

Extending Debtors' Exclusive Periods Within Which to File a Plan of Reorganization and Solicit Votes Thereon [Docket No. 3498] (the "Second Exclusivity Motion" or the "Motion"), respectfully represents:

INTRODUCTION

1. The Debtors' second request for an extension of the exclusive periods under Section 1121(d) of the Bankruptcy Code should be denied. No "cause" exists for an extension. To the contrary, allowing the Debtors' exclusivity periods to expire would be in the best interests of all of the Debtors and their creditors. Termination of the Debtors' exclusivity would generate the "tension" necessary to move the plan process forward - - hopefully, towards a successful conclusion of these cases.

2. Over the more than nine (9) months that have elapsed since the Petition Date,² the Debtors have primarily focused their efforts on attempting to resolve the legacy labor and retiree issues affecting the Obligor Debtors, but for which the Non-Obligor Debtors have no liability or responsibility. Granting the Debtors a further extension of exclusivity would prevent creditors,

(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; (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 Capitalized terms used and not otherwise defined herein, including "Obligor Debtors" and "Non-Obligor Debtors," have the meanings ascribed to such terms in Wilmington's objection [Docket No. 3606] (the "Wilmington Objection") to the Debtors' 1113/1114 Motion. In the interests of brevity, the lengthy background and arguments set forth in the Wilmington Objection are also in all respects incorporated herein by reference.

including those of the Non-Obligor Debtors, from filing their own chapter 11 plan(s) for some or all of the Debtors, to the detriment of the Debtors' estates as a whole.

OBJECTION

A. Section 1121(d) of the Bankruptcy Code

3. It is well settled that a "debtor seeking to extend the 120-day exclusive period bears the burden of proof and must show that cause exists for granting an extension." *In re Southwest Oil Company of Jourdanton, Inc.*, 84 B.R. 448, 450 (Bankr. W.D. Texas 1987); *In re McLean Industries, Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) (debtor bears burden of proof that cause exists for extending exclusivity). A debtor's motion to extend exclusivity may not "be granted routinely" or without a compelling reason. *McLean Industries, Inc.*, 87 B.R. at 834; *Matter of All Seasons*, 121 B.R. at 1004; *In re Matter of All Seasons Indus., Inc.* 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (a "request to extend . . . exclusivity is a serious matter.").

4. Courts look at many factors in determining whether to extend exclusivity periods under section 1121.³ The principal or primary focus of a court's analysis, however, is whether extending exclusivity will move the plan process forward. *In re Dow Corning Corp.*, 208 B.R.

³ When determining whether a debtor has demonstrated that "cause" exists to extend exclusivity, courts look to the facts of each specific case. Among the "factors" that courts have considered in assessing whether "cause" exists include, but are not limited to, the following:

- (i) the size and complexity of the case;
- (ii) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
- (iii) the existence of good faith progress toward reorganization;
- (iv) the fact that the debtor is paying its bills as they become due;
- (v) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- (vi) whether the debtor has made progress in negotiations with its creditors;
- (vii) the amount of time which has elapsed in the case;
- (viii) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
- (ix) whether an unresolved contingency exists.

In re Adelpia Communications Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006). See also *In re Tripodi*, 2005 WL 2589185, at *1-2 (Bankr. D. Conn., Oct. 9, 2005); *In re Service Merchandise Company, Inc.*, 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000); *McLean Industries, Inc.*, 87 B.R. at 834.

661, 670 (Bankr. E.D. Mich. 1997). If allowing exclusivity to lapse would foster or enhance the plan process, a court should not extend the debtor's exclusivity periods. *Id.*

5. Termination of exclusivity can act as a catalyst towards reaching an approved plan or other successful outcome of a case. *See, e.g., In re EUA Power Corp.*, 130 B.R. 118, 119 (Bankr. D.N.H. 1991); *see also In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich 1993). This is not surprising, as this result was precisely what Congress intended Section 1121(d) to accomplish. *See, e.g., In re Public Service Company of New Hampshire*, 88 B.R. 521 (Bankr. D. N.H. 1989). Section 1121 is one of numerous provisions of the Bankruptcy Code which balance the rights and obligations of a debtor and its creditors, "thus creating a tension among interested parties which will hopefully lead to appropriate administration of and a successful conclusion to the Chapter 11 case." *In re Tony Downs Foods Co.* 34 B.R. 405, 407–408 (Bankr. Minn. 1983) (emphasis added).

6. Put another way, section 1121(d) of the Bankruptcy Code was specifically designed to avoid making creditors "hostages" of the Debtors during the bankruptcy process. *See In re Timbers of Inwood Forest Assocs, Ltd.* 808 F.2d 363, 372 (5th Cir. 1987) (*aff'd* 484 U.S 365 (1988)) ("Section 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors"); *In re Curry Corporation*, 148 B.R. 754, 755 (Bankr. S.D.N.Y. 1992) (same); *In re Gen. Bearing Corp.*, 136 B.R. 361, 368 (Bankr. S.D.N.Y. 1992) (same). Among other things, Section 1121(d) allows creditors to "have a right to a say in the future" of a debtor's estate. *See In re Timbers of Inwood Forrest Assoc., Ltd.*, 808 F. 2d at 372.

B. The Debtors Have Not Shown That “Cause” Exists to Extend Exclusivity

7. The Debtors have not demonstrated, and cannot demonstrate, that “cause” exists to extend their exclusivity periods. Allowing the Debtors’ exclusivity to lapse would be in the best interests of the Debtors’ estates and their creditors. During the 280 days plus since the Petition Date, the Debtors have ignored the interests of their Non-Obligor Debtors (and their creditors) and have focused on resolving labor contracts and legacy labor liabilities that relate only to the Obligor Debtors.⁴

8. Instead of allowing the Debtors to continue to hold their creditors, particularly those of the Non-Obligor Debtors, “hostage,” this Court should allow the Debtors’ exclusivity periods to lapse so that other parties in interest may “have a say in the future” of these cases. The “tension” that is created when exclusivity lapses is precisely the catalyst that would move these cases towards a successful outcome for all of the Debtors and their respective creditors. As courts have noted (and experience has shown), allowing other parties in interest the ability to propose and prepare plans can (and was designed to) foster, enhance and expedite the successful plan process. This Court’s inquiry on this Motion should focus on such “primary consideration” - - “whether or not doing so would facilitate moving the case forward.”⁵

⁴ The result of these negotiations is the Debtors’ Proposal embodied in the 1113/1114 Motion - - a Proposal which, in effect, contemplates an inappropriate and unwarranted “substantive consolidation” of the Debtors by improperly “pooling” all of the Debtors’ assets to satisfy the UMWA’s claims. *See, generally*, Wilmington’s Objection to the Debtors’ 1113/1114 Motion [Docket No. 3606].

⁵ *Dow Corning*, 208 B.R. at 670.

WHEREFORE, the Wilmington respectfully requests that the Court (i) deny the Second Exclusivity Motion and (ii) grant such other relief as the Court deems appropriate.

Dated: April 16, 2013

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 16th 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:

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