UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Re: ECF No. 1919**

THE SALARIED RETIREE COMMITTEE'S REPLY TO THE MOTION OF DEBTORS AND DEBTORS IN POSSESSION FOR AN ORDER, PURSUANT TO 11 U.S.C. § 363, AUTHORIZING DEBTORS TO TERMINATE BENEFITS OF NON-UNION RETIREES

The Official Salaried Retiree Committee ("Retiree Committee") of Debtor Patriot Coal Corporation and its Affiliated Debtors (collectively, the "Debtors"), sets forth the following Objection to the Debtors' Motion for an Order Pursuant to 11 U.S.C. § 363, Authorizing Debtors to Terminate Salaried Retiree Benefits (the "Motion"), and in support thereof, the Retiree Committee states as follows:

I. INTRODUCTION

1. Notwithstanding the title of the instant Motion filed by Debtors, the Motion represents an inequitable, immoral, and unlawful attempt by Debtors to obtain a *de minimus* benefit at the overwhelming expense of the over 1,300 affected retiree families. While callously asserting use of "careful deliberation" in seeking the termination of substantially all non-union retiree benefits—those words ring hollow to the non-union workers (most of whom spent their lives working underground in dangerous conditions) who are now losing the ability to obtain affordable healthcare insurance. (*See* Motion at ¶ 2.) While Debtors seeking relief from UMWA retirees, the Debtors are seeking only relatively minor modifications to union retiree benefits while

simultaneously asserting the necessity to terminate *all* health care insurance of the non-union retirees. Putting this into further perspective, based on the financial information provided by Debtors, the costs to the Debtors (if no reduction were made to any salaried retiree benefits) would equal only only approximately 2% of the *entire* amount expected to be spent by Debtors on UNWA healthcare costs. In light of these financial realities, Debtors' assertion that elimination of non-union retiree benefits as being "critical to their survival" is likewise far from the truth. (*Id.*)

2. It is puzzling too that Debtors assert that "it is important that the burdens associated with the Debtors' reorganization to be shared *equitably* among the Debtors' stakeholders and the modification and [that] termination of Non-Union Retiree benefits is only fair given the sacrifices that the Debtors are demanding from their union employees and other stakeholders." (*Id.* (emphasis added).) Debtors fail to mention, in this regard, that it has made several offers to fund a VEBA trust for UMWA retirees by offering to give the Union retirees a 35% equity stake in the reorganized enterprise, participation in a profit sharing plan and continuation of current benefits through January of 2014. It is estimated that the consideration offered by the Debtors to the Union Retirees may valued as high as $400 - $600 million dollars.[1] While Debtors did agree to a fractional unsecured claim for the non-Union retirees in the Agreed Order (EFC Doc. 3004) (the "Agreed Order"), the unsecured claim that it would give rise to would likely constitute about 2% of the value of what the retiree are faced with loosing here.[2] Accordingly, it is

[1] See Debtors Fifth Section 1114 Proposal.

[2] Debtors have only agreed to a claim representing the loss of benefits arising "during the course of these cases." (Motion at ¶ 40). In other words, when split among the non-union retirees, that amount will likely not be sufficient to pay for one month of health insurance coverage, if that.

hard to imagine what Debtors' mean when asserting that the sacrifices of Debtors' reorganizations will be shared "equitably." (*Id.* at ¶ 2.)

II. THE RETIREE PLANS SOUGHT TO BE TERMINATED BY DEBTORS ARE VESTED AND THUS 11 U.S.C. §§ 105(a) and 363(b) ARE INAPPLICABLE

3. As reflected in the Agreed Order, Debtors have acknowledged that the non-union retiree plans at issue not be terminated pursuant to 11 U.S.C. §§ 105(a) and 363(b) if said plans fall under the protections afforded by 11 U.S.C. § 1114, *et seq*. (i.e. if they are vested benefits.) Accordingly, the Agreed Order reflects that Debtors must demonstrate that the benefit plans they seek to terminate are not vested before, and/or as a predicate to, termination under Section 363 of the Bankruptcy Code. For the reasons set forth herein, the plans at issue are all vested, and thus cannot be terminated without the Debtors going through the entire Section 1114 process.

4. The Debtors have identified ten (10) individual retiree benefit plans (collectively "Retiree Plans") that they seek to terminate.[3] The Debtors' argument is straightforward, but is predicated upon a false premise. Debtors argue that they have the right to terminate the Retiree Plans because they allegedly have reserved the unilateral right to terminate the plans within the plan documents at issue. (Motion at ¶ 23.) However, a careful and full examination of the relevant documents describing the welfare

---

[3] The Debtors refer to the "Retiree Life Insurance" as an apparent catchall for each instance that life insurance was promised to the affected retirees for the last approximate fifty-five years. The Retiree Committee asserts that the documents cited by Debtors describing the life insurance benefits were promised and presented in a manner demonstrating the vesting of same. The Retiree Committee also notes that in the Motion, Debtors are not seeking to eliminate the vast majority of life insurance benefits at issue, but rather only limiting each non-union retiree life insurance policy to a maximum of $30,000. By doing so, Debtors seek to eliminate approximately $3 million dollars of retiree benefit costs.

plan reveals otherwise.

III. APPLICABLE LEGAL STANDARDS[4]

5. It is not disputed, as a general legal principal, that retiree welfare plans are not automatically presumed to vest, however, the Eight Circuit (and a majority of other Circuits) have repeatedly held that welfare plans should be treated as vested when promised by or offered as lifetime benefits by an employer. *See Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8thCir. 1987); *see also Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76 (2dCir. 2001), *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996)(citing *Bidlack v. Wheelabrator Corp.*, 993 F.3d 603, 604-05 (7thCir.) (en banc), cert. denied, 510 U.S, 909 (1993)).

6. Debtors cite to *Stearns v. NCR Corp*., for the unremarkable proposition that "an *unambiguous* reservation-of-rights provision" is sufficient without more to defeat a claim that retirement welfare plans are vested. 297 F.3d 706, 712 (8thCir. 2002) ("there must be an affirmative indication of vesting in the plan documents to overcome an *unambiguous* reservation of rights." (Emphasis added). In support of this proposition, the

[4] Patriot Coal Corporation spun-off from Peabody Energy Corporation in November of 2007. Peabody retained a portion of Patriot's postretirement welfare liability but Patriot agreed to continue the benefits of the affected retirees at issue here. To a large extent as well, employees hired under and/or retired under particular company benefit plans have been segregated and maintained in approximately ten (10) different benefit plans identified by Debtors. The historical ERISA plan and other documents cited by the Debtors in support of the instant Motion, in this regard, reflects not only welfare benefit plan documents of current Debtors, but also of the prior companies that had originally tendered plan and related documents to their employees….who are now the affected retirees. Accordingly, rather than that cite to the particular legal entity names that distributed each of the ERISA plan documents in the past, the Retiree Committee shall rather refer to the "Company" when referring to language cited by the (then) employer in all ERISA plan documents referenced herein.

Court in *Stearns* cited to *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1385 (8th Cir. 1992), indicating that an "*unambiguous"* reservation of rights clause can defeat a vesting claim, but only when there is "absolutely nothing in the plan to contradict or cloud [its] plain and obvious meaning." *Id.* In this respect too, "if a reservation-of-rights provision is facially ambiguous, or if it conflicts with other plan provisions, the court in resolving a dispute over vesting may look at extrinsic evidence to determine whether the parties intended to confer vested retirement health care benefits." *Id.* (*citing Barker v. Ceridian Corp.*, 122 F.3d 628, 635-39 (8th Cir.1997)).[5] Moreover, an employer may not provide a Summary Plan Description ("SPD") promising vested benefits but then seek rely upon termination language in an underlying Plan document. *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620-21 (8th Cir. 1998) (terms of summary plan prevailed even where the summary plan referred the reader to the formal plan for "[c]omplete details")).

7. Of course too, part of the analysis undertaken in Response to the Motion is, whether when read as a whole, the SPDs or other materials given to the employees are "reasonably susceptible of being interpreted as a commitment by the employer to vest benefits." *Jensen v SIPCO, Inc*, 38 F.3d 945, 953 (8thCir. 1994);[6] *Rexam v. United Steel Workers of America*, 2006 WL 3247139 *5 (Nov. 9, 2006, D. Minnesota); *see also*

[5] Further, in a case involving ambiguous ERISA document, contemporaneous interpretation of other documents are relevant. *Id.* (*citing Fink v. Union Cent. Life Ins. Co.*, 94 F.3d 489, 492 (8th Cir.1996)); *see also Empire Blue Cross and Blue Shield*, 2004 U.S. Dist. LEXIS 18286 *8-9 (E.D.N.Y. Sept. 8, 2004); *Smith v. ABS Indus., Inc.*, 890 F.2d 841, 846 (6thCir. 1989) (extrinsic evidence in form of other writings given to plan participants should be considered in the context of ambiguous language in an SPD).

[6] Debtors cite to *Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 877 (8thCir. 2009) where the court notes that the vesting standard was adopted from the Second Circuit.

Bidlack v. Wheelabrator Corp., 993 F.2d 603, 604-05 (7thCir.) (*en banc*), *cert denied* 510 U.S. 909 (1993) ("it is not necessary that a commitment to vest must be in precise language denying the right to withdraw benefits…." rather, the employee must merely be able to "*point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest…benefits*.") (emphasis added). If the relevant plan documents contain ambiguous provisions, extrinsic evidence may also be viewed to determine if the benefits should be considered vested. *Anderson*, 836 F.2d at 1517; *Rexam*, 2006 WL 3247139 at *5. In either case, *when* reviewing welfare plan documents, the documents must be construed against the employer. *Feifer v. Prudential Sec. of America*, 306 F.3d 1202, 1212 (2d Cir 2001); *DaLee Realty, Inc. v. Kuhl*, 209 Neb. 6, 305 N.W.2d 891 (1981); *Weum v. Mut. Benefit Health & Acc. Ass'n*, 237 Minn. 89, 54 N.W.2d 20, 29 (1952); *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N.W. 891 (1932).

IV. ANALYSIS OF EACH RETIREE PLAN

A. THE MEDICAL PREMIUM REIMBURSEMENT ACCOUNT PROGRAM IS NOT SUBJECT TO UNILATERAL TERMINATION

8. The Medical Premium Reimbursement Allowance Program (hereinafter the "MPR Account Program," and the accounts related thereto shall be referred to as "MPR Accounts") was historically presented as a vested benefit by the Company to its employees. Utilizing the applicable legal standard for vesting noted above herein, there was language incorporated into the plan documents that was reasonably susceptible of being interpreted as a commitment by the Company to vest the MPR Account benefits. *See Jenson*, 38 F.3d at 953; *Rexam*, 2006 WL 3247139 *5; *Bidlack*, 993 F.2d at 604-05. In seeking terminate the MPR Account Program, Debtors cite to language that is either

vague on its face or contradicts other information provided by the Company that was intended to be relied upon and gave the impression of lifetime benefits. Additionally, Debtors' argument is wholly predicated upon citing reservation of rights language, while ignoring contradictory statements in the same (or earlier) materials, as well as other writings given to the participants describing the MPR Account Program as vesting in nature.

1. Basics of MPR Account Program

9. The Company used and designed the MPR Account Program to encourage employees to work for extended periods into the future in order that they might qualify for the MPR Account Program instead of receiving a more traditional subsidized medical plan previously offered through the Company or a higher salary.[7] (*See, e.g.*,. The Key to Medical Benefits SPD April 2010 at 53, RC Ex 1.)[8] As described herein below, the MPR Accounts were presented to employees as reimbursement accounts, equivalent to money in the bank, backed by the Company, and consisting of monies to be used in the future to pay for any type of medical related expenses—whether through a Company sponsored welfare plan or any other third party medical plan available in the marketplace.

---

[7] In relevant part, as stated by the Company about the MPR accounts in a letter to its employees:

> *We also hope the change provides you with an incentive to continue your career with the company. By extending your service, you will not only have an increased retiree medical benefit credit, but will also enjoy the other advantages of active employment, including … coverage under the health, life and accident benefit plans for active employees*.

(*See* 8/18/2004 Ltr. (emphasis added), RC Ex. 3.

[8] Retiree Committee exhibits are all identified on the Appendix at the end of the Response. Herein, exhibits reflected therein shall be referred to as "RC" with the exhibit number appearing thereafter.

10. The manner, form and substance of the materials the Company provided describing the MPR Accounts over the years reflected an express promise of a lifetime monetary benefits without any *clear* reservation of right to terminate same. MPR Accounts were not presented as a typical medical plan, but rather a means for each employee, working toward eligibility, to obtain a specific dollar amount would be held in an MPR Account (*i.e.* a health reimbursement account) that could to be used for either a Company sponsored healthcare plan or any other third party plans for the remainder of their lives. (*See* Peabody Benefits Update at 6, RC Ex. 2.) . The MPR Account Program appears to have been first described and promised to employees in the year 2000. (RC Ex. 1). That SPD, in relevant part, provided:

> "You will have the choice of purchasing your own private insurance policy or you can elect coverage through a retiree catastrophic plan offered by the company" (*Id.* at 53.)
>
> "In either case you can request reimbursement from the MPR program for any health insurance plan you purchase for yourself and/or your eligible dependents, including individual policies." (*Id.*)
>
> "You may also use your MPR to pay the cost of COBRA continuation coverage while you are eligible…" (*Id.*)

The Company's assertion that the MPR Account funds could be used for COBRA further strengthened the impression that even if the healthcare plans described in the SPD were to be terminated….that *the MPR account balances themselves would still be available to the retiree participants to pay for COBRA premiums*. (Id.) This alone demonstrates that the MPR Accounts were described to employees as a lifetime benefit that was not subject to termination.

11. Additionally, the above noted SPD contained a vesting formula indicating, for each retiree who retired after January 1, 2003, exactly how much money will be paid

into their individual MPR Accounts. (*Id.*) The SPD notes, in this context, that "if you should die before your maximum allowance has been exhausted, your eligible dependant may continue to request reimbursements until the allowance if fully used." (*Id.*) The only limit reflected on the MPR Account Program in this SPD was a pronouncement that after a retiree exhausted their "**lifetime maximum**" of MPR funds, that they will "no longer be eligible for any medical premium reimbursements from the company." (*Id.*) Again, these are the exact type of language and program features that give employees the impression of a vested benefit.

12. Later, when the MPR Account Program was implemented in January of 2003 (after employees had worked for several more years to qualify for this benefit), the Company distributed a new SPD supplement describing the new MPR Account Program. (*See* Your Benefit Keys 2003, Debtors' Ex. 10.) In describing the MPR Account Program, strict eligibility criteria was defined, providing, in relevant part, that a worker had to be at least 55 years of age and have ten (10) or more years of service to be eligible. (*Id.* at 36). Setting forth such standards—whereby an employee is only entitled to retiree benefits after working for a particular number of years—has been specifically found to constitute a promise of vested benefits. *See Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 85 (2d Cir. 2001)(benefits found to be vested where employees were told they would be eligible for retiree benefits if they completed twenty years of service and were at least 55 years of age).[9] As explained by the Devlin Court, such provisions should be construed as an offer that specifies performance as the means of acceptance -

[9] As noted earlier herein, the Second Circuit utilizes the same test to determine vesting as in this Circuit, only requiring an employee to "point to written language *capable of reasonably being interpreted* as creating a promise" *Id.* at 84.

sometimes referred to as an offer for a unilateral contract. (*Id*.) The Court continued by noting that by "performing" (that is, working for at least twenty years until attaining the age of 55, the employees accept such offers). *Id*. (citing *Restatement (Second) of Contracts* § 45(1) (1981)). Thus, in the instant case, employees performed, thereby accepting the Company's offer for a unilateral contract, by working at least 10 years and attaining the age of 55.

2. Ineffective Unilateral Termination Language

13. The reservation of rights language cited by Debtors with respect to the MPR Account Program is ineffectual when read in the context of the whole documents where it appears. (*See* Appendix A to Motion, Sec. I.) Common sense dictates that while a particularly worded reservation of rights might be clear and applicable for one type of ERISA plan, the *same* reservation of rights might not be clear in a more esoteric or complex ERISA plan or in a plan having contradictory statements therein. Such is the case here, where Debtors attempted to reserve the right to terminate some aspects of the "plans" (referred to in the SPDs), but not the MPR Account balances that were *already* earned and built up for retired MPR Account Program participants.

14. First, it is important to note that there are no SPDs that deal exclusively with the MPR Account Program. Rather, the MPR Account Program was systematically presented as wholly separate and distinct from other traditional medical healthcare plans that are otherwise described in said SPDs. (*See* SPD cited by Debtors, App. A, Section I, and corresponding Debtors Exs. 2–8.)[10] By way of example, the SPD distributed by the

[10] Debtors' citation to a document purporting to be a plan document should not even be considered in this context. First of all, while Debtors attach a 2003 "Plan" document as Exhibit 1 in regards to the MPR Account Program, the SPDs given to its

Company in 2003 describes the MPR Accounts, but is largely devoted to the "Retiree Catastrophic Plan" that would be available to retires if they worked until January 1, 2003. (*Id.* at 54).[11] The Retiree Catastrophic Plan was a medical plan with a very basic level of coverage with a high deductable." (*Id.*) As described separately in the SPD, a retiree having an MPR Account was allowed to, but not required to, apply their MPR Account dollars toward the catastrophic plan. (*Id.*) The Company told employees that an MPR Account Program participating retiree that, if they preferred, they could apply those earned MPR Account funds toward any medical plan, *even for COBRA premiums*. (*Id.*)

15. The reservation of rights in the year 2000 SPD, provided that:

> The *plan* is adopted with the intention that it will be continued for the benefit of present and future employees and retired employees of the company. However, the company reserves the right to terminate the plan, change required contributions or modify this plan in whole or in part at any time or for any reason, including changes in any and all of the benefits provided.

(Id. at 68.)

16. The above reservation of rights language references a "plan" but does not appear on its face to address or relate to the separate MPR Account Program described in the SPD. Indeed, an examination of the the year 2000 SPD at issue reveals that the "plan" referred to in the termination language is referring only to the "medical plan" that is painstakingly detailed in over sixty (60) other pages in the same SPD—a series of

---

retirees referred in the SPD only to a "June 1, 1985" Plan document. (*See* Debtors Ex. 2, at 70, Ex. 3 at 78, Ex. 4 at 75). Moreover, as noted above herein, an employer may not provide an SPD promising vested benefits but then seek to rely upon termination language in an underlying Plan document. *Marolt*, 146 F.3d at 620-21 (summary plan prevailed even where the summary referred the reader to the formal plan for "[c]omplete details").

[11] In every SPD cited by Debtors, the SPDs describe and are focused on describing separately traditional medical plans which appear to be the subject of the reservation of rights, not the MPR Accounts. (*See* SPD cited by Debtors in App. A, Sec. I.)

"Peabody medical plans offering three medical options to choose [differing only on amount of deductibles and co-pay obligations."] (*Id.* at 15 - 17) In other words, a plain reading of the *whole* year 2000 SPD would merely have put an employee on notice that the "*medical plans*" described in the SPD could be modified or terminated…but it is not clear or even inferred that a promised MPR Account balance earned by three additional years of labor service was being addressed in the above termination notice.

17. The Company continued to describe the MPR Account Program in SPDs as late as January 2010, which still, when read as a whole, were reasonably susceptible of being interpreted as a commitment by the Company to vest benefits with respect to the MPR Accounts. (*See* Patriot Coal Patriot Salaried Retiree Guide to Benefits After Retirement ("Patriot 2010 SPD"), RC Ex. 4) As in prior plan materials, the Company promised employees who remained employees for a particular period of time that they would earn and receive MPR Account funds based on the total number years of service for the company. (*Id.* at at 1-3.)

18. As with earlier reservation of rights language cited by Debtors in its Motion, later attempts to describe rights of termination in the Patriot 2010 SPD were still vague and unclear in the context in which they appeared, especially in light of the Company's definition of the "Plan" contained in the SPDs. On the inside page of the Patriot 2010 SPD provides the following:

> This document is a Summary Plan Description (SPD) and the legal Plan Document for the **Medical Premium Allowance** and **Catastrophic Retiree Medial Plan** and the SPD for the retiree life insurance for eligible salaried retires of Patriot Coal Corporation ("Company" and "Plan Administrator") and certain designated affiliates and subsidiaries in effect as of January 1, 2010, in accordance with the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the U.S. Department of Labor Regulations. A complete list of participating

> employers may be obtain upon written request to the Plan Administrator, and may be examined at the principal office of the Plan Administrator, and may be examined at the principal office of the Plan Administrator and other worksites. This document supersedes any documents previously issued to you.
>
> The Company intends to maintain this **plan** for eligible retirees, but reserves the right to change or terminate the **Plan** at any time. This document is not a guarantee of benefits or an employment contract of any kind.

(*Id.* at inside cover.) On the last page of the Patriot 2010 SPD, the following language can be found:

> This **plan** is adopted with the intention that it will be continued for the benefit of eligible present and future retired employees of the Company and certain designated affiliates and subsidiaries. However, the Company reserves the right to terminate the **plan**, change required contributions or modify this **plan** in whole or in part at any time for any reason, including changes in any and all of the benefits provided.
>
> This may cause retired employees to lose all or a portion of their benefits under the **plan**.
>
> This means that a retired employee cannot have a lifetime right to any **plan** benefit or to the continuation of this **plan** simply because this *plan* or a specific benefit is in existence at any time. This **plan** will comply with all requirements of the law and will be amended, if necessary, in order to meet any such requirements.

(*Id.* at 73 (emphasis added).)

19. Of course, the above language, when given its plan meaning would allow the Company to arguably terminate certain aspects of the "Plan." However, here, the Company expressly and narrowly defined the Catastrophic Medical and Prescription Drug Benefits to constitute the "Plan" (*Id.* at 6). In sharp contrast, when the MPR Account Program was described earlier in the Patriot 2010 SPD, the Company referred to that as an MPR Allowance but did not define it as part of any "plan" or "Plan." (Id. at 3 – 5.) Given the specificity used in the SPDs when describing vested benefits, including the MPR Accounts, the Company should not now be allowed to rely upon more general

language towards asserting unilateral termination rights. *Corso v. Creighton Univ.*, 731 F.2d 529, 532-33 (8th Cir. 1984) (it is also axiomatic that where general and specific terms in a contract may relate to the same thing, the more specific provision should control) (*citing State v. Commercial Cas. Ins. Co.*, 125 Neb. 43, 248 N.W. 807 (1933)).

20. Importantly too, *even if one were to interpret the above unilateral termination language to be applicable to the MPR Account Program as being terminable in the future,* there is no language adequately warning that anyone with an existing MPR Account balance would face the prospect of wholly forfeiting the balance of their MPR Accounts if the Company's "plan" were terminated. Rather, at best, the unilateral termination language in the MPR Account Program could merely be applied to allow it to end eligibility for future employees and/or to allow the Company to terminate the Catastrophic Medical Plan described in the SPDs.

21. Given that, at a minimum the reservation of rights language in the SPDs is ambiguous and/or contradictory to terms therein, it is appropriate for this Court to also examine other information provided by the Company to the employees about the MPR Account Program. *Anderson*, 836 F.2d at 1517; *Rexam* at *5 (if the relevant plan documents contain ambiguous provisions, extrinsic evidence may be viewed to determine if the benefits should be considered vested.) Here, the Company provided additional information about the MPR Account Program to its employees outside of official plan documents. For instance, MPR Accounts were described a Company meeting in August 2004 and print-outs of the presentation were given the employees. (*See* Peabody Energy Benefits Update Presentation ("2004 Presentation"), RC Ex. 5.) As noted in the "Objectives" section, the purpose of the meeting was, in large part, to "Review the

improved medical premium reimbursement (MPR) program and discuss how the MPR program works." (*Id.* at 2). Addressed wholly *separately* in that written 2004 Presentation, was the "Retiree Medical Plan" which was described as consisting of three different plans with different levels of coverage for healthcare costs and the like. (*Id.* at 4). Only in the "Retiree Medical Plan" section of the written 2004 did the Company provide language where it "reserve[d] the right to amend or terminate the *retiree medical plan* in whole or in part at any time." (*Id.* at 5 (emphasis added).) This *limited* right reserved by the Company was consistent with prior instances where the Company expressed the right to terminate medical "plans" but not the actual MPR Account dollars at issue.

22. Similar to prior materials relating to the MPR Account Program, the 2004 Presentation reflected that the MPR Account funds would only be provided to those employees with at least ten (10) years of service and only if an employee retired at a future date. (*Id.* at 8-11.) Moreover, the 2004 Presentation: (a) noted that spouses will be entitled to use the MPR Account upon death of the retiree; (b) provided the exact amount of reimbursement funds that will be earned for each year of service; and (c) provided charts showing the amount of MPR Account allocations for various levels of service. (*Id.*). In that same document, the Company also promised that "Upon retirement, you receive a one-time credit…to be used toward the purchase of your own healthcare policy – whether it is another employer's group health plan, an individual policy, COBRA, Peabody's catastrophic plan or Medicare." (*Id.* at 12.) This language reinforces the vested nature of the MPR Accounts.

23. In November of 2006, the Company sent notices to the employees reflecting that it was increasing the size of MPR Accounts for retirees with over twenty-five (25) years of service—a method to benefit the company by keeping its employees working even later into their lives. (*See* Peabody Letter November 2007, RC Ex. 6) In said letter, the Company represented that MPR Accounts would pay for the costs of medical premiums "over your and your spouse's expected ***lifetimes***." (*Id.)*(emphasis added.) Additionally, the same material included tables reflecting the *exact* amount of monies provided to retirees for each year of their additional service if they put off retirement until later years. (*Id.*) There are *no warnings* in this Company literature that the MPR Account balances were subject for forfeiture. (*Id.*) Indeed, everything related to MPR Accounts was to the contrary.

24. After Participants were in the MPR Account Program, the Company sent participants MPR Account statements further reflecting the vested nature of the Accounts, which included language reflecting the exact account balances available to each MPR Account holder. (*See, e.g.*, MPR Account Statement dated March 3, 2010RC Ex. 7). These MPR Account statements provided, in relevant part, that:

> This letter is to inform you, as December 31, 2009, your Medical Premium Reimbursement (MPR) accrued account balance is $116,356. Effective January 1, 2010 you're in MPR allowance (for calendar year 2010) will be accrued at the following rates:…

(*Id.*)

25. These MPR Account statement letters were clearly sent by the Company to notify each retiree, or future eligible retirees, as to the amount of money they have earned and would have to spend on healthcare (whether through a plan offered through the Company or any third party plan) so that the retirees could plan their finances

accordingly. Indeed, knowing that a particular MPR Account balance was available, the affected retirees reasonably understood they could spend their other monies, savings or the like, on other necessities of life and did not need to save for healthcare premiums beyond the accrued amounts reflected in the MPR Account. *In the letters send by the Company informing each MPR participant of their MPR balance, there was* ***no*** *reference to any plan document nor was there any warning that the MPR balances were subject to forfeit, diminishment or elimination.* (*See Id*.; see also Patriot Coal Letter August 3, 2012, RC Ex. 8) In 2012, the Company communicated to MPR retirees:

> Enclosed is a summary outlining the benefits for which you are eligible for retirement Patriot Coal. Medical Premium Reimbursement is a benefit to help you purchase health insurance after retirement. The MPR allowance will reimburse premiums for medical, dental or vision insurance purchase for you and your eligible dependents.
>
> You are eligible to receive the MPR benefit under the Patriot Coal [sic] because you were at least 55 years of age and have five or more years of service as of the last date of your employment with the company.

(RC Ex. 8.)

26. Other materials were also provided by the Company to its employees confirming the vested nature of the MPR Accounts. (*See* MPR Allowance Statement dated April 20, 2006 Statement, RC Ex. 9.) These "computed" and "approved" documents set forth the amount of credit the employee will receive as part of their service credit, to be used "at any time in the future to request reimbursement for any premiums you pay for medical, dental, or vision insurance for you and your eligible dependents…" (*Id*.) These statements also reflected that even upon death of a participant the MPR Account Program would pass to the spouse of the employee. (*Id*.) While setting forth this clear expectation of having these MPR Account funds made available upon retirement as a vested benefit, the Company provided *no* termination language and *no* warning that the

Company could take away the MPR Account funds after retirement. (*Id.*) When employees retired thereafter, the MPR Account Program participating retirees then received statements showing—to the penny—their available MPR Account monies in their individual accounts. (*See* BeneFlex Statement dated February 20, 2013, RC 10.)

27. In conclusion, over a period of nearly thirteen years, the Company held out the terms of the MPR Account Program to benefit the Company and encourage employees to remain loyal employees. During that time, the Company provided express objective criteria to the employees describing what would be required of them to obtain the MPR Account benefits. But while clearly explaining that plans like the Catastrophic Medical Plan might not be available for the Retiree to spend their monies on…it was always understood based on the materials provided by the Company that, at a minimum, that the MPR Account monies could be used to pay for third party medical expenses and/or third party insurance plans—even to pay for COBRA premiums if the Company terminated the medical plans. Accordingly, the language incorporated into the plan documents (and/or that provided in addition to same) were reasonably susceptible of being interpreted as a commitment by the Company to vest the MPR Account Program benefits. See *Jensen*, 38 F.3d at 953; *Rexam, at* *5; *Bidlack*, 993 F.2d at 604-05. For the above reasons too, the ambiguous or contradictory reservation of rights, in the context of all of the other materials provided by the Company, failed to provide Debtors with the right to terminate MPR Account balances once earned.

B. THE RETIREE CHOICE ACCOUNTS ARE NOT SUBJECT TO UNILATERAL TERMINATION

28. The Retiree Choice Accounts were represented to employees as vested benefits by the Company and are not subject to unilateral termination. A review of the

Retiree Choice Account Plan ("Choice Account Plan," and individual accounts related thereto shall be referred to as "Choice Accounts") materials reveals language that is *more* than reasonably susceptible of being interpreted as a commitment by the Company to vest the Choice Account Plan benefits. (*See Jenson*, 38 F.3d at 953). Moreover, the Debtors have not cited any reservation language in the plan documents, that when viewed carefully in context and taking into account contradictory promises, could ever overcome the vesting language at issue.

29. All of the reservation of rights language relied upon by Debtors in support of its argument that the Choice Account Plans are terminable are located in the same SPDs (and enrollment materials) cited in support of the MPR Account Program termination. (*See* Appendix A to Motion, Sec. I.) Similar to the MPR Account Program, the reservation of rights language that Debtors rely upon in an attempt to terminate the Choice Account Plan is ineffectual when read in the context of the entire documents. While on the whole, the Debtors attempted to reserve the right to terminate some aspects of the "plans" that they refer to, they did not adequately do so with respect to the Choice Account balances.

30. No SPDs are exclusively limited to describing the Choice Accounts. Rather, as noted above, a description of the "Consumer Choice Accounts" is reflected in small portions of other SPDs describing other medical plans, *i.e.* the "Salaried Employee Guides to Medical Benefits." (*See* Exs/ 2-6 to Debtors' App., inside covers). Indeed, in each of the nearly eighty (80) page length applicable SPDs, a vast amount of the information therein is focused on several distinct medical healthcare plans—ranging from the "Option 250 plan" providing the highest level of coverage and the highest levels of

monthly employee contributions to the "Option 1000" plan that eliminated employee monthly contribution but providing for the highest level of potential out-of-pocket costs. (*See, e.g.* Debtors' Ex. 2 at 9.)

31. Unlike the traditional healthcare plans described in the SPDs at issue, when the Company described the Choice Accounts, it indicated that if that option were chosen, that an employee and/or retiree would receive "two special accounts called the Employee Choice Account (ECA) and the Retiree Choice Account (RCA)." (Debtors Ex. No. 2, at 22.) In turn, they were described as follows:

- Through the ECA, the company provides you with an annual credit to support your health care needs as an active employee. A portion of any unused funds from this account can be rolled over at the end of the year to a Retiree Choice Account (RCA) to be used toward health care expenses during your retirement. (*Id.*).
- [You must then pay the primary deductable of your health insurance coverage, and] [a]fter you have met your primary deductable, you gain access to your Employee Choice Account. This account gives you the opportunity to choose how and when the dollars in your account are spent to pay for eligible medical expenses….The Employee Choice Account gives you the option to *save money for the future if you do not need or want to use the money now ("save").* (*Id.* at 34 (emphasis added).)
- **How to "Save"**

  If you do not use all the money in your Employee Choice Account in a year, you can roll over a certain amount into your Employee Choice Account for next year…. (*Id.*)
- **Investing in a Retiree Choice Account**

  If you carry over the maximum toward next year's secondary deductable, the remaining amount in your Employee Choice Account will transfer to your Retiree Choice Account. You can use money from you Retiree Choice Account to reimburse yourself for medical expense you incur during your retirement. *Interest will be credited to your Retiree Choice Account based on the rate of interest earned by one-year U.S. Treasury bills.* (*Id.* at 35 (emphasis added).)
- **Philosophy**

This option lets you treat plan benefits like they are your own money…In combination with the Medical Premium Reimbursement Program, your savings can help provide health security during retirement. (*Id.* at 37 (emphasis added).)

- **Eligible Expenses for the Retiree Choice Account**

  You can use the Retiree Choice Account to purchase your own health care policy when you retire. This can be another employer's group healthcare plan, an individual policy, or Peabody Investments Corp.'s Catastrophic Medical Plan or Medicare. You can also use up to $5,000 per year from your Retiree Choice Account to pay for the deductibles or co-pays of the healt care plan that you purchase. You can begin taking money out of the Retiree Choice Account after you are age 55 and are no longer an active employee. You cannot take money out of the account until you meet both of these requirements. (*Id.* at 42.)

- **When you retire**

  When you retire, the remaining amount in your Employee Choice Account transfers to your Retiree Choice Account. Your Retiree Choice Account becomes available to you, subject to that account's rules based on years of service. *The Retiree Choice Account is completely separate from the Retiree Medical Plan* (which requires ou to be at least 55 and have 10 years of service), as described on starting on page 54. (*Id.* at 45 (emphasis added).)

- **If you die after your retire**

  The Retiree Choice Account is immediately available for use by your surviving dependants for eligible expenses, subject to the account's rules based on your years of service….(*Id.*)

32. The above language describing the Choice Accounts, when read together, easily surpasses the applicable vesting standard of being susceptible of interpretation as a commitment by the Company to vest benefits. See *Jensen*, 38 F.3d at 953; *Rexam*, *at* *5; *Bidlack*, 993 F.2d at 604-05. Indeed, the above language *directly* implies the lifetime vesting of accounts that could be used at any time in the future. *Id.*

33. Enrollment Guides given to the employees, cited by Debtors in support of its Motion, also provide affirmative actions by the Company rendering the Choice Account benefits vested. The Choice Account "Enrollment Guides" were not just small brochures, sign up sheets or summaries of the SPDs—but rather consisted of 50-60 page

books that described the Choice Accounts in greater detail. (*See, e.g.*, Debtors Ex. 12). Therein, Company stated that the "Enrollment Guide is your key to unlocking information about your benefits and changes to the plans for 2005." (*Id.* at 1.) The information in the Enrollment Guides is even more specific and contains additional details that go beyond the SPDs themselves. For instance, and by way of *significant* relevance, each of the Enrollment Guides explain that if an employee chooses not to participate in the employee Choice Accounts (that turn into Retiree Choice Accounts per the same documents upon retirement), then "a cash payment will be added in a lump sum to a paycheck" of each employee. (*Id.* at 9.) In other words, employees were told that if they choose not to participate in the Choice Account Program….they would get the cash instead. As explained further by the Company, the only implication of receiving the cash instead of banking away in a Choice Account was that the payment made by the employer would be "subject to the same taxes as your regular pay." (Id. at 9) In other words, the Company was in effect, merely withholding wages of its employees and allowing them to use said funds in a Choice Account…or the same employees could take as a cash payment. Certainly, anyone reading this description would, at a minimum, understand that if they choose to put the money in a Choice Account that said monies belonged to the employee/retiree….and could not revert back to the Company.

34. Importantly, when the Company wanted to advise Choice Account participants as to a risk of forfeiture, it did provide *one* express situation where monies in a Choice Account could be forfeited. Specifically, the vesting chart provided by the Company provided, in material part, that if an employee left the company "before retirement" and had fewer than two years of service, that they would forfeit a percentage

of their Retiree Choice Account…a percentage of forfeiture that decreased with the number of year of employment. (*Id.* at 25.) The vesting chart otherwise reflected that upon working for five years, an employee's Choice Account was "100%" vested. (*Id.*) Accordingly, when the Company intended to be clear about the possibility of forfeiture of a Choice Account, it demonstrated the ability to do so, but not in the reservation of rights language sought to be relied upon by Debtors.

35. At best, the unilateral termination language (cited by the Debtors) might be effective to put a participant of a generic medical healthcare plan on notice that such a plan was subject to termination and should not be considered as a vested benefit. Certainly, the language would give the Company the right to stop offering Choice Account benefits to new employees after it may have changed the SPDs. However, given the highly specific and unique features described by the Company when describing the Choice Account Program, a generic termination reservation is not sufficient here to diverst the account holders of their Choice Account balances. Specifically, Debtors cite to the following unilateral termination reservation:

> The plan is adopted with the intention that it will be continued for the benefit of the present and future employees and retired employees of the company. However, the company reserves the right to terminate the plan, change the required contributions or modify this plan in whole or in part at any time or for any reason, including changes in any and all of the benefits provide.
>
> This means that an employee or a retiree cannot have a lifetime right to any plan benefit or to the continuation of this plan simply because this plan or a specific benefit is in existence at any time during the employee's employment or retirement. This plan will comply with all requirements of the law and will be changed, if necessary , in order ot meet any such requirements.

(*Id.* at 78.) The above language, however, does *not* serve to otherwise undo the vested nature of the Choice Accounts promised by the Company. The unilateral termination

language relied upon by Debtors refers to "*the plan*." (*Id.*(emphasis added).) On the first page of the SPD, however, the Company defines the "plan" as a reference only to the "*medical plan*" for eligible salaried employees. (*See id.*, inside cover (emphasis added).) Accordingly, there is no language identifying the Choice Accounts in the definition of the "plan" as set forth by the Companies. (*Id.*)

36. The Retiree Committee, moreover, is not suggesting this this Court merely ignore the unilateral termination language, as in the context of this particular set of SPDs, as it could be arguably asserted to give the Company the rights to terminate or modify the "medical plans" described in the SPD – *i.e.* the Option 250, the Option 1000 Plan, and/or the Catastrophic Medical Plans. However, if it was the Company's intention to put participants on notice that the Choice Accounts were subject to termination or forfeiture—they could have easily done so. Here, however, the Company lead its retirees to work based on the premise that they would earn these valuable Choice Accounts and the Company did not adequately (even if it was their intent) warn retirees that such benefits were not vested.

C. THE PATRIOT RETIREE MEDICAL BENEFIT PLAN FOR LEGACY PEABODY ENERGY CORPORATION RETIREES IS NOT SUBJECT TO UNILATERAL TERMINATION

37. The Patriot Retiree Medical Benefit Plan for Legacy Peabody Energy Corporation retirees ("the Peabody Plan") was historically presented as a vested benefit to Company employees. Adopting the legal standard for vesting noted above, language was used in Plan documents that was reasonably susceptible of being interpreted as a commitment by the Company to vest benefits. *See Jenson*, 38 F.3d at 953. At best, Debtors cite to language that is vague on its face or contradicts other information

provided by the Company that was intended for employees to rely upon. Additionally, to the extent the relevant plan documents contain ambiguous provisions or contradictory language, extrinsic evidence may be viewed to determine if the benefits should be considered vested. *Rexam* at *5.

38. In attempting to persuade the Court that the Peabody Plan is terminable unilaterally, the Debtors initially cite to a certificate of health insurance issued in 1976 by an insurance company that indicated that "the discontinuance of the Policy shall immediately terminate all insurance hereunder." (Debtors' Ex. 20, pg. 2 of 25.) Of course, the right of the insurer to stop paying claims in the event that a policy is "discontinued" has no bearing on whether the Company was obligated to provide a medical benefit, whether through that policy of insurance, some other policy of insurance, or by directly paying claims itself. However, the Certificate of Insurance did have language (omitted by Debtors from their briefing) that reflected the Company's affirmative obligation to its employees. The Certificate of Insurance indicated that the insurance would be continued absent an employee making her contributions toward the cost of the insurance, if she entered the armed forces, or if she terminated employment. The Certificate was also clear that "Retirement and total disability shall not be considered as termination of employment." (*Id.* at 9 of 25.)

39. The above language is reasonably susceptible as being interpreted to offer a retiree benefit that was permanent and the language that would relieve the *insurer* of obligations in the event that its insurance policy was cancelled, not renewed, or otherwise discontinued fails to undermine that interpretation nor does it reflect a reservation of rights for the Company.

40. The next affirmation of the Company supporting a vesting of benefits is found in the Peabody Employee Manual dated November 1984. (Peabody Employee Manual dated November 1984 at I-1, RC Ex. 11.) Therein, the Company stated, "All of the liberal medical benefits are provided throughout your active career. In addition, upon retirement, medical, surgical and hospital benefits are also provided at no cost to you, your spouse, and eligible dependents. If you retire at age 65, benefits will supplement Medicare insurance." (*Id.*) While the Employee Manual indicated that "your coverage is administered in accordance with the terms provided in a written plan document or policy," there is no evidence that the plan document (which has not been produced by debtors) contradicted the plain, unambiguous promise to provide lifetime benefits made by the Company and is reflected by the Company's statements in the Employee Manual.

41. In 1990, the Company provided employees with a Peabody Plan booklet entitled, "Peabody Medical Benefits Plan." (Peabody Medical Benefits Plan at 1, RC 12.) That document also has language that can be interpreted as promising of vested benefits such as "The benefits package is designed to help employees maintain financial security in their active years and during retirement…" and "[m]aintenance of this package requires careful long-range planning that is responsive to changes." (Id.) Of course, the "design" and "planning" are pointless if the Company is empowered to strip the employees of that "financial security" after they have given their working lives to the Company. The same document also touted inflation-adjusted "*Lifetime* Benefits" and "Lifetime Maximums" at various points. (Id. at 2, 4 & 8) (emphasis added.) Nowhere did the booklet contain any language contradicting or withdrawing the promises of "financial security" and "Lifetime Benefits."

42. While the Debtors cite language in some of the Peabody Plan documents made available to employees—that language seems to trip over itself. Debtors point to seven occasions between 2006 and 2010 when the Company used language identical or nearly-identical to:

> The Company intends to maintain this plan for eligible [retirees] [retired employees], but reserves the right to change or terminate the Plan at any time. This document is not a guarantee of benefits or an employment contract of any kind.
>
> The Plan is adopted with the intention that it will be continued for the benefit of eligible present and future retired employees of the Company and certain designated affiliates and subsidiaries. However, the Company reserves the right to terminate the Plan, change required contributions or modify this plan in whole or in part at any time or for any reason, including changes in any and all of the benefits provided. This may cause retired employees to lose all or a portion of their benefits under the Plan, but will not affect the right of any retired employee to be reimbursed for any covered expense that has already been incurred. ***This means that a retired employee cannot have a lifetime right to any plan benefit or to the continuation of this plan simply because this plan or a specific benefit is in existence at any time.***

(*See* Appendix a to Debtors' Motion (emphasis added).)

43. Having drafted an explanation of what "this means," the Company is obligated to live with its own definition and to have any ambiguity construed against it. *Feifer*, 306 F.3d at 1212; *DaLee Realty, Inc.*, 305 N.W.2d at 893; *Weum*, 54 N.W.2d at 29; *Lyman-Richey Sand & Gravel Co.*, 243 N.W. at 894. The Company indicated that its language meant that the employee did not derive rights from the fact that there was a plan or a benefit "in existence at any time." (See Debtors' Appendix A to Motion) Of course, the Retiree Committee does not seek to obtain their benefits because the plan was "in existence at any time," but because the plan was in existence all of the time. The Peabody Plan, with its absent or sloppy disclaimers, was in existence year after year; it was changed from time to time, but never terminated. The language of these documents

as defined by the Company itself is reasonably susceptible of an interpretation that there is a lifetime benefit for this plan and its package of benefits that was in place as these employees spent their working lives delivering on their end of the bargain. It is only appropriate that the Company be required to keep its end after it has taken the benefit of these retirees' years of work.

D. THE PATRIOT MEDICAL PLAN FOR LEGACY MAGNUM RETIREES IS NOT SUBJECT TO UNILATERAL TERMINATION

44. The Patriot Medical Benefit Plan for Legacy Magnum Retirees ("the Magnum Plan") was explicitly presented as a vested benefit to Company employees. Adopting the legal standard for vesting noted above, language was incorporated into the Plan documents that was reasonably susceptible of being interpreted as a commitment by the Company to vest benefits. *See Jenson*, 38 F.3d at 953. Additionally to the extent that relevant plan documents contain ambiguous provisions or contradictory language, extrinsic evidence may be viewed to determine if the benefits should be considered vested. *Rexam* at *5.

45. Among the materials not cited by Debtors are documents that were distributed to retirees of Arch (Magnum's predecessor) regarding "1/1/97 Medical Benefit Changes / New Retiree Medical Plan." In those materials, the Company filled *an entire* page with one the statement in a giant font state, "**For the purposes of the new retiree medical plan, all existing retirees and all employees retiring as of 12/31/96 will be grandfathered with 20 years of service.**" (Arch of Illinois Memorandum dated Dec. 12, 1996 ("Arch 1996 Memo"), RC 13 at 4 of 5 pgs.) "Grandfathering" and "years of service" are terms that have only one meaning—vesting. *See Devlin*, 274 F.3d at 85. The Arch 1996 memo did include *some* reservation language, however, it was solely

limited to "reserve[ing] the right to increase or decrease the Company Contribution Cap for future Plan Years." *Id.* Where the Company expressly "grandfathered" these employees, it is hard to imagine how these benefits could not be considered as vested.

46. A separate document was also provided by the Company along with the Arch 1996 Memo, in which the Company also speaks of "vesting schedules." (Retiree Medical Examples and Recaps from Video at 3, RC Ex. 14.) Therein the "Company's contribution to retiree medical was capped at fixed level" and "each year cost of providing coverage will be estimated." (*Id.* at 13-14.) There is no evidence of any Magnum Plan document contradicting these representations that were made to the Retirees. Therefore, it is reasonable to infer that the Magnum Plan documents were consistent with these representations.

47. Debtors point to language in some of the plan documents, identical to that provided in the Peabody Plan, but for the reasons set forth above in the Peabody Plan analysis, that termination language should be deemed ineffectual. Moreover, the Company's later introduction of reservation of rights different from what it originally promised its retirees cannot used to retroactively eliminate benefits that had already vested. *See Devlin,* 274 F.3d at 83-87. Moreover, Debtors cannot provide large signs promising vested benefits for employees with 20 years of experience and then seek to terminate same through small print located in the back of a plan document. (See RC 13)

E. THE EACC MEDICAL, DENTAL AND LIFE INSURANCE BENEFIT PLANS ARE NOT SUBJECT TO UNILATERAL TERMINATION[12]

[12] This portion of the Response to Motion addresses the ERISA plans segregated in Section V of Debtors' Appendix A to Motion.

48. The Medical, Dental and Life Insurance Plans created for employees and retirees of Eastern Associated Coal Corp., and its subsidiaries (collectively, the "EACC Plans") were presented as lifetime, vested benefits. Contrary to Debtors' argument that the Company had always clearly and sufficiently reserved its right to terminate said retiree benefits, the Company rather was leading employees to believe that once they completed their requisite years of service for the Company they had vested medical benefits for the rest of their lives. *Devlin*, 274 F.3d 76**.**

47. Company employees were encouraged to work for for extended periods in order to qualify for, *inter alia*, medical, dental, and life insurance ("MDL Benefits) as part of their compensation throughout their careers, which would ultimately become solidified upon the completion of their requisite years of service to become "eligible" or these valuable MDL Benefits (*Id.*) As described below, the MDL Benefits were presented as a way for employees to provide security for themselves and their families in retirement, all in an effort to keep employees working longer for the Company. Thus, Company employees were led to believe that by remaining with the Company their retirement benefits would be vested upon becoming eligible.

48. As early as 1973, the Company indicated to employees that retirement benefits were vested and could be relied upon in planning their retirement. For example, the EACC's Group Insurance Protection Benefits Plan ("EACC 73 GIP Plan"), provided a lifetime insurance benefit to the spouse of a deceased Employee, and that insurance only "will terminate on the date the wife of the deceased Employee remarries." (EACC 1973 Plan at 30, RC Ex. 15.) This provision indicates a vested, lifetime benefit for such any such wife/spouse. (*Id.*) Moreover, the EACC 1973 Plan provides that, Major Medical

Expense Benefits and Supplemental Medical Expense Benefits continue "after termination" if coverage terminates during a period of total disability. (*Id.* at 29.) Moreover the Company's correspondence to its employees/retirees reflected that the Company's retiree benefit plans would provide lifetime benefits. For example:

- The 1987 Peabody exchange "will have no effect on any of the benefits which you have been receiving as a retiree of Eastern Coal … the amount of your monthly retirement check remains the same **as does any death benefit or health insurance to which you may be entitled." You should feel secure that your retirement benefits have been provided for …"** (Eastern Letter dated April 17, 1987 (emphasis added), RC Ex. 16.)

- The 1987 Peabody exchange "will have no effect on any benefit you may be entitled to as a result of your employment with Eastern Coal…. In short, your **benefit entitlement has been provided for, remains in effect and is unchanged."** (Eastern Letter dated April 17, 1987 (emphasis added), RC Ex. 17.)

- You "**will receive credit under Peabody's employee benefit plans** and programs for your previous uninterrupted service time…" (Peabody Ltr. to Eastern Associated Coal Wells Cleaning Plant, dated Mar. 23, 1987, RC Ex. 18.)

- "Health Care Benefits are available to the retired employee and dependent spouse at no cost to you through the Provident Life and Accident Insurance Company. (EACC Ltr. to Health Care Benefits dated Jan. 25, 1988, RC Ex. 19.)

- "Medical and prescription drug coverage continues for you and your eligible dependents after you retire" (EACC Letter dated July 12, 2004, RC Ex. 20.)

1. <u>Group Insurance Protection for Retired Employees of Eastern Associated Coal Corp. and Subsidiaries (Effective Date 7.1.1973)</u>

49. The EACC 73 GIP Plan is vague, ambiguous and does not include any language whereby the Company reserved a right to amend or terminate the EACC 73 GIP Plan and the benefits provided thereunder. (EACC 73 GIP Plan at 30.) Debtors' assertion that it clearly reserved its rights to terminate the EACC 73 GIP Plan is simply untrue, *no*

such reservation language exists. Indeed, nowhere in the EACC 73 GIP Plan does the Company even mention that it may terminate the EACC 73 GIP Plan and benefits being provided to retirees and their dependents. The EACC 73 GIP Plan is ambiguous at best, as the sole termination language therein refers to the termination of "insurance" which is undefined. (*Id.* at 30.) Insurance can be terminated if the Company chose to utilize different medical companies, insurers, and providers to minimize costs or provide more comprehensive benefits for retirees.

2. Eastern Associated Coal Corp. Medical Dental and Life Insurance Benefits For Salaried Employees Retired before March 1, 1990 (Effective Date January 1, 1970), dated August 1998[13]

50. The EACC 1970 Plan does not contain a clear reservation of rights language that would allow Debtors to terminate the benefits provided to retirees thereunder. The language referenced by Debtors is as follows, in pertinent part: "The company intends to maintain this plan for retired salaried employees, but reserves the right to change or end the plan at any time." (EACC 1970 Plan, at inside cover, RC Ex. 21.) The term "plan" is not defined in the EACC 1970 Plan and any such termination would be in contravention of the lifetime benefits that the retirees were promised as employees as part of their compensation. Moreover, the EACC 1970 Plan contradicts itself as it provides a retiree's surviving spouse (including dependents) medical benefits for the surviving spouse's lifetime, or until the surviving spouse "dies, remarries or is

[13] The Eastern Associated Coal Corp. Medical, Dental and Life Insurance Benefits For Salaried Employees Retired Before March 1, 1990 (Effective Date January 1, 1970), dated August 1998 shall be referred to as the "EACC 1970 Plan."

covered under another employer's health plan." (*Id.* at 3.) (Dental benefits also continue similarly until age 65.)

3. Eastern Associated Coal Corp. Medical Dental and Life Insurance Benefits For Salaried Employees Retired before March 1, 1990 (Effective Date July 1, 1999), dated August 2004[14]

51. The EACC 1999 Plan does not contain clear and reservation of rights language that would allow Debtors to terminate the benefits provided to retirees therein. The language referenced by Debtors is as follows, in pertinent part: "The company intends to maintain this plan for retired salaried employees, but reserves the right to change or end the plan at any time." (EACC 1998 Plan, inside cover, RC Ex. 22.) The term "plan" is not defined in the EACC 1998 Plan and any such termination would be in contravention of the lifetime benefits that the retirees were promised as employees as part of their compensation Moreover, the EACC 1999 Plan contradicts itself as it provides a retiree's surviving spouse (including dependents) medical benefits for the surviving spouse's lifetime, or until the surviving spouse "dies, remarries or is covered under another employer's health plan." (*Id.* at 3.) (Dental benefits also continue similarly until age 65.) At best, the EACC 1998 Plan is ambiguous, vague, confusing and/or contradictory as to whether the company could terminated the EACC 1998 Plan and the benefits thereunder.

52. Accordingly, Company must be held to its promises that retirees under the EACC Plans could effectively plan their retirement and financial security around the promised retiree benefits that Company offered them as part of their compensation

[14] The Eastern Associated Coal Corp. Medical, Dental and Life Insurance Benefits For Salaried Employees Retired before March 1, 1990 (Effective Date July 1, 1999), dated August 2004 shall be referred to as the "EACC 1990 Plan."

throughout their careers, in lieu of higher salaries. Moreover, Company realized the benefit of promising such benefits as part of the employee's earned compensation by keeping a continuity of its employees as they worked to vest their MDL benefits through years of service at the Company. It is patently unfair to allow Debtor to repeatedly represent to its retirees that they have earned and are "entitled" to their hard-earned retirement benefits when it was advantageous to them, now that Company deems it advantageous to backtrack on its promised vested retiree benefits. Debtor should not be allowed to profit from duping entire generations of employees and retirees into believing they were earning retirement benefits, in lieu of greater take home pay and foregoing more lucrative opportunities throughout their careers. Compensation and having earned or being entitled to benefits is clear vesting languge that obligates Company to provide retirees covered by the EACC Plans their promised, earned benefits as compensation earned throughout their loyal years of service for Company.

F. EASTERN ASSOCIATED COAL CORPORATION BENEFITS FOR SALARIED EMPLOYEES RECEIVING DISABILITY BENEFITS, LONG TERM DISABILITIES AND ELIGIBLE SPOUSES ARE NOT TERMINABLE.

1. EASTERN ASSOCIATED COAL CORPORATION HEALTH CARE PLAN, AS AMENDED APRIL 29, 1979 and EASTERN ASSOCIATED COAL CORPORATION HEALTH CARE PLAN, AS AMENDED JANUARY 1, 1982, AND EASTERN ASSOCIATED COAL CORP. MEDICAL, DENTAL AND LIFE INSURANCE BENEFITS FOR SALARIED EMPLOYEES RECEIVING DISABILITY BENEFITS UNDER THE EASTERN GAS AND FUEL ASSOCIATES LONG-TERM DISABILITY PLAN; PLAN; ELIGIBLE SURVIVING SPOUSES OF EACC EMPLOYEES DATED AUGUST 1998 CANNOT BE UNILITERALLY TERMINATED[15]

[15] The Eastern Associated Coal Corporation Health Care Plan, as amended through April 29, 1979 will hereinafter be referred to as ("EACC 1979"), the Eastern Associated Coal

53. These EACC Disability Plans cannot be unilaterally terminated under the Eighth Circuit law. The Debtor relies on language which, at first glance, suggests a unilaterally right to terminate health benefits, however this is simply not true. The alleged termination language is contradicted by other language in the documents leaving a reasonable impression that the Company was committed to providing a continuous health care program, thus, providing a vested benefit.

54. To the extent the relevant plan documents contain ambiguous provisions or contradictory language, extrinsic evidence may be viewed to determine if the benefits should be considered vested. *Rexam* at *5. Lastly, if and to the extent there is any ambiguity in the termination language, it must be construed against the Company . *Feifer*, 306 F.3d at 1212; *DaLee Realty, Inc.*, 305 N.W.2d at 893;*Weum*, 54 N.W.2d at 29; *Lyman-Richey Sand & Gravel Co.*, 243 N.W. 891 (1932).

55. The Debtor cites the following in support of its position to terminate:

> The Company expects to continue the program, but reserves the right terminate, suspend, withdraw amend or modify the plan in whole or part at any time."

(Debtors' Ex. 58 at 1.) This language does not allow the Company to terminate a health care insurance program to its employees. The "program" of health insurance and the specific "plan" of health benefits are two different concepts. On the one hand, the language suggests the Company is committed to providing health care, *i.e.* "the program"

Corporation Health Care Plan, as amended through January 1, 1982 will hereinafter be referred to as ("EACC 1982") and the Eastern Associated Coal Corporation Medical, Dental and Life Insurance Benefits for Salaried Employees Receiving Disability Benefits under the Eastern Gas and Fuel Associates Long-Term Disability Plan; Eligible Surviving Spouses of EACC Employees, dated August 1998 will hereinafter be referred to as ("EACC LTD 1998"). Collectively, the EACC 1979, EACC 1982, and EACC LTD 1998 Plans will be referred to as the "EACC Disability Plans."

and then, immediately contradicts itself by the termination language. (Id.) Inserting termination language within the same sentence merely contradicts but, does not supersede the meaning of the words and as such, the interpretation of the document must be construed against the Debtor. *Feifer*, 306 F.3d at 1212; *DaLee Realty, Inc.*, 305 N.W.2d at 893; *Weum*, 54 N.W.2d at 29; *Lyman-Richey Sand & Gravel Co.*, 243 N.W. 891 (1932).

56. The Company's representation of providing indefinitely some form of health care is supported by its own language in the documents. It clearly states "the Company expects to continue the program…" (Debtors' Ex. 58 at 1.) This infers that some form of health care insurance program will be provided at all times, but that the extent, specifics and provider of the health care coverage may be different. Nowhere in the document does the Company state it has the right to terminate the "program," *i.e.* health care coverage in its entirety. Rather the Company ties the right to terminate with the word "plan" and never explicitly states the right to terminate all health care programs.

57. The Company's definition of "plan" is very limiting. Under the section Plan Document, it states:

> "For simplicity, the plan has been described in a general manner in this booklet. The extent of coverage for each individual is governed at all times by the complete terms of the health plan document and the life insurance contract which are maintained by the Plan Administrator."

(Id., section: Plan Document). This paragraph seems to define the "plan" as meaning the *extent* of health care coverage for any individual. The word *"extent"* means boundaries, caps or ceilings or in other words, how much the insurance company will pay for medical services. (See Merriam Webster Dictionary, *extent*). This language does not imply or

provide reasonable notice that the Company can wholly eliminate health care coverage as a benefit of employment.

G. THE DIAMOND SHAMROCK RETIREES BENEFIT PLAN CANNOT BE UNILATERALLY TERMINATED

58. As with other plans discussed above, the Diamond Shamrock plan contains form termination language that is ambiguous and directly contradicts the remainder of the document. In support of its Motion and in claiming that the plan can be terminated at will, the Debtors rely on a single paragraph while ignoring the plain meaning of the remainder of the document. Specifically, Debtors cite the following language: "To the full extent permitted by law, Diamond Shamrock reserves the right to terminate or change any provision of this section at any time and for any reason as it applies to current, past, or future retirees and beneficiaries." *See*, Debtors' Annex A, Ex. 61, p. 3.

59. On its face, this language does not state that the Debtors can terminate the plan in whole. It merely says it can terminate or change individual provisions contained within the twenty-one page plan. Moreover, *immediately* following this ambiguous disclaimer, the Debtors qualify the above language and expressly promises to provide certain benefits for the retirees' lifetimes. (Id.) Specifically, with regard to life insurance benefits after retirement, Diamond Shamrock promised that "*for the remainder of your life* – Your coverage equals 10% of the Company-Paid Life Insurance amount in effect immediately prior to your retirement, with a minimum coverage of $10,000.00. *See*, Debtors' Annex A, Ex. 61, p. 3 (emphasis supplied).

H. The Catastrophic Group Health Plan for Salaried Employees Terminated Through a Reduction in Force Cannot Be Terminated[16]

60. The health care plans under this section concern employees who choose early retirement in exchange for certain promised benefits. These employees agreed to retire early, cutting short their wage earning years in consideration of Company promised pension and health care benefits. To allow the Company to renege on their agreements is tantamount to breaching a contract with no consequences.

61. The Company's reliance on its termination language does not grant it an absolute right to terminate health care benefits for this group of early retirees. Other contradictory language in the documents creates ambiguity as to the plan's termination. The parties' intent with respect to offering theses plans must be examined in light of the whole document and not from any one clause standing alone. *Feifer,* 306 F.3d at 1212; *DaLee Realty, Inc.*305 N.W.2d at 893;*Weum,* 54 N.W.2d at 29; *Lyman-Richey Sand & Gravel Co.,* 243 N.W. 891 (1932).

62. The Company relies on language it placed on the very last pages of the plans under the subtitle, "AMENDING THE PLAN" (Debtors' Ex. 62 at 48; Debtors' Ex. 63 at 51). The subtitle is set forth in bold capital letters. What is suspect is that the language regarding termination is not set forth in the same conspicuous manner. Rather,

[16] The policies listed under this section will be referred to as follows: The Key to Medical Benefits, dated December 1995, ("1995 Key"); The Key to Medical Benefits, dated January 2000 ("2000 Key"); Summary Plan Description of the March 1998 Retirement Bridge Program: Employees affected by the Wells Business Unit Work Force Reduction, dated march 1998 ("Retirement Bridge 1998"); Summary of Material modification, January 200 SPD (undated) ("2000 SPD"); Patriot Coal Corporation 2010 Medical Coverage News for Retired Employees ("2010 News"); Patriot Coal Corporation 2011 Enrollment for Retired Employees ("2011 Enrollment") and Special Catastrophic Patriot Coal Corporation 2012 Enrollment for Retired Employees ("2012 Enrollment").

it is set forth in regular type conforming and blending in with the other paragraphs on pages 1-48 at a minimum.

63. Further, the Company subtitles this section, "Amending"; it does not use the word "termination." The word "amending" means to make better, or enhance. "amend". Word Central: Merriam-Webster's Electronic Dictionary. 2013. http://www.m-w.com/dictionary.htm (9 April 2013). It does not mean to end or terminate. Mislabeling the termination paragraph with an innocuous word is misleading and should not be allowed to act as a subterfuge to hide termination language. The contradiction in terms, between "amend" and "terminate" create ambiguity; resulting in a reasonable interpretation that the plan would be "amended," not unilaterally terminated.

64. The 1995 and 2000 Key Plan documents state that the plans provide for a maximum lifetime benefit amount of $1 million dollars (Debtors' Ex. 62 at 6; Debtors' Ex. 63 at 5) and provides that coverage also will end if the employee reaches "the end of the maximum coverage period provided in your Voluntary Separation Agreement" (Debtors' Ex. 62 at 7; Debtors' Ex. 63 at 6.) These provisions imply that benefits are available until a monetary or time period maximum is reached, not because the Company no longer wants to pay for promised benefits.

65. The Retirement Bridge 1998 plan also has conflicting termination language. Although the Debtor cites the usual termination language, the plan states the program "shall automatically terminate once all benefits have been paid hereunder". (Debtors' Ex. 64 at 27.) This language suggests that all entitled benefits will be paid out and only *then*, does the plan terminate. This language contradicts the Company's

unilateral termination language and questions whether the Company has an absolute right of termination.

66. The parties' intent with respect to offering theses plans must be examined in light of the totality of the circumstances. These policies were offered as part of an early severance package. Logic dictates that beneficial incentives are offered as an inducement for employees to forgo future years of earning potential. The employee did not have input into the benefits offered since the Company had absolute decision making power. In short, the Company is in a superior bargaining position. There's no evidence that the Company offered numerous health care plans to choose from upon leaving. An employee was offered either COBRA coverage under the salaried employees plan or the catastrophic plan (Debtors' Ex. 64 at 21-25; Debtors' Ex. 65). Since coverage under COBRA has a limited duration, there was only one plan offered, the catastrophic plan; take it or leave it. Accordingly, on a totality of the relevant materials, there appears to have been an intention that these benefits would vest.

G. THE AMHERST COAL COMPANY BENEFIT PLAN FOR SALARIED EMPLOYEES CANNOT BE UNILATERALLY TERMINATED

67. Debtors assert that the Amherst Coal Company Employee Benefit Plan (the "Amherst Plan") contains the same reservation of rights language as that quoted from the Medical Premium Reimbursement Allowance Plan. *See*, the Motion at ¶ 35. It does not. Rather, the Amherst Plan reflects the following ambiguous reservation of rights language: "The right is reserved in the Plan for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time, subject to the applicable provisions of the Group Policy." Annex A, Ex. 69, p. 63.

68. The provision is buried at the end of a long ERISA notice on Page 63 of the Amherst Plan's SPD. It is not offset. It is not in bold type, capitalized, or otherwise noticeable to anyone other than a lawyer looking for the term. The last clause of the cited language makes the purported termination reservation vague and broad. There is no description of the method of termination anywhere in the document such that a retiree could understand to what the document refers to as "applicable provisions." Further, it is unclear if the termination provision applies to only active employees or to retirees whose rights in the Amherst Plan fully vested.

69. The remainder of the document is devoted to listing the benefits provided to active employees and retirees, without limitation. There is no conspicuous provision suggesting that the Debtors would break their promise of providing benefits for their retirees. The retirees' benefits pursuant to the Amherst Plan vested.

V. LEGAL CONCLUSION

70. For the reasons set forth above herein, the Retiree Committee respectfully asserts that vesting language in the various plans at issue extend the coverage and protection afforded by Section 1114 of the Bankruptcy Code to each and every plan at issue. Accordingly, to the extent this Court agrees that some or all of these plans vested, the Debtors may not use the Section 363 to summarily terminate these plans.

71. The Retiree Committee also notes that if and to the extent a change was made by the Company to a plan document at some given point in time, arguably giving it the right to terminate a particular benefit, the Court should not allow such a modificiaton that to impact employees who were working for the Company *before* those changes were

made--but only with respect to employees who were hired after such modification were published.

WHEREFORE, the Official Salaried Retiree Committee respectfully requests that this Court deny the Debtors' Motion for an Order Pursuant to 11 U.S.C. § 363, Authorizing Debtors to Terminate Salaried Retiree Benefits, and to grant the Retiree Committee all such other relief that is deemed fair and just and consistent with the Agreed Order previously entered with respect to the retiree benefit plans at issue.

Dated: April 16, 2013

Official Salaried Retiree Committee

/s/ Jon D. Cohen
STAHL COWEN CROWLEY LLC
Jon D. Cohen (IL 6206666), *Pro Hac Vice*
55 West Monroe Street, Suite 1200
Chicago, Illinois 60603
(312) 641-0060
(312) 641-6959 facsimile

CERTIFICATE OF SERVICE

I certify that on April 16, 2013, I caused a copy of the foregoing pleading to be served through the Court's CM/ECF system on those parties receiving ECF notices in these proceedings.

/s/ *Thomas H. Riske*

Thomas H. Riske

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Re: ECF No. 1919**

EXHIBIT SUMMARY

Pursuant to L.R. 9040-1, the following exhibits are referenced in support of the Reply to the Motion of Debtors and Debtors in Possession for an Order Pursuant to 11 U.S.C. § 363, Authorizing Debtors to Terminate Benefits of Non-Union Retirees filed by The Salaried Retiree Committee. Copies of these exhibits will be provided as required by Local Rules:

Exhibit 1 – Key to Medical Benefits dated April 2000

Exhibit 2 – Peabody Benefits Update effective 1/1/2001

Exhibit 3 – Peabody Letter August 18, 2004

Exhibit 4 – 2010 Patriot Coal Benefits After Retirement

Exhibit 5 – Peabody Energy Benefits Update August 19, 2004

Exhibit 6 – Peabody Letter November 2006

Exhibit 7 – MPR Account Statement dated March 23, 2010

Exhibit 8 – Patriot Coal Letter August 3, 2012

Exhibit 9 – MPR Allowance Statement dated April 20, 2006

Exhibit 10 – BeneFlex Statement dated February 20, 2013

Exhibit 11 – Peabody Employee Manual dated November 1984

Exhibit 12 – Peabody Medical Benefits Plan

Exhibit 13 – Arch of Illinois Memorandum dated December 12, 1996

Exhibit 14 – Retiree Medical Examples and Recaps from Video

Exhibit 15 – EACC 1973 Plan

Exhibit 16 – Eastern Letter dated April 17, 1987 addressed to Retiree

Exhibit 17 – Eastern Letter dated April 17, 1987 addressed to Former Participant of the Eastern Gas and Fuel Associates Retiree Plan

Exhibit 18 – Peabody Letter to Eastern Associated Coal Wells Cleaning Plant, dated March 23, 1987

Exhibit 19 – EACC Letter re: Health Care Benefits, dated January 25, 1988

Exhibit 20 – EACC Letter Dated July 12, 2004

Exhibit 21 – EACC 1970 Plan

Exhibit 22 – EACC August 1998 Plan

Respectfully submitted,

/s/ Jon D. Cohen
STAHL COWEN CROWLEY LLC
Jon D. Cohen (IL 6206666), *Pro Hac Vice*
55 West Monroe Street, Suite 1200
Chicago, Illinois 60603
(312) 641-0060
(312) 641-6959 facsimile

Counsel to the Official Salaried Retiree Committee

-and-

Robert E. Eggmann, Bar #37374
Thomas H. Riske, Bar #61838
DESAI EGGMANN MASON LLC
7733 Forsyth Boulevard, Suite 2075
St. Louis, MO 63105
314-881-0800 (Telephone)
314-881-0820 (Fax)
reggmann@demlawllc.com
triske@demlawllc.com

Local Counsel to the Official Salaried Retiree Committee

CERTIFICATE OF SERVICE

I certify that on April 16, 2013, I caused a copy of the foregoing pleading to be served through the Court's CM/ECF system on those parties receiving ECF notices in these proceedings.

/s/ *Thomas H. Riske*

Thomas H. Riske