Corydon Resources LLC; (21) Coventry Mining Services, LLC; (22) Coyote Coal Company LLC; (23) Cub Branch Coal Company LLC; (24) Dakota LLC; (25) Day LLC; (26) Dixon Mining Company, LLC; (27) Dodge Hill Holding JV, LLC; (28) Dodge Hill Mining Company, LLC; (29) Dodge Hill of Kentucky, LLC; (30) EACC Camps, Inc.; (31) Eastern Associated Coal, LLC; (32) Eastern Coal Company, LLC; (33) Eastern Royalty, LLC; (34) Emerald Processing, LLC; (35) Gateway Eagle Coal Company, LLC; (36) Grand Eagle Mining, LLC; (37) Heritage Coal Company LLC; (38) Highland Mining Company, LLC; (39) Hillside Mining Company; (40) Hobet Mining, LLC; (41) Indian Hill Company LLC; (42) Infinity Coal Sales, LLC; (43) Interior Holdings, LLC; (44) IO Coal LLC; (45) Jarrell's Branch Coal Company; (46) Jupiter Holdings LLC; (47) Kanawha Eagle Coal, LLC; (48) Kanawha River Ventures I, LLC; (49) Kanawha River Ventures II, LLC; (50) Kanawha River Ventures III, LLC; (51) KE Ventures, LLC; (52) Little Creek LLC;

Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code [Docket No. 3214] (the “1113/1114 Motion”), respectfully represents:

INTRODUCTION AND SUMMARY

1. The Debtors have moved this Court for an Order approving a proposal to the United Mine Workers of America (the “UMWA”) under Sections 1113 and 1114 of the Bankruptcy Code. Although Wilmington agrees that rejection and/or modification of the UMWA liabilities and obligations is necessary for the Debtors’ unionized mine entities (the “Obligor Debtors”), the Debtors’ proposal would effectively have Debtors that have no liability on the UMWA claims (the “Non-Obligor Debtors”) “siphoning” value from their creditors to satisfy such UMWA claims. As such, the Debtors’ present proposal cannot be approved.

2. Only a small number of the Debtors are subject to collective bargaining agreements with the UMWA.² As a consequence, the UMWA and its beneficiaries - - the Debtors’ unionized employees and retirees - - may not look to the assets of the Non-Obligor Debtors for satisfaction of such union claims or obligations. Notwithstanding this, the Debtors have proposed to satisfy the Obligor Debtors’ obligations to the UMWA by, among other things,

(53) Logan Fork Coal Company; (54) Magnum Coal Company LLC; (55) Magnum Coal Sales LLC; (56) Martinka Coal Company, LLC; (57) Midland Trail Energy LLC; (58) Midwest Coal Resources II, LLC; (59) Mountain View Coal Company, LLC; (60) New Trout Coal Holdings II, LLC; (61) Newtown Energy, Inc. (62) North Page Coal Corp.; (63) Ohio County Coal Company, LLC; (64) Panther LLC; (65) Patriot Beaver Dam Holdings, LLC; (66) Patriot Coal Company, LP; (67) Patriot Coal Sales LLC; (68) Patriot Coal Services LLC; (69) Patriot Leasing Company LLC; (70) Patriot Midwest Holdings, LLC; (71) Patriot Reserve Holdings, LLC; (72) Patriot Trading LLC; (73) PCX Enterprises, Inc.; (74) Pine Ridge Coal Company, LLC; (75) Pond Creek Land Resources, LLC; (76) Pond Fork Processing LLC; (77) Remington Holdings LLC; (78) Remington II LLC; (79) Remington LLC; (80) Rivers Edge Mining, Inc.; (81) Robin Land Company, LLC; (82) Sentry Mining, LLC; (83) Snowberry Land Company; (84) Speed Mining LLC; (85) Sterling Smokeless Coal Company, LLC; (86) TC Sales Company, LLC; (87) The Presidents Energy Company LLC; (88) Thunderhill Coal LLC; (89) Trout Coal Holdings, LLC; (90) Union County Coal Co., LLC; (91) Viper LLC; (92) Weatherby Processing LLC; (93) Wildcat Energy LLC; (94) Wildcat, LLC; (95) Will Scarlet Properties LLC; (96) Winchester LLC; (97) Winifrede Dock Limited Liability Company; and (98) Yankeetown Dock, LLC. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors’ chapter 11 petitions.

² Wilmington understands that only 13 of the 99 Debtors are liable for unionized labor and retiree medical benefits while the other 86 Debtors have no such liability.

establishing a voluntary employee benefits association trust (or “VEBA”) which, under the Debtors’ most recent proposal, would be funded by a grant of thirty-five percent (35%) of the equity of the Reorganized Debtors (the “Equity Stake”).

3. The Equity Stake replaces a former or prior component of the Debtors’ Proposal (which was included in the 1113/1114 Motion) - - an “allowed unsecured claim against Patriot’s estate in an amount to be calculated and negotiated,” estimated as high as \$1.0 billion and which the Debtors implied had a value that could be “hundreds of millions of dollars.”³ The Debtors, however, did not specify which Debtors would be liable on such claim (or whether all Debtors would be liable) or the value to such claim attributable to the Obligor Debtors. Similarly, the Debtors have not provided any evidence with respect to the valuation of the Equity Stake (including how much value of such Equity Stake relates to or “stems from” the Obligor Debtors and whether such Equity Stake represents (or approximates) the value of the recovery the UMWA would be entitled to against the Obligor Debtors). Indeed, the Debtors have not provided any analysis or evidence whatsoever supporting the Equity Stake to the UMWA.

4. Because the Debtors have not established such values, it must be assumed that the Debtors’ proposal contemplates, in substance, a “pooling” of all of the Debtors’ assets (or reorganization value) to satisfy the UMWA’s claims (including the significant value of the many Non-Obligor Debtors). In addition to the proposed Equity Stake, the Debtors’ proposal also includes (i) a lump sum payment of \$15 million to the VEBA, payable by all of the Debtors, including those that presently have no obligations to such retirees, (ii) contributions pursuant to a “profit-sharing” mechanism funded by all of the Debtors (including, again, the Non-Obligor Debtors that are not liable to the UMWA) and (iii) the creation of a litigation trust (the

³ Based on the Debtors’ pleadings, the trading price of the Senior Notes, which are obligations of each and every Debtor, was used as a “proxy” of sorts to ascribe such value.

“Litigation Trust”) to pursue claims or causes of action against Peabody Energy Corporation (“Peabody”) or Arch Coal, Inc. (“Arch”).⁴

5. Although not expressly stated, the Debtors’ proposal appears to rely, in substance, on a “substantive consolidation” of the Debtors’ estates to the detriment of creditors of the Non-Obligor Debtors. No factual or legal basis exists for such “substantive consolidation” of the Debtors’ estates. The Debtors operate as separate and distinct entities, as they historically have. The Debtors’ assets and liabilities are not commingled and can be separately and accurately identified, accounted for and valued. All of the Debtors’ creditors, certainly the Senior Notes, for whom Wilmington acts as Indenture Trustee, relied on the Debtors’ separate legal identities. The Debtors cannot meet their burden to support the extraordinary equitable remedy of substantive consolidation. The Debtors have likewise not valued the Debtors to demonstrate, as they must, that Non-Obligor Debtors are not paying for or subsidizing the union’s recoveries when such Non-Obligor Debtors are not liable for the UMWA’s claims.

6. The handful of Obligor Debtors are liable for the UMWA’s claims while the majority of the Debtors (the Non-Obligor Debtors) are not. That fact is incontrovertible. Because there is no factual or legal basis for “substantively consolidating” the Debtors’ estates and for the Non-Obligor Debtors to “subsidize” the liabilities of the Obligor Debtors, the proposal underlying the Debtors’ 1113/1114 Motion cannot be approved.

⁴ The proceeds obtained by the Litigation Trust, if any, would be distributed (a) twenty percent (20%) to the Reorganized Debtors (of which the UMWA would own thirty-five percent (35%)) and (b) eighty percent (80%) to the Debtors’ unsecured creditors. The Litigation Trust would have an oversight committee (the “Trust Oversight Committee”) consisting of two members appointed by the UMWA, two members appointed by the Official Committee of Unsecured Creditors (the “Committee”), and one member appointed jointly by the UMWA and the Committee. The UMWA would be entitled to receive one hundred percent (100%) of the net proceeds obtained in an action commenced by the Litigation Trust involving the obligation to provide UMWA retiree healthcare, which, presumably, is an estate cause of action.

BACKGROUND

I. COMPANY OVERVIEW AND BACKGROUND

7. The Debtors consist of ninety-nine (99) separate and distinct entities. The Debtors each have a distinct capital and corporate structure. Individual Debtor entities own particular assets. The Debtors maintain separate books and records, observe corporate formalities when transferring assets and liabilities to each other, do not commingle such individual assets and liabilities, and operate as separate and distinct legal entities.⁵

8. The Debtors collectively own, operate and conduct mining operations at twelve (12) active mining complexes consisting of nineteen (19) surface and underground mines in the Northern and Central Appalachia and Illinois Basin coal regions. The Debtors collectively employ approximately 4,200 employees and contractors. Approximately forty percent (40%) of the Debtors' active employees and over fifty percent (50%) of the Debtors' active miners are members of the UMWA. The Debtors also have a significant number of retirees for whom they pay or administer healthcare and other retiree benefits.⁶ The Debtors' union employees and retirees, however, are concentrated within a handful of the Debtors. As set forth in the Debtors' 1113/1114 Motion, only ten (10) of the ninety-nine (99) debtors are party to the UMWA CBAs.⁷

⁵ Prior to October 31, 2007, many of the Debtors were wholly-owned subsidiaries of Peabody Energy Corporation ("Peabody"). On October 31, 2007, Patriot was spun off from Peabody through a dividend of all outstanding shares of Patriot and, as a result of the spin-off, Patriot became a separate, public company, listed on the New York Stock Exchange. On July 23, 2008, Patriot acquired Magnum Coal Company ("Magnum"). At the time of its acquisition by Patriot, Magnum (which had previously acquired substantial assets and liabilities from Arch Coal, Inc. ("Arch")) was one of the largest coal producers in Appalachia, controlling more than 600 million tons of coal reserves.

⁶ As of February 28, 2013, the Debtors paid for or administered retiree healthcare benefits to approximately 21,000 individuals. Of that total, approximately 8,100 retirees and dependents received benefits from certain of the Debtors pursuant to the UMWA CBAs and approximately 3,500 retirees and dependents received benefits from the Debtors pursuant to federal statute or non-union agreements. The Debtors also administered benefits for approximately 9,200 additional retirees and their dependents (although Peabody was obligated to pay for the healthcare benefits of this group).

⁷ The Debtors that are parties to the UMWA CBAs are: (i) Apogee Coal Company, LLC; (ii) Colony Bay Coal Company; (iii) Eastern Associated Coal, LLC; (iv) Gateway Eagle Coal Company, LLC; (v) Heritage Coal

Only four (4) of the Debtors have employees and active mining operations that are subject to the UMWA CBA wage rates, rules and funding contribution requirements.⁸ The majority of the Debtors have no obligations to the UMWA or its unionized employees and retirees.

9. Wilmington acts as Indenture Trustee for \$250 million principal amount of Senior Notes that were issued by Patriot pursuant to an Indenture, dated May 5, 2010. The Senior Notes are unconditionally guaranteed by each of the Debtors. As a consequence, the Senior Notes have, as was bargained for, a claim against each of the Debtors. The UMWA, on the other hand, has claims only against the Obligor Debtors who are liable for or obligated on the UMWA's claims.

II. THE DEBTORS' 1113/1114 MOTION

10. On March 14, 2013, the Debtors filed the 1113/1114 Motion. In the 1113/1114 Motion, among other things, the Debtors seek an Order from this Court implementing the terms of the Debtors' section 1113 and 1114 proposal (the "Proposal"). The section 1113 component of the Proposal primarily focuses on modifying the wages, health benefits, pension benefits, and work rules relating to the Debtors' union employees to bring the terms of such employees' compensation and benefits in line with those of the Debtors' non-union employees. The section 1114 component of the Proposal seeks to spread the impact of the Obligor Debtors' obligations

Company LLC; (vi) Highland Mining Company, LLC; (vii) Hobet Mining, LLC; (viii) Mountain View Coal Company, LLC; (ix) Pine Ridge Coal Company, LLC; and (x) Rivers Edge Mining, Inc.

⁸ A majority of the UMWA CBAs either (i) are between the UMWA and a Debtor that has no employees or active mining operations or (ii) have significantly less stringent payment and other obligations than those set forth in the National Bituminous Coal Wage Agreement of 2011 (the "NBCWA").

Eight (8) of the UMWA CBAs mirror the terms of the NBCWA. Four (4) of the Debtors that are party to such UMWA CBAs, however, do not have any employees because they are not engaged in active mining operations. Such Debtors are: (i) Colony Bay Coal Company; (ii) Mountain View Coal Company, LLC; (iii) Pine Ridge Coal Company, LLC; and (iv) Rivers Edge Mining, Inc.

The remaining two (2) Debtors that are party to UMWA CBAs, Highland Mining Company LLC and Gateway Eagle Coal Company, LLC, are signatories to "individualized" collective bargaining agreements with the UMWA that contain wage rates, work rules, and multi-employer fund contributions that are much less onerous than those in the NBCWA.

to the UMWA retirees across all of the Debtors, including the Non-Obligor Debtors that are not parties to the UMWA CBAs or liable to such retirees. As discussed above, the Debtors have not shown - - and cannot show - - that spreading or pooling such liabilities across all of the Debtors' estates is permissible or appropriate under the facts or the law.

11. Under the Proposal, responsibility for paying and managing the healthcare and other retirement benefits of the Debtors' retirees would be transferred from the handful of Obligor Debtors to a to-be-formed "voluntary employee beneficiary association" trust (the "VEBA"). The VEBA would be funded by, among other things, (i) a lump sum payment of \$15 million, payable by all of the Debtors, including those that have no obligations to such retirees, (ii) a grant of the thirty-five percent (35%) Equity Stake in the Reorganized Debtors (which replaces the Debtors' prior proposal of an allowed \$1 billion unsecured claim against all of the Debtors that the Debtors previously stated was worth "hundreds of millions of dollars"), and (iii) contributions pursuant to a so-called "profit-sharing" mechanism, whereby all of the Debtors would contribute various amounts to the VEBA depending on the amount of income the Debtors earn in future years.⁹ In addition, under the Proposal, the UMWA would have a significant "oversight" presence over the Litigation Trust to pursue claims against Peabody and Arch and be entitled to receive significant proceeds therefrom.¹⁰

⁹ Specifically, the Debtors' proposed "profit-sharing" mechanism would, if approved, obligate the Debtors to contribute to the VEBA (i) an amount equal to 15% of net income earned by all of the Debtors above \$75 million in 2014 and 2015 and (ii) an amount equal to 15% of net income earned by all of the Debtors above \$150 million in 2016 and subsequent years. Under the profit-sharing mechanism, the Debtors could be obligated to contribute as much as \$75 million, cash, per year and \$300 million, cash, in the aggregate over the life of the "profit-sharing" plan.

¹⁰ As previously noted, the Proposal provides for the proceeds obtained by the Litigation Trust, if any, to be distributed (a) twenty percent (20%) to the Reorganized Debtors and (b) eighty percent (80%) to the Debtors' unsecured creditors. The Trust Oversight Committee would consist of two members appointed by the UMWA, two members appointed by the Committee, and one member appointed jointly by the UMWA and the Committee. The UMWA would be entitled to receive one hundred percent (100%) of the net proceeds obtained in an action commenced by the Litigation Trust involving the obligation to provide UMWA retiree healthcare.

12. As discussed above, the Debtors' payment and other obligations set forth in the Proposal would be borne by all of the Debtors - - not only the Obligor Debtors. Without valuing each of the Debtors to demonstrate that a grant of the 35% Equity Stake in the Reorganized Debtors represents the value that the UMWA would receive solely from the Obligor Debtors, the Proposal effects a "substantive consolidation" of the Debtors' estates for purposes of satisfying the obligations to the UMWA. While Wilmington understands that the Obligor Debtors need relief from their union labor and retiree obligations, the Non-Obligor Debtors should not be affected by the UMWA's claims. Assets or value from the Non-Obligor Debtors cannot be used to "subsidize" recoveries on the UMWA's claims against the Obligor Debtors. The 1113/1114 Motion, as presently proposed, must be denied.

ARGUMENT AND AUTHORITY

III. THE 1113/1114 MOTION IMPROPERLY CONTEMPLATES "SUBSTANTIVE CONSOLIDATION" OF THE DEBTORS' ESTATES AND THEREFORE MUST BE DENIED

A. Sections 1113 and 1114 of the Bankruptcy Code

13. A debtor may reject collective bargaining agreements and modify retiree benefits if the debtor complies with the terms of sections 1113 and 1114 of the Bankruptcy Code, respectively.¹¹ The requirements for rejection under section 1113 are substantially the same as those for modification under section 1114.¹² Generally, in order to satisfy the requirements of sections 1113 and/or 1114, a proposal must meet various requirements, including among other things, that (i) the proposal treat all creditors, the debtor and all affected parties "fairly and

¹¹ See 11 U.S.C. §§ 1113(c), 1114(g).

¹² See *In re Horizon Natural Res. Co.*, 316 B.R. 268, 281 (Bankr. E.D. Ky. 2004) (noting that the "requirements for modification of retiree benefits are ... substantially the same as the requirements for rejection of collective bargaining agreements" and applying the same standard); see also *In re Family Snacks, Inc.*, 257 B.R. 884, 896-97 (8th Cir. B.A.P. 2001); *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 520 (Bankr. S.D.N.Y. 1991); *In re Horsehead Indus., Inc.*, 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003).

equitably” and (ii) the “balance of the equities” must favor rejection. *See* 11 U.S.C. §§ 1113; 1114.

14. The requirement that all creditors, the debtor, and other affected parties be accorded “fair and equitable treatment” under sections 1113 and 1114 necessitates fairness under the circumstances. *See, e.g., In re Indiana Grocery Co.*, 136 B.R. 182, 194 (Bankr. S.D. Ind. 1990); *see also In re Family Snacks Inc.*, 257 B.R. at 892 (a proposal must “assure that all creditors, the debtor, and all other affected parties are treated fairly and equitably”) (emphasis added). Moreover, in balancing the equities, the court must weigh the interests of all affected parties. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *In re Indiana Grocery, Inc.* 136 B.R. at 196 (indicating that the “balancing the equities” element of the 1113/1114 analysis codifies the test set forth in *Bildisco*).

B. “Substantive Consolidation” in the Eighth Circuit

15. “Substantive consolidation” is the pooling of two or more debtors’ assets and liabilities so that of each of the debtor’s liabilities are satisfied from the common pool of assets created by the consolidation. *Eastgroup Properties v. S. Motel Assoc. (In re Southern Motel Assoc.)*, 935 F.2d 245, 247 (11th Cir. 1991).¹³ The sole purpose of substantive consolidation is to promote the fair and equitable distribution of the debtors’ collective assets. *S. Motel*, 935 F.2d at 248; *FDIC v. Colonial Realty*, 966 F.2d 57, 61 (2d Cir. 1992); *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000).¹⁴ Because substantive consolidation is purely an equitable remedy, a court

¹³ There is no provision in the Bankruptcy Code that explicitly authorizes a court to substantively consolidate debtors’ estates - - rather, substantive consolidation is a “product of judicial gloss.” *In re Augie/Restivo Banking Co.*, 860 F.2d 515, 518 (2d Cir. 1988). Courts, however, have held that courts have the power to substantively consolidate various debtors’ estates under the general equitable powers provided under section 105(a) of the Bankruptcy Code. *Colonial Realty Co.*, 966 F.2d at 59; *Bonham*, 229 F.3d at 764.

¹⁴ A court may only apply substantive consolidation if, based on the record before it, substantive consolidation is necessary to achieve a fair and equitable distribution of the debtors’ collective assets. *S. Motel*, 935 F.2d at 250 n. 14; *Colonial Realty*, 966 F.2d at 61; *Bonham*, 229 F.3d at 765.

should not employ it when it would benefit one set of creditors at the expense of another unless the proponent can advance a legitimate equitable reason for such a redistribution. *Union Savings Bank v. Augie/Restivo Banking Co. (In re Augie/Restivo Banking Co.)*, 860 F.2d 515, 521 (2d Cir. 1988); *In re Circle Land & Cattle*, 213 B.R. 870, 875-76 (Bankr. D. Kan. 1997). No such reason can be advanced here.

16. The Eighth Circuit has stated that the bankruptcy court's analysis should include the following three factors: (1) the necessity of consolidation due to the interrelationship among the debtors;¹⁵ (2) whether the benefits of consolidation outweigh the harm to creditors; and (3) prejudice resulting from not consolidating the debtors. *In re Huntco Inc.*, 302 B.R. 35, 39 (Bankr. E.D. Mo. 2003); *First Nat'l Bank v. Giller (In re Giller)*, 962 F.2d 796, 799 (8th Cir. 1992). The proponent of substantive consolidation has the burden of producing evidence that demonstrates that substantive consolidation is necessary. *Huntco*, 302 B.R. at 39; *Affiliated Foods*, 249 B.R. at 775 (Bankr. W.D. Mo. 2000). Because of the harm substantive consolidation will inflict upon some creditors, the proponent's burden of establishing the need for substantive consolidation is "exacting." *Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994). The Debtors cannot come close to meeting such burden here.

C. The Debtors' Proposal Cannot Be Approved

17. From the outset of these cases, it has been clear that one of the Debtors' principal reasons for filing chapter 11 was the need to restructure the Obligor Debtors' union (and related

¹⁵ Commingling or interrelationship between the debtors can justify substantive consolidation only where "the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors..." or where no accurate identification and allocation of assets is possible. *Augie/Restivo Banking Co.*, 860 F.2d at 519 (citations omitted).

The court's analysis of the "interrelationship" factor should focus on whether creditors of the various debtors actually relied on that interrelationship and treated the debtors as a single entity. *Huntco*, 302 B.R. at 39; *S. Motel*, 935 F.2d at 250; *In re 599 Consumer Elecs.*, 195 B.R. 244, 249 (S.D. N.Y. 1996); *Affiliated Foods*, 249 B.R. at 783; *In re Circle Land & Cattle*, 213 B.R. at 876; *In re Leslie Fay Cos.*, 207 B.R. 764, 780 (Bankr. S.D. N.Y. 1997).

retiree) cost structure and liabilities. Wilmington does not dispute that that is a central issue in these cases (and that restructuring the UMWA's claims seems necessary here).¹⁶ The Debtors' Proposal as it relates to the VEBA and its funding, however, cannot be approved. The Proposal must be fair and equitable to all creditors. The Debtors' Proposal, however, significantly prejudices the interests of certain creditors - - specifically, Wilmington and the holders of Senior Notes. As discussed above, the Debtors' Proposal contemplates, in substance, a "pooling" or substantive consolidation of all of the Debtors' assets (or equity value) to satisfy the UMWA's claims (including the significant value of the many Non-Obligor Debtors).

18. The Debtors have plainly not met their "heavy" and "exacting" burden to establish that the Proposal satisfies the standard for "substantive consolidation" of the Debtors' estates. It clearly does not. As discussed above, it is incontrovertible that the Debtors (i) consist of ninety-nine (99) separate and distinct entities, which own particular assets and have distinct liabilities, (ii) maintain separate books and records, observe corporate formalities, (iii) do not commingle such individual assets and liabilities, and (iv) operate as separate and distinct legal entities.

19. The Debtors may not disregard their fiduciary duties to the majority of their estates and unsecured creditors by using the assets of the Non-Obligor Debtors to pay or satisfy the UMWA's claims. For all of the reasons set forth above, the Debtors' 1113/1114 Motion should be denied.

¹⁶ For example, among other things, the existing UMWA retiree medical benefit plans cost the Debtors who are liable on such plans over \$62 million annually. Such obligations are clearly unmanageable.

WHEREFORE, Wilmington respectfully requests that the Court (i) deny the Debtors' 1113/1114 Motion and (ii) grant such other and further relief as may be just and proper.

Dated: April 12, 2013

ANDREWS KURTH LLP

By: Paul N. Silverstein
Paul N. Silverstein (admitted *pro hac vice*)
Jonathan I. Levine (admitted *pro hac vice*)
Jeremy B. Reckmeyer (*pro hac vice* pending)
450 Lexington Avenue, 15th Floor
New York, New York 10017
Telephone: (212) 850-2800
Facsimile: (212) 850-2929

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 12th day of April, 2013, on all persons on the Court's CM/ECF notice list, and, in addition, on the following parties via first class United States mail, postage prepaid:

Davis Polk & Wardwell LLP
Attn: Marshall S. Huebner and
Brian M. Resnick
450 Lexington Avenue
New York, NY 10017

Curtis, Mallet-Prevost, Colt & Mosle LLP
Attn: Steven J. Reismann and
Michael A. Cohen
101 Park Avenue
New York, NY 10178

Bryan Cave
Attn: Lloyd A. Palans and
Brian C. Walsh
211 North Broadway, Ste. 3600
St. Louis, MO 63102

Office of the U. S. Trustee for the Eastern District of Missouri
Attn: Leonora S. Long and
Paul A. Randolph
111 South 10th Street, Ste. 6.353
St. Louis, MO 63102

Kramer, Levin, Naftalis & Frankel LLP
Attn: Thomas Moers Mayer,
Adam C. Rogoff and Gregory G. Plotko
1177 Avenue of the Americas
New York, NY 10036

Carmody MacDonald P.C.
Attn: Gregory D. Willard and
Angela L. Schisler
120 South Central Avenue
St. Louis, MO 63105-1705

Patriot Coal Corporation
c/o GCG, Inc.
P. O. Box 9898
Dublin, OH 43017-5798

Weil, Gotshal & Manges LLP
Attn: Marcia Goldstein and
Joseph Smolinsky
767 Fifth Avenue
New York, NY 10153

Willkie Farr & Gallagher LLP
Attn: Margo B. Schonholtz and
Ana Alfonso
787 Seventh Avenue
New York, NY 10019

/s/ Paul N. Silverstein
Paul N. Silverstein