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

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| In re: | |
| PATRIOT COAL CORPORATION, | Case No. 12-51502-659 |
| Debtor. | Chapter 11 |
| | Division 18 |

**MOTION OF NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO THE MOTION OF DEBTOR TO (A) REJECT COLLECTIVE BARGAINING AGREEMENTS AND (B) TO MODIFY RETIREE BENEFIT OBLIGATIONS PURSUANT TO 11 U.S.C. §§ 1113, 1114 OF THE BANKRUPTCY CODE**

The National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file a brief *amicus curiae* in the above-captioned bankruptcy case in opposition to the Motion of the Debtor to reject Collective Bargaining Agreements and to modify retiree benefit obligations pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code (Docket No. 3214). A copy of the proposed *amicus* filing is attached hereto as Exhibit A.

The NCCMP is a nonprofit, tax-exempt organization that has historically participated in the development of the law applicable to employee benefit plans. Some 240 multiemployer defined benefit pension plans and related international unions are affiliated with the NCCMP. The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans by advocating on behalf of these plans in Congress, in the courts, and in the regulatory process.[1]

[1] Notably, Congress has recognized the significant impact the NCCMP had in shaping the law applicable to multiemployer employee benefit plans, including the Multiemployer Pension Plan

Multiemployer plans provide pension, medical, and other benefits for millions of American workers. Significantly, multiemployer pension plans alone cover over ten million workers. In adopting the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), PUB. L. NO. 96-364, 94 STAT. 1208, Congress recognized that the continued well-being and financial security of these workers, retirees, and their dependents are directly impacted by the continued existence and financial soundness of multiemployer pension plans. Consequently, Congress determined that employer withdrawals from such plans without concomitant liability are contrary to the national public interest. 29 U.S.C. § 1001(a)(1), (3) and (c)(2). As further discussed in the attached brief, MPPAA amended the Employee Retirement Income Security Act of 1974 (ERISA), 88 STAT. 829, 29 U.S.C. § 1001, et seq., to create a mechanism to protect the pensions of multiemployer pension plan participants. The statutorily created mechanism – called "withdrawal liability" – discourages employer withdrawals and prevents the burden of a plan's underfunding from unduly falling upon the employers remaining in the plan.

The instant case involves an effort by a large employer to terminate its obligation to contribute to a multiemployer pension plan with the employer's resulting withdrawal liability erased by action of this bankruptcy proceeding. Such action, if sanctioned by this Court, will defeat congressional intent in creating withdrawal liability to protect plan participants' pensions.

It is well established that a district court has broad inherent authority to grant or deny an appearance as *amicus curiae* in a given case. Pete's Brewing Co. v. Whitehead, 1998 WL 537399, *1 (8th Cir. 1998) (district court permitted Anheuser–Busch, Inc. to appear *amicus curiae* after denying motion to intervene). A court may grant leave to appear as amicus if the

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Amendments Act of 1980, PUB. L. NO. 96-364, 94 STAT. 1208. See 126 CONG. REC. S9835 (daily ed., July 21, 1980) and S10100 (daily ed., July 29, 1980).

information proffered is "timely, useful, or otherwise." United Fire & Cas. Co. v. Titan Contractors Serv., Inc., 2012 WL 3065517 (E.D. Mo. 2012). Where there is a special interest in the subject matter of the litigation, courts - including bankruptcy courts in this circuit - have granted leave for parties to appear as *amicus curiae*. Pettet v. May, (W.D. Mo. 2011) (explaining that allowing a party to participate as *amicus curiae* is appropriate when the party demonstrates a special interest); Waste Management of Pa., Inc. v. City of York, 162 F.R.D. 34 (M.D. Penn. 1995) (EPA granted leave to participate as amicus curiae in light of its special interest in CERCLA litigation); In re First Cont'l Communications, Inc., 1992 WL 12626480 (Bankr. S.D. Iowa Dec. 7, 1992) (Iowa Bankers Association appeared as amicus curiae to respond to a bankruptcy party's summary judgment motion); Matter of Schake, 154 B.R. 270, 272 (Bankr. D. Neb. 1993) (The Legal Aid Society appeared as amicus curiae to contest the county district attorney's office request to prosecute dishonored checks in violation of the automatic stay).

Applied to the instant case, the NCCMP and its constituent groups have a strong interest in the outcome of the Debtor's instant motion to ensure that multiemployer plans continue to have an effective remedy against employers who seek to end their obligation to contribute to multiemployer pension plans. The NCCMP's interest is magnified where, as here, the employer is attempting to improperly shield themselves from the withdrawal liability Congress sought to impose through the MPPAA to protect the pensions of workers. Additionally, the Court will benefit from the NCCMP's expertise with multiemployer pension plans and withdrawal liability issues that may arise from the proposed modification of the Debtors' collective bargaining agreements. Accordingly, the NCCMP respectfully requests that the Court grant it leave to appear as *amicus curiae*.

Respectfully submitted,

Date: April 12, 2013

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed on April 12 2013, using the Court's CM/ECF system and that service will be accomplished upon all counsel of record with an e-mail address in the CM/ECF system by operation of that system.

/s/ James I. Singer

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

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| In re:<br><br>PATRIOT COAL CORPORATION,<br><br>Debtor. | Case No. 12-51502-659<br><br>Chapter 11<br><br>Division No. 18 |

**BRIEF AND MEMORANDUM OF LAW OF *AMICUS CURIAE* NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE MULTIEMPLOYER PENSION PLANS' OBJECTIONS TO THE DEBTOR'S SECTION 1113 MOTION**

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# BRIEF AND MEMORANDUM OF LAW OF *AMICUS CURIAE* NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE MULTIEMPLOYER PENSION PLANS' OBJECTIONS TO THE DEBTOR'S SECTION 1113 MOTION

The National Coordinating Committee for Multiemployer Plans ("**NCCMP**") submits this brief *amicus curiae* to urge the Court to deny the Patriot Coal Corporation and its affiliated debtors' (collectively, "**Patriot**" or the "**Debtors**") Section 1113 motion [Docket No.3214] ("**Motion**") to, *inter alia,* eliminate the Debtors' obligation to contribute to the United Mine Workers of America 1974 Pension Trust ("**1974 Plan**"). Such withdrawal would give the 1974 Plan a claim for withdrawal liability that would be an unsecured claim dischargeable through this Chapter 11 proceeding, thereby leaving a plan that is already "seriously endangered" in dire financial straits (*see* Motion to Intervene by the United Mine Workers of America 1974 Pension Trust, Docket No. 3444 ("**Motion of 1974 Plan**") at 7-8), which is contrary to the public interest and not necessary to the success of the Debtors' reorganization.

## I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The NCCMP is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of the law applicable to employee benefit plans. Some 240 multiemployer defined benefit pension plans and related international unions, with a nationwide participant base, are affiliated with the NCCMP. The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans by advocating on behalf of these plans in Congress, in the courts and in the regulatory process. The NCCMP was recognized by the Senate co-sponsors of the Multiemployer Pension Plan

Amendments Act of 1980 (the MPPAA), PUB. L. NO. 96-364, 94 STAT. 1208, as having had a significant impact on the passage of that Act.[1]

Multiemployer plans provide pension, medical, and other coverage for millions of American workers. Multiemployer pension plans alone cover over ten million workers, nearly one-fourth of all American workers with pension plans.[2] Congress recognized with the adoption of MPPAA that the continued well-being and security of these employees, retirees and their dependents are directly impacted by the continued existence and financial soundness of multiemployer pension plans and that employer withdrawals from such plans without concomitant liability are contrary to the national public interest. 29 U.S.C. § 1001(a)(1), (3) and (c)(2).

As further discussed below, MPPAA amended the Employee Retirement Income Security Act of 1974 (ERISA), 88 STAT. 829, 29 U.S.C. § 1001, *et seq.*, to create withdrawal liability for employers who cease to contribute to multiemployer pension plans. That liability was created to improve the financial soundness of those plans by discouraging such withdrawals and preventing the burden of a plan's underfunding from unduly falling upon the employers that have elected to remain in the plan. Not only were such employers reneging on promised benefits, prior to MPPAA such irresponsible employers were given a double competitive advantage by eliminating their contribution obligations and by shifting the remaining liabilities to those employers who continued to honor their contribution obligations. Congress recognized that the

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[1] *See* 126 CONG. REC. S9835 (daily ed., July 21, 1980) and S10100 (daily ed., July 29, 1980).

[2] *See* HARRIET WEINSTEIN AND WILLIAM J. WIATROWSKI, *Multiemployer Pension Plans*, COMPENSATION AND WORKING CONDITIONS, 23 (Spring 1999); 2011 PBGC ANN. REP. 2 (2012). *See also* 2010 PBGC ANN. EXPOSURE REP. at 10.

financial soundness and stability of multiemployer plans was being undermined by employer withdrawals, to the direct detriment of the plans, the participants and beneficiaries, and those employers that honored their contribution obligations.

This case involves an effort by a large employer to terminate its obligation to contribute to the UMWA 1974 Pension Plan, a multiemployer defined benefit plan, with the expectation that the employer's resulting withdrawal liability under MPPAA will thereafter be largely reduced or totally eliminated by action of this bankruptcy proceeding. Such action, if sanctioned by this Court, will defeat congressional intent in creating withdrawal liability.

The evasion by some employers through the bankruptcy process of their withdrawal liability constitutes a persistent and serious problem for multiemployer plans. The plan trustees labor under an obligation to attempt to collect withdrawal liability, a task made particularly burdensome when employers are able to manipulate the Chapter 11 reorganization process to have that liability discharged. The actuarial soundness of multiemployer plans can be directly and adversely affected when employers successfully evade their withdrawal liability through bankruptcy reorganization. Moreover, the ability of participants and beneficiaries to claim and receive the full amount of benefits to which they are entitled will be seriously undermined if employers are permitted to evade withdrawal liability in this manner.

Accordingly, the NCCMP and its constituent groups have a strong interest in the denial of the Debtors' instant motion, to ensure that multiemployer plans continue to have an effective remedy against employers who seek to cease their obligation to contribute to multiemployer pension plans in a manner that perversely shields them from the withdrawal liability Congress sought to impose through the MPPAA.

## II. SUMMARY OF ARGUMENT

The Debtors in this case have moved the Court pursuant to 11 U.S.C. § 1113 for an order authorizing them to withdraw from the 1974 Plan and several other pension and benefit plans to which the Debtors contribute pursuant to the Collective Bargaining Agreements with the United Mine Workers of America. *See* Memorandum of Law in Support of the Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 (Docket No. 3219)("**Debtors MOL**") at 47-48. Debtors indicate that the contribution obligations to these plans drive up the per-hour cost of coal production. *Id.* at 41. The Debtors now seek to withdraw from the 1974 Plan without properly satisfying their contribution and withdrawal liability obligations to the Plan, leaving the burden to fund pension benefits on the remaining contributing employers and/or the Pension Benefit Guaranty Corporation. Ignoring the financial reality faced by multiemployer plans, the Debtors blithely assert that the proposed withdrawal "would not affect pensioners' receipt of payments from this multi-employer fund" while at the same time noting that the Debtors' obligation for those pensions would only result in a reduced unsecured claim on the Debtors' bankruptcy estate. *Id.* at 47. As noted by the 1974 Plan, however, "the 1974 Plan's claim may yield only cents on the dollar or even no recovery at all, which is insufficient to fully compensate the 1974 Plan's participants and beneficiaries for the loss of Patriot's contributions." Motion of 1974 Plan, Docket No. 3444, at 9. The Court should not permit the Debtors to manipulate the bankruptcy process in this fashion to the detriment of their unionized employees, their beneficiaries, and the other employers that continue to meet their pension obligations to their workers through continued contributions to the 1974 Plan.

This is a matter of national interest because it reflects the very concerns that motivated Congress in adopting ERISA in 1974 and MPPAA in 1980, namely the need to ensure that employees will receive promised pension benefits by protecting multiemployer plans from the negative impact of employer withdrawals. In the event that the downward spiral described in Debtors' brief is permitted to continue, there is a real and present risk that the multiemployer plan will fail. In that event, the burden of providing the promised benefits, albeit at a substantial reduction to the detriment of the plan participants and their beneficiaries, will fall to the PBGC, whose role is statutorily circumscribed and which itself is not sufficiently funded to carry that burden. Ultimately, then, it is the plan participants and their beneficiaries who will suffer the loss of anticipated and necessary retirement income.

## III. ARGUMENT

### A. Public Interest Served by Multiemployer Pension Plans

Congress enacted the MPPAA to protect multiemployer pension plans because those plans serve important functions in the national economy and as a private source of economic security to the nation's workers. In its declaration of policy in adopting MPPAA, Congress made the following findings:

> (1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;
>
> (2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;
>
> (3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and
>
> (4) (A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

> (B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

29 U.S.C. § 1001a.

In *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 608 (1993), the Court explained that multiemployer plans are beneficial because they make possible pension plans in industries where,

> there [is] little if any likelihood that individual employers would or could establish single-employer plans for their employees ...[,] where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer.

508 U.S. at 606, quoting *Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means*, 96th Cong., 1st Sess., 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans). The Court further explained that,

> Multiemployer plans provide the participating employers with such labor market benefits as the opportunity to offer a pension program (a significant part of the covered employees' compensation package) with cost and risk-sharing mechanisms advantageous to the employer. The plans, in consequence, help ensure that each participating employer will have access to a trained labor force whose members are able to move from one employer and one job to another without losing service credit toward pension benefits.

508 U.S. at 606-07.

### B. History and Purpose of Withdrawal Liability

In 1974, after careful study of private retirement plans, Congress enacted the Employee Retirement Income and Security Act (ERISA) to protect employees with pension rights vested in such plans from the "great personal tragedy" of losing those rights when the plans terminated. *Nachman Corp. v. PBGC Corp.*, 446 U.S. 359 (1980) (quoting statement of Senator Bentsen, 3 Leg. History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 4793 (Comm. Print 1976)). Congress "wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (internal quotations and citations omitted).

Congress thereafter became concerned, however, that a significant number of plans were experiencing extreme financial hardship, and that ERISA's limited system to address plan terminations actually created a counterproductive incentive for employers to withdraw from financially-troubled plans. *Id.* at 730; *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 608 (1993). Congressional testimony by the Executive Director of the Pension Benefits Guaranty Corporation (PBGC), quoted by the Court in Gray, explained the problems caused by employers withdrawing from multiemployer plans[3] as follows:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

[3] A "multiemployer plan" is a plan "to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. . . ." 29 U.S.C. § 1002(37)(A). Generally speaking, a multiemployer pension plan is a multiemployer plan that exists to provide income upon retirement to employees of the employers that contribute to the plan. *Id.* § 1002(2)(A).

*Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess., 22 (1978) (statement of Matthew M. Lind), *quoted in* 467 U.S. 717, 722 n. 2.

To stem the tide of this "vicious downward spiral," Congress enacted MPPAA, the withdrawal liability provisions of which appear at 29 U.S.C. § 1381 et seq. Under MPPAA, an employer that withdraws from an underfunded multiemployer pension plan is liable to the plan for the employer's proportionate share of the fund's unfunded vested benefit ("UVB") liability. A fund's UVB liability is the difference between the present value of vested benefits—*i.e.*, benefits that are currently being paid to retirees as well as benefits that will be paid in the future to covered employees who have already completed sufficient years of service to be "vested" in their benefits—and the current value of the plan's assets. 508 U.S. at 609, citing 29 U.S.C. §§ 1381, 1391. The fund's UVB liability is allocated to a withdrawing employer under one of several statutory methods on the basis of the employer's past contributions to the fund. 29 U.S.C. § 1391.

Importantly, withdrawal liability is only owed if an employer withdraws from a multiemployer pension fund. *Id.* § 1381. MPPAA requires that, as soon as practicable after an employer's complete or partial withdrawal, the plan sponsor of the affected pension fund is required to notify the employer of the amount of liability and the statutorily prescribed schedule of payments. *Id.* § 1399(b)(1). MPPAA then provides a procedure for the employer to raise any objection it may have to the assessed liability, for any disputes between the employer and the pension fund to be resolved through arbitration, and for the collection of the assessed liability through action in federal court. *Id.* §§ 1399, 1401.

### C. Debtors Have Not Met the Requirements of Section 1113

Debtors' Memorandum of Law cites to the nine requirements that a debtor must prove it has met in order to be permitted to reject a collective bargaining agreement under Section 1113. *See* Debtors MOL at 64-65, citing *Family Snacks*, 257 B.R. 884, 892 (Bankr. 8th Cir. 2001). Four of the other employers that also contribute to the 1974 Plan, The Ohio Valley Coal Company and the Ohio Valley Transloading Company ("**Ohio Valley Coal**"), Drummond Company, Inc. ("**Drummond**") and Energy West Mining Company ("**Energy West**") (collectively the "**Contributing Employers")**, argue that the Court should deny the Debtors' motion because Debtors have failed to meet several of these requirements. *See* Objection to Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code, (Docket No. 3326) ("**Ohio Valley Coal Objection**") at 5-11; Objection to Debtors Motion to Reject Collective Bargaining Agreements and to modify Retiree Benefit Pursuant to Sections 1113 and 1114 of the Bankruptcy Code (Docket No. 3585) ("**Drummond Objection"**); Objection to Debtors Motion to Reject Collective Bargaining Agreements and to modify Retiree Benefit Pursuant to Sections 1113 and 1114 of the Bankruptcy Code (Docket No. 3586) ("**Energy West Objection"**). In particular, each of the Contributing Employers argue the proposal does not meet the requirement that all affected parties be treated fairly and equitably because it is not fair and equitable to the other employers obligated to contribute to the 1974 Plan. Should the Court grant the Debtors' 1113 Motion, it is those other contributing employers who will bear the costs of funding the 1974 Plan's vested benefit liability, including that owed to Debtors' past or present employees, with no help from the Debtors. *Id.* at 9-10.[4]

[4] Ohio Valley Coal also argues that, because the Debtors' plan to cease contributing to the multiemployer pension plan excludes Debtors' potential recovery from claims against

The NCCMP does not want to repeat points made by the Contributing Employers or the 1974 Plan but would like to expand on those arguments from the NCCMP's point of view as a coordinating body of multiemployer plans. In particular, the NCCMP is concerned with the potential impact on the pension plan and by extension the plan's participants and beneficiaries if the Court were to grant Debtors' motion and thereby permit the Debtors to exit the 1974 Plan and effectively evade $959 million in withdrawal liability.

As discussed above, Congress adopted MPPAA to address the "vicious downward spiral" of employers withdrawing from multiemployer plans and thereby increasing the financial pressure on remaining contributors which in turn increases the incentive on other employers to withdraw from the plan and so on. Congress sought to address this problem through the imposition of withdrawal liability, which effort is undermined by permitting employers to use section 1113 as a means to exit the affected plans without paying their withdrawal liability, which is precisely what Debtors seek with their motion. Indeed, the "vicious downward spiral" would be accelerated by the Court's granting of Debtors' motion, both because Debtors are themselves a significant participating employer in the industry and because of the precedent it sets or the "road-map" it would provide to permit other employers to renege on their pension obligations in this manner.

The potential consequences of perpetuating this downward spiral are dire for the plans and for the national interest they represent. As an increasing number of contributing employers seek to shed contribution and withdrawal liability obligations to multiemployer plans under Section 1113 of the Bankruptcy Code, fewer employers remain to contribute to those plans and to fund the plans' payment of accrued benefits. The diminishing contribution base that results

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Peabody and/or Arch, it does not meet the requirement under the "best interests of creditors" test of 11 U.S.C. § 1129(a)(7).

can compromise a plan's funding status and trigger mandatory reductions in future benefit accruals as well as the elimination of previously non-forfeitable benefits under Internal Revenue Code funding rules adopted as part of the Pension Protection Act of 2006. *See* 26 U.S.C. §§ 432(e) and (f). Moreover, plans that fail to satisfy a special ERISA funding test are deemed to be in "reorganization status" and can thereby be forced to eliminate any new or increased benefits that that have been in the plan for less than five years. 29 U.S.C. §§ 1421-1425.

Thus, participants and beneficiaries pay the price immediately for plan funding shortfalls caused by employers' failures to pay their assessed withdrawal liability. Ultimately, even the elimination or reduction of participant benefits required by the statutory provisions above may prove insufficient to offset the declining contribution base, however. In that case, a plan would be left with insufficient assets to pay benefits as they come due, which would cause the plan to be deemed "insolvent." 29 U.S.C. § 1462(b)(1). It is only in the event of plan insolvency that the Pension Benefit Guaranty Corporation ("PBGC"), the government insurer of last resort, would step in to provide financial assistance to the financially compromised multiemployer plan. 29 U.S.C. § 1426.

While the PBGC will guarantee the nonforfeitable benefits of participants of an insolvent multiemployer plan, the PBGC guaranteed level of benefits is typically substantially less than the benefit amount promised under the plan, thus exposing participants to yet further reduction of their pension benefits. *See* 29 U.S.C. § 1322a (guaranteeing nonforfeitable benefits at a rate of 100% of monthly benefit up to $11 per month per year of service plus 75% of the lesser of $33 or the accrual rate under the plan in excess of $11). For example, in a multiemployer plan where monthly pension benefits are the product of a participant's years of service and an accrual rate of $56, a participant with 20 years of service would be entitled to an $1,120 monthly pension ($56 x

20 years of service). Under the PBGC guaranteed level of benefits, however, the participant's monthly benefit would be capped at $715 per month[5]—a reduction of more than 36% in the participant's monthly pension benefit. Thus, as the plan's financial condition spirals downward, so too does the value of a participant pension benefit.

In addition to the substantial cut the PBGC guarantee amount would represent relative to promised benefits under the plan, there is growing evidence that the PBGC may be unable to guarantee even these significantly reduced benefits on an ongoing basis. As of September 30, 2012, the PBGC's multiemployer program had a deficit of $5.2 billion.[6] 2012 PBGC ANN. EXPOSURE REP. at 6. The PBGC relies primarily on premiums payments (and any interest thereon) from multiemployer plans for funding. *Id.* Over the next decade, the PBGC multiemployer program expects to collect less than $1.3 billion in premium payments. *Id.* at 7. Over the same period, the PBGC multiemployer program anticipates assuming responsibility for the payment of $17.1 billion new benefit claims, though the cost of such claims could be as high as $35 billion. *Id.* As a result of the disparity between income from premium payments and expenses attributable to benefit claims, the PBGC multiemployer program's operating deficit is expected to exceed $26.2 billion by the year 2022. *Id.* at 13. Moreover, due in large part to the financial deterioration of two large multiemployer plans, there is now nearly a 91% chance the PBGC multiemployer plan program will be insolvent by 2032. *Id.* at 1.

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[5] This guaranteed benefit calculation is based on the formula set forth in 29 U.S.C. § 1322A(c)(1)(A) under which the participant receives 100% of the first $11 of the $56 accrual rate (or $11) and 75% of the next $33 (or $24.75), for a total maximum benefit accrual rate of $35.75.

[6] The PBGC maintains two insurance programs, one for single employer plans and another for multiemployer plans. As of September 30, 2012, the single employer program had a deficit of $29.1 billion. 2012 PBGC ANN. EXPOSURE REP. 7 (2013).

In light of the PBGC's recent reports, the Debtors are incorrect (or perhaps disingenuous) when they claim that their proposal to withdraw from the 1974 "would not affect the pensioners' receipt of payments from this multiemployer fund." Debtors' MOL at 47. In light of the agency's own precarious financial situation, the PBGC's role as backstop to the downward spiral of employer contributions to multiemployer plans is very limited and increasingly uncertain, and the cost borne by plan participants in terms of reductions to the expected amount of their benefits is very high. That means that, ultimately, it is the participants and their beneficiaries who will lose out if employers are permitted to exploit the bankruptcy court's procedures in this fashion. That was precisely the goal that Congress sought to avoid with the adoption of ERISA and MPPAA.

## IV. CONCLUSION

The NCCMP offers this amicus curiae brief in an effort to give the Court a "big picture" view of the potential consequences of permitting Debtors to exit the pension plan and have their withdrawal liability treated as a general unsecured claim on which the plan will be entitled to pennies on the dollar if anything. The NCCMP believes that the Debtors' motion should be denied in the national interest of securing the pensions provided by multiemployer plans and that the Debtor and the affected parties should be directed to explore other potential sources of savings and revenue that would make the Debtors' Motion unnecessary.

Respectfully submitted,

Dated: April 12, 2013

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed on April 12 2013, using the Court's CM/ECF system and that service will be accomplished upon all counsel of record with an e-mail address in the CM/ECF system by operation of that system.

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