

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:)	
)	Chapter 11
PATRIOT COAL CORPORATION, <i>et al.</i> ,)	Case No. 12-51502-659
)	(Jointly Administered)
Debtors.)	
)	Re: Docket No. 3214
)	
)	
)	Hearing Date:
)	April 29, 2013 at 10:00 a.m. (CT)
)	

**STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
IN CONNECTION WITH 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**

The Official Committee of Unsecured Creditors (the “**Committee**”) in response to the above-captioned motion (the “**1113/1114 Motion**”) respectfully states as follows¹:

PRELIMINARY STATEMENT

1. The Committee:
 - supports the rejection of the Debtors’ collective bargaining agreements (the “**CBA**s”) and retiree medical benefit plans because the savings outlined in the 1113/1114 Motion are necessary to the survival of the Debtors;
 - supports the basic structure of the latest proposal made on April 10, 2013 in connection with the motion (the “**Fifth Proposal**”), which the Committee understands allocates value (i) to employees on account of their wage, workrule and benefit sacrifices and (ii) to

¹ The Committee understands that Committee members United Mine Workers of America (the “**UMWA**”) and United Mine Workers of America 1974 Pension Plan and Trust (the “**1974 Pension Plan**”) intend to file their own separate pleadings in opposition to the 1113/1114 Motion. Each Committee member is, of course, free to express its own views on the merits of the 1113/1114 Motion even if those views differ from those of the Committee. The Committee authorized the filing of this statement by vote of the requisite majority of Committee members.

a trust (called a “**VEBA**”²) for retirees on account of claims for retiree medical benefits; but

- objects to the implementation of the Fifth Proposal (i) outside of a chapter 11 plan process and (ii) unless and until the Debtors show – as it is their burden to show – that the proposed allocation of value to employees and retirees in return for their sacrifices and in respect of their claims is fair and equitable to all creditors.

2. The Debtors cannot overpay for the savings they request. The Fifth Proposal allocates to employees and retirees substantial value, principally including 35% of the stock of the reorganized Debtors, or “**New Stock**”, which would be issued as part of a chapter 11 plan of reorganization. But, the Debtors have not shown that their proposed allocation of value, and, in particular, the allocation of 35% of the New Stock, “assures that ***all creditors***, the Debtor and all affected parties are treated fairly and equitably” as required under Sections 1113(b)(1)(A) and 1114(g)(1)(A) (emphasis added).³ The Committee’s own “recovery model” shows that the proper share of value distributable on account of unsecured retiree medical benefit claims could be 28% (or even lower), depending on various assumptions described below.

3. The Committee is working with the Debtors to harmonize their respective “recovery models” – or at least to agree on how the models differ – and may withdraw the “fair and equitable” portion of its objection if the proposed allocation of value to employees and retirees is “fair and equitable” to ***all creditors***.

FACTS

4. The existing UMWA retiree medical benefit plans cost the Debtors who are liable on such plans over \$62 million per year – a cost that those Debtors cannot afford to

² A “Voluntary Employee Benefit Association” – a particular type of trust recognized under the Employee Retirement Income Security Act of 1974, as amended (“**ERISA**”).

³ All references to “Sections” are to sections of the Bankruptcy Code unless otherwise indicated.

pay.⁴ The Debtors propose to eliminate their UMWA retiree medical plans and instead have their UMWA retirees obtain reduced benefits from the VEBA.

5. The Debtors' "**Fourth Proposal**" (as defined in the 1113/1114 Motion) – the operative proposal at the time the 1113/1114 Motion was filed – proposed to fund the VEBA with \$15 million in cash and a small amount of profit sharing, plus an "allowed unsecured claim against Patriot's estate in an amount to be calculated and negotiated" arising from the termination of retiree medical benefits (*See* Robertson Decl. Ex. 1 ¶ 5) and estimated as up to \$1.0 billion (the "**VEBA Claim**") (Huffard Decl. at ¶ 69). The Debtors suggested that the VEBA Claim could have an implied value of "hundreds of millions of dollars" (Debtors' Mem. of Law 53).

6. As part of the Fourth Proposal, the Debtors neither (i) specified the amount of the VEBA Claim nor (ii) identified those Debtors against whom the VEBA Claim would be allowed. Moreover, the Debtors did not determine the value of any of the Obligor Debtors or of the VEBA Claim.

7. The Debtors' Fourth Proposal also contemplated the allowance of an unsecured claim to the UMWA 1974 Pension Plan, which had filed claims against every Debtor in the amount of \$959,662,367. (*See e.g.*, Claim No. 2548 (EDMO Claim No. 1528) against Patriot Coal Corporation).⁵ The pension claim, if allowed in an amount approaching the asserted amount, would significantly reduce distributions of New Stock on account of all unsecured claims, including the VEBA Claim.

⁴ The Committee understands only 13 of the 99 Debtors are liable for retiree medical benefits (the "**Obligor Debtors**") while the other 86 Debtors are not (the "**Non-Obligor Debtors**").

⁵ The claim asserted by the 1974 Pension Plan is of course subject to challenge under Section 502 by any party in interest, including the Committee, and the Committee reserves its right to do so.

8. The Committee alerted the Debtors to these issues and urged them to modify their Fourth Proposal to include:

- an agreement to satisfy any withdrawal liability to the 1974 Pension Plan in annual installments of approximately \$25.8 million or less⁶ as contemplated by ERISA, 29 U.S.C. § 1399(c)(1)(A), or in such other acceptable amounts as may be negotiated with the 1974 Pension Plan;⁷ and
- an offer to capitalize the VEBA with a specified percentage of the New Stock commensurate with the rights of the VEBA Claim.

9. On or about April 10, 2013, the Debtors disclosed the terms of their Fifth Proposal. In lieu of a VEBA Claim, the Fifth Proposal allocates 35% of the New Stock to the UMWA.⁸ And, in addition to the profit sharing offered to the VEBA as a component of the Fourth Proposal, the Fifth Proposal contemplates that the VEBA will receive an additional per-ton royalty contribution for each ton of coal produced from existing mining complexes. However, the Debtors have provided no analysis supporting the allocation of this value, including 35% of the New Stock, to the UMWA and VEBA.

10. In addition, while the Fifth Proposal indicates that the Debtors will seek to satisfy any liability for withdrawal from the 1974 Pension Plan with cash payments over time, the proposal leaves open the possibility that, in lieu of such a payment stream, the 1974 Pension Plan might be provided a pre-petition unsecured claim against all Debtors. As stated above, were that to occur, distributions on account of all unsecured claims would be significantly

⁶ The \$25.8 million annual installment payment is an estimate. The Committee understands that the annual amount may be materially *less* than \$25.8 million.

⁷ ERISA provides for satisfaction of withdrawal liability in annual installments but also provides that the full amount of the withdrawal liability becomes due and payable if there is a default. See 29 U.S.C. § 1399(c)(5). The 1974 Pension Plan has alleged that defaults have occurred under the pension plan documents. The Committee believes that such defaults are either curable or are in the nature of *ipso facto* defaults that need not be cured such that, under Section 1124(2), the 1974 Pension Plan's claim for any withdrawal liability could be considered unimpaired if paid in annual installments as contemplated by ERISA. This issue is not before the Court at this time and the Committee reserves all rights with respect thereto.

⁸ It is not entirely clear from the Fifth Proposal whether the New Stock would be distributed for the benefit of both (i) active employees on account of their wage, workrule and benefit sacrifices and (ii) the VEBA on account of retiree medical claims, but the Committee understands that is the case.

reduced, thereby further calling into question the appropriateness of allocating 35% of the New Stock and the other consideration to the UMWA and VEBA.

ARGUMENT

11. Section 1113 provides in relevant part as follows:

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession . . . shall –

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor **and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . .**

(Emphasis added).

12. Section 1114 provides in relevant part as follows:

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall –

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor **and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably**

(Emphasis added).

13. The Debtors cannot prevail under Sections 1113 and 1114 unless their proposal “assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably”. 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(A).

14. As the Fifth Proposal currently stands, there is no way to determine whether the proposal “assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably” because the Debtors have allocated 35% of the New Stock to the

UMWA without valuing that New Stock (and leaving open the possibility that the 1974 Pension Plan might be provided a significantly dilutive unsecured claim). Thus, it is impossible for the Court, the Committee, or any party-in-interest to determine whether employees have been under or over compensated for their sacrifices, or whether the New Stock to be distributed to the VEBA under a chapter 11 plan is commensurate with or in excess of the distribution of New Stock that would otherwise be distributed on account of any VEBA Claim that the VEBA would otherwise be entitled to.

15. Assuming any withdrawal liability to the 1974 Pension Plan is paid over time, the VEBA's appropriate share of distributable value could be 28% (and possibly lower), depending on several factors and assumptions, including:

- The allowed amount of any VEBA Claim that the VEBA would otherwise be entitled to;
- Limiting any such VEBA Claim's recovery to its share of the Obligor Debtors' value;
- The aggregate allowed amount of unsecured claims at each Debtor; and
- Total value distributable to unsecured creditors and the allocation of that value among Obligor Debtors and Non-Obligor Debtors.

16. The Committee is working with the Debtors to harmonize its recovery model with the Debtors' model, and to agree on (or isolate differences of opinion with respect to) the issues set forth above. Pending such agreement (and if no agreement can be reached), the Committee objects to the implementation of the Fifth Proposal on the ground that the Debtors have not shown that the proposal treats all creditors "fairly and equitably".

17. The Committee also objects to any attempt to use this proceeding under Sections 1113 and 1114 to allow a VEBA Claim (or otherwise provide value to the VEBA on account of any claims arising from the termination of retiree medical benefits) or any withdrawal

liability claim arising from the Debtors' withdrawal from the 1974 Pension Plan. Allowance of any such claims (or distribution of value thereon) requires a separate claims allowance proceeding at a later date.

18. An unliquidated claim for termination of retiree medical benefits, such as what the VEBA would hold, can be allowed only (i) through a proceeding under Section 502 (which this Section 1113/1114 proceeding most certainly is not⁹) or (ii) under a chapter 11 plan. If the VEBA were to be allocated value in excess of what it otherwise would recover on account of a VEBA Claim against the UMWA-Obligated Debtors to the detriment of other creditors, that allocation would be legally permissible, if indeed it is permissible at all, only in the context of a chapter 11 plan.

19. Finally, withdrawal from the 1974 Pension Plan is an act that is not in the ordinary course of business. Therefore, court approval under Section 363(b) is required. Furthermore, payment over time of any resulting liability – required to ensure that any VEBA Claim would have any material value – can be accomplished only pursuant to a chapter 11 plan confirmed by this Court. Paying the withdrawal liability over time will require the use of a chapter 11 plan either to eliminate pension defaults using Section 1124(2) in order to pay annual installments of approximately \$25.8 million or less as contemplated by ERISA, 29 U.S.C. § 1399(c)(1)(A), or to negotiate payment over time with the 1974 Pension Plan.

⁹ Section 502 gives any party in interest the right to object to allowance of a claim. The Court's orders limiting the participation of the Committee and other parties in the Section 1113/1114 hearing (ECF Nos. 3543, 3544, and 3547) further confirm that the proceedings under Sections 1113 and 1114 are not Section 502 claims allowance proceedings. Allowance would require a separate proceeding in which the Committee will have the opportunity to object and introduce evidence if necessary.

CONCLUSION

For the reasons set forth above, the Committee supports the rejection of the Debtors' CBAs and retiree medical plans but objects to the implementation of the Debtors' Fifth Proposal (i) outside of an appropriate chapter 11 plan process and (ii) absent proof that the proposal treats all creditors "fairly and equitably".

Dated: April 12, 2013

CARMODY MACDONALD P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Statement of the Official Committee of Unsecured Creditors in Connection with 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* was filed on April 12, 2013 using the Court's CM/ECF system, which sent a copy to all parties receiving electronic notices in this case.

/s/Gregory D. Willard
Gregory D. Willard