UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **April 23, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North** **Re: ECF Nos. 1575, 3498, 3665, 2669, 3670, 3673, 3679**

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO DEBTORS' SECOND MOTION FOR AN ORDER EXTENDING DEBTORS' EXCLUSIVE PERIODS WITHIN WHICH TO FILE A PLAN OF REORGANIZATION AND SOLICIT VOTES THEREON

Patriot Coal Corporation and its subsidiaries that are debtors and debtors in possession in these proceedings (collectively, the "**Debtors**" or "**Patriot**") respectfully submit this reply (the "**Reply**") to the objections (the "**Objections**") of Wilmington Trust Company [ECF No. 3679] ("**Wilmington Trust**"), Aurelius Capital Management, LP and Knighthead Capital Management LLC [ECF No. 3673] (together, the "**Noteholders**"), the United Mine Workers of America [ECF No. 3670] (the "**UMWA**"), the Official Committee of Unsecured Creditors [ECF No. 3669] (the "**Committee**") and

[1] The Debtors are the entities listed on Schedule 1 to the Debtors' Second Motion for an Order Extending Debtors' Exclusive Periods Within Which to File a Plan of Reorganization and Solicit Votes Thereon [ECF No. 3498] (the "**Exclusivity Motion**"). The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

U.S. Bank National Association [ECF No. 3665] ("**U.S. Bank**") (collectively, the "**Objectors**"), and respectfully represent as follows:

Preliminary Statement

1. The Objections are a surprising and regrettable turn in what have otherwise been remarkably productive and consensual chapter 11 cases. The Objectors ask this Court to take the unprecedented step of refusing to extend the Debtors' plan exclusive periods a mere nine months into these exceedingly large and complex cases.[2] Such a result would be tremendously damaging to the Debtors' estates and creditors, and it is supported by neither the facts nor the applicable legal standard.

2. With regard to the Objectors' arguments, the following essential points are irrefutable:

> (i) As the fiduciary for all stakeholders, the Debtors have been actively developing the foundations for plan negotiations and in fact are on the doorstep of those negotiations. The Debtors have been and continue to be ready and willing to listen to and immediately engage on any and all plan proposals—no party has yet come forth with a single plan proposal to the Debtors;
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> (ii) The Objectors argue that each and every creditor should—immediately—be permitted to seek exit financing for the Debtors. This is wrong for three reasons. First, the simple fact is that no third-party investor would agree to finance a reorganized Patriot before a resolution of the 1113/1114 process (which is currently underway and proceeding apace). Second, having many parties reach out to the market to seek financing for Patriot would be destructive and counterproductive. Third, Patriot is ready and willing to talk to any bona fide investor. Not one has been identified by any party that Patriot has turned away; and

[2] The attached Schedule A shows the results of a search conducted on April 18, 2013 using the *Chapter11Dockets.com* service of chapter 11 cases filed in the last five years where the debtors disclosed assets of more than $2.5 billion. The first column of Schedule A lists the cases in which these debtors sought an extension of exclusivity past one year after the petition date and the request was denied. **There are no such cases.** The second column of Schedule A lists the cases in which these debtors sought an extension of exclusivity past one year after the petition date and the request was granted. **There are twenty such cases.**

(iii) The Objectors argue that all parties in interest should be permitted to file their own plans at this time, **but** such a result at this early stage of this case would result in market and creditor confusion, additional expense, delay and significant value erosion for the Debtors' estates.

3. With regard to the applicable law, the Objections give short shrift to the legal standard actually relevant to the Debtors' Exclusivity Motion: whether the Debtors have demonstrated sufficient progress in these cases to warrant an extension of their exclusive periods to file a plan of reorganization and solicit acceptances thereof. Despite hyperbole and unsupported allegations, the Objections cannot credibly refute the fact that the Debtors have shown significant progress during the first nine months of these cases—despite facing overwhelming challenges—or that the Debtors are the parties best-suited to continue driving this reorganization forward and propose a plan of reorganization that will garner broad-based creditor support.

4. The 18-month cap on exclusivity in section 1121 of the Bankruptcy Code is not arbitrary. It is especially meaningful in massive, multi-faceted cases such as these, with material labor and retiree liabilities subject to sections 1113 and 1114 of the Bankruptcy Code. Recognizing that chapter 11 debtors are the only parties with fiduciary duties to all other stakeholders, Congress struck a balance and found that it was appropriate for debtors to maintain exclusivity for up to 18 months if progress could be demonstrated: "the legislative history of § 1121 reflects that . . . it was not intended to create a completely level playing field between the debtor and creditor, but, rather, retained the debtor's exclusive right to propose a plan of reorganization for a certain period of time, subject to an extension granted upon a showing of cause." *See Official Comm. of Unsecured Creditors v. Elder Beerman Stores Corp.* (*In re Elder-Beerman Stores Corp.*), No. C-3-97-175, 1997 U.S. Dist. LEXIS 23785, at *14-15 (S.D. Ohio June

23, 1997) (affirming bankruptcy court decision). The Debtors have shown ample cause for their requested 120-day further extension, and the Objections should therefore be overruled.

The Debtors Have Made Substantial Progress to Date in these Cases

5. The Objectors' contentions that the Debtors have been dilatory in restructuring their businesses and preparing for emergence are unfounded and untrue—and no party has ever complained to the Debtors about the pace of the case prior to their exclusivity objections. Despite the fact that these cases are exceedingly large and complex, very substantial progress has been made during the first nine months. *See In re Wisconsin Barge Line, Inc.*, 78 B.R. 946 (Bankr. E.D. Mo. 1987) (granting the Debtors' exclusivity motion and particularly noting that the case was the largest ever filed within the Eighth Circuit); *In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (stating that the "traditional ground" for granting an exclusivity extension is "the large size of the debtor and the concomitant difficulty in formulating a plan of reorganization"); *see also* H.R. Rep No. 95-595, at 231–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 ("[I]f an unusually large company were to seek reorganization under Chapter 11, the Court would probably need to extend the time in order to allow the debtor to reach an agreement.").

6. For example, the Debtors have implemented significant measures to achieve long-term cost savings and efficiencies necessary to emerge as a healthy

enterprise. Indeed, the Debtors have worked hand-in-hand with the Committee on many of these matters. It is indisputable that the Debtors have, among other things:[3]

- Negotiated and entered into multiple coal supply agreement stipulations for modified agreements that are more favorable to the Debtors by tens of millions of dollars.
- Negotiated and obtained court approval for modifications to certain transloading agreements resulting in significant cost savings.
- Commenced and prosecuted multiple adversary proceedings relating to coal sale contracts expected to, if successful, save the estates tens of millions of dollars.
- Undertaken analysis of literally thousands of executory contracts to identify those that are beneficial to the Debtors' estates and to seek the rejection of those that are not. To date, the Debtors have substantially completed their analysis of real property leases and obtained court authority to assume nearly 1,000 leases of nonresidential real property and reject a number of real property leases.
- Rejected over 100 executory contracts, resulting in an estimated cost-savings of tens of millions of dollars.
- Made significant progress in reconciling the nearly 4,000 claims filed in these cases and have substantially completed the reclamation claims and section 503(b)(9) claims processes.
- Developed (with Committee support) and obtained court approval of procedures for the compromise and settlement of certain claims, litigations and causes of action [ECF No. 2821] and an order establishing procedures for claims objections [ECF No. 3021].
- Reduced production of thermal and metallurgical coal, including by idling and closing certain mining operations.
- Sold surplus assets.

[3] While the Noteholders cite the Debtors' revenues for January and February 2013 to imply that the Debtors' reorganization efforts have been unsuccessful, such contentions ignore the economic reality that the implementation of the Debtors' reorganization plan is still underway, and is in substantial part contingent on the cost-savings being pursued in connection with the Debtors' labor and retiree obligations. As noted herein, the Debtors have implemented significant restructuring initiatives and continue to work toward successfully reorganizing their businesses, but at this juncture, it is simply too early to evaluate the effect of the Debtors' efforts, and attempts to do so should not form the basis of terminating the Debtors' exclusivity. *See In re AMKO Plastics, Inc.*, 197 B.R. 74, 76 (Bankr. S.D. Ohio 1996) (fact that debtors' reorganization efforts had so far only produced losses did not provide basis for denying debtors motion for an extension of exclusivity where such efforts had "not yet been completed nor carried forward to the point that its effectiveness can be finally evaluated").

- Made significant modifications to the wages and benefits available to their non-union workforce, including eliminating certain management personnel, terminating the Debtors' supplemental 401(k) plan, reducing salaries of non-union salaried and hourly employees, modifying healthcare and long-term disability benefits for non-union employees and seeking court authority to terminate substantially all non-union retiree benefits.

- Sought and obtained, with court approval, additional time to comply with certain of the Debtors' material environmental obligations, securing much-needed liquidity during these cases.

7. The Debtors' progress compares very favorably with similar large, complex chapter 11 cases. **Notably, among all comparable cases in the past five years in which the debtors requested an extension of their exclusive periods beyond the first year, no such request has ever been denied. (*See* Schedule A and *infra* note 2).**

8. The Debtors have also made substantial progress with regard to their most critical cost-saving issue—the restructuring of the Debtors' union labor and retiree obligations. These initiatives demand sacrifice and compromise on behalf of all affected parties; entail thousands of hours, significant planning and extensive resources to implement; and are essential components of the Debtors' ongoing efforts to emerge from bankruptcy. Despite the Noteholders' unsupported allegations of "sluggishness", the timing of the Debtors' negotiations with the UMWA is on par with typical restructurings of this size and complexity (and measurably faster than many) and, if anything, evidences the Debtors' commitment to acting prudently.[4]

[4] Specifically, there were 129 days between the Debtors' July 9, 2012 petition date and the date on which the Debtors delivered their initial proposal to the UMWA. This is a significantly shorter timeframe than in many other large-scale bankruptcies involving complex section 1113 negotiations. *See e.g.*, *In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y.) (279 days elapsed between the petition date and the date of initial section 1113 proposal); *In re Horsehead Indus., Inc.*, No. 02-14024 (SMB) (Bankr. S.D.N.Y.) (283-331 days elapsed between the petition date and the date of each initial section 1113 proposal); *In re Falcon Products, Inc.*, No. 05-41108 (BSS) (Bankr. E.D. Mo.) (177 days elapsed between the petition date and the date of initial section 1113 proposal); *In re Tower Automotive, Inc.*, No. 05-10578 (ALG) (Bankr. S.D.N.Y.) (257-266 days elapsed between the petition date and the date of each initial (….continued)

9. Moreover, the Debtors have demonstrated this substantial progress while coordinating a transfer of the venue of these cases, defending against a motion to appoint an equity committee and operating in a heavily regulated industry. *See In re Express One*, 194 B.R. at 100 (finding that the debtor airline, as an entity subject to government regulation, licensing requirements and transportation standards, was "the type of debtor for which the extension of exclusivity provisions of the Bankruptcy Code were contemplated.").

10. Terminating exclusivity before the Debtors have an opportunity to complete their major restructuring initiatives would create destructive turmoil in these cases and risk the confidence of the Debtors' lenders, customers, suppliers, vendors and employees. The Debtors absolutely cannot risk the certain significant damage to their already-fragile business operations at this critical time. *See In re Ames Dep't Stores, Inc.*, 1991 WL 259036, at *3 (S.D.N.Y. Nov. 25, 1991) (refusing to terminate the debtors' exclusivity where a termination "would likely have a disruptive effect on the Ames Group's business operations during one of the retail industry's most crucial sales periods.").

11. Finally, it is important to note that the brand-new allegations of creditor dissatisfaction with the speed at which the Debtors are progressing towards the development of a plan are not, without more, grounds to deny the Debtors an extension of their exclusive periods, especially if, as is the case here, the dissatisfied creditors have

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section 1113 proposal); *In re Horizon Natural Res. Co.*, No. 02-14261 (JMS) (Bankr. E.D. Ky.) (266-288 days elapsed between the petition date and the delivery dates of portions of the initial 1113 proposal); *In re Star Tribune Holdings Corp.*, No. 09-10244 (RDD) (Bankr. S.D.N.Y.) (155 days elapsed between the petition date and the date of initial section 1113 proposal).

offered no alternative plan. *See id.* ("Although the speed with which the Ames Group is progressing is not satisfactory to Citibank, and the Court certainly understands Citibank's desire to have the proceedings advance more quickly, the Ames Group is nonetheless working toward filing its own reorganization plan."); *cf. In re AMKO Plastics, Inc.*, 197 B.R. at 77-78 (considering the fact that the official committee of unsecured creditors, despite objecting to the Debtors' motion for extension of exclusivity, had not offered a plan nor shared with the court what initiatives it would undertake if exclusivity were terminated, and granting the extension).

The State of the Debtors' Chapter 11 Cases Does Not Justify a Termination of Exclusivity

12. In large, complex chapter 11 cases like those of the Debtors, courts sometimes terminate exclusivity when plan negotiations between the Debtors and creditors reach an impasse. That is not the case here. There is no impasse because the time for serious plan negotiations is almost upon us—not behind us. This helps explain why we know of no other mega-case—anywhere, ever—where the debtors did not have at least one year of exclusivity.[5]

13. Importantly, extending the Debtors' exclusive periods remains consistent with Congressional intent and in no way impedes any creditor's ability to negotiate with other stakeholders (and, indeed, certain parties have already conducted such negotiations with like-minded creditors) or to make a plan proposal to the Debtors. **Again, no party has proposed so much as a plan term sheet to the Debtors.** There is no impasse here that necessitates breaking. Further, despite their baseless allegation that they are being

[5] Excluding cases where the debtors did not request an extension beyond one year because, for example, the case was a pre-packaged bankruptcy or liquidation.

"held hostage" in these cases,[6] the Objectors do not—and cannot—point to any way the Debtors have attempted to force anything on any of them. With very few exceptions, the overwhelming majority of matters in these cases have been consensually resolved. Thus, the cases cited by the Objectors in support of their position that the Debtors are holding these cases "hostage" are inapplicable here. Each case cited was either a (i) simple matter with very few stakeholders,[7] (ii) case in which the debtors offered zero evidence of progress,[8] (iii) case that did not concern a motion to extend an exclusivity period,[9] or (iv) case that resulted in the court actually extending the exclusivity period.[10] In contrast, the Debtors have accomplished much in nine months, hopefully stand on the brink of substantially greater certainty as to their cost structure, and have been, and continue to be, willing to work with all creditors towards a viable and consensual plan of reorganization.

14. Significantly, none of the Objectors has seriously alleged that the Debtors have requested an extension of their exclusive periods as a negotiation tactic or as a means of maintaining leverage over any group of creditors. Nor can they, because the

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[6] *See* Noteholders Obj. ¶ 7, Committee Obj. ¶ 8, Wilmington Trust Obj. ¶ 8 .

[7] *See, e.g.*, *In re Curry Corp.*, 148 B.R. 754, 755 (Bankr. S.D.N.Y. 1992) (denying an extension of exclusivity where it should have been possible to promulgate a plan of reorganization during the initial exclusivity period since the case was not complex and "has not produced numerous and complex proceedings involving related cases"); *In re Gen. Bearing Corp.*, 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (denying an extension of exclusivity because the case was "not a complex case; there are only two secured claimholders"); *In re Tripodi*, Case No. 04-30793, 2005 Bankr. LEXIS 1981, at *6 (Bankr. D. Conn. Feb. 18, 2005) (denying an extension of exclusivity where the debtor had already received two extensions and the case was "a simple case that [had] been pending for more than a year providing ample time to negotiate and prepare adequate information").

[8] *In re Sharon Steel Corp.*, 78 B.R. 762, 765-6 (Bankr. W.D. Pa. 1987) ("Even accepting counsel's arguments as fact insofar as they pertained to factual matters, nothing was offered indicating progress.").

[9] *See, e.g.*, *In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363 (5th Cir. 1987) (§ 1121 statement was made in *dicta* as there was no motion to extend exclusivity at issue).

[10] *In re Public Serv. Co. of New Hampshire*, 88 B.R. 521, 542 (Bankr. D.N.H. 1988) (granting a second extension of exclusivity so "the debtor [has] the necessary time free from distraction to get the job done").

Debtors are requesting the extension in good faith, to give themselves (with the help of their creditors) sufficient time to develop a consensual plan of reorganization. The state of these cases shows exactly why Congress drafted section 1121(d) of the Bankruptcy Code in the precise way that it did—to allow a debtor up to 18 months to file a plan of reorganization so long as a debtor is not abusing the privilege and can demonstrate cause. "By requiring an affirmative showing of cause to grant such an extension, 'Congress intended to create a balance so as to protect the right of a debtor in possession to propose and obtain the requisite consents to its plan of reorganization while at the same time protecting creditors from abuse of Chapter 11 by a debtor unwilling to negotiate in good faith with creditors.'" *See In re Elder-Beerman Stores Corp.*, 1997 U.S. Dist. LEXIS 23785, at *11 (citing 5 Collier on Bankruptcy (15th ed.) 1121.04); *accord In re AMKO Plastics, Inc.*, 197 B.R. at 77. Of course, even if the Court grants the Debtors an extension of exclusivity, parties in interest are able to petition the Court, pursuant to section 1121(d)(1) of the Bankruptcy Code, to terminate exclusivity if, in the future, there is a true breakdown in plan negotiations.

No Exit Financing Will Be Available Until Material Contingencies are Resolved

15. The Committee's Objection asserts that the termination of the Debtors' exclusivity would facilitate the Debtors securing exit financing and a consensual plan by allowing any party to solicit investors and plan support. This is plainly false.

16. No party could secure exit financing for Patriot at this point in the case. In fact, the UMWA's own financial expert, Perry Mandarino, testified under oath to the following: Question: "until the 1113/1114 issue is resolved, you don't believe that the company can get exit financing, correct?" Answer: "That's right." *See* Mandarino Dep. Tr., April 17, 2013, at 357:10-15.

17. None of the Objections dispute that significant unresolved contingencies remain, including (i) the restructuring of the Debtors' union labor and retiree liabilities, (ii) negotiations with the United Mine Workers of America 1974 Pension Plan and Trust (the "**1974 Plan**") over their asserted $959 million claim at each Debtor; (iii) significant intercompany account balance issues; and (iv) whether or not the estates should be substantively consolidated. In fact, the 1974 Plan's own purported expert, Dale Stover, has acknowledged that the anticipated increase in the Debtors' required contributions to the 1974 Plan alone could cripple the Debtors' ability to operate in a competitive market. *See* Stover Dep. Tr., April 16, 2013, at 45:18-46:5 and 48:9-12 ("it would be a very, you know, trying time for everyone if these rates occurred"). Quite simply, no investor would consider providing the Debtors with exit financing before there is far greater clarity on these billion dollar issues. The Debtors are absolutely dedicated to moving quickly toward a plan as soon as these crucial, threshold issues are resolved.

The Objectors' Narrow, Divergent Interests are Clear

18. Why would the Objectors argue for such an unprecedented and damaging result? The answer is that many or all of them are merely acting strategically to advance their own parochial interests. As this Court knows, the Noteholders seek to rip apart the Debtors' estates and have a surely mistaken view about these cases.[11] The Noteholders, by their belatedly disclosed holdings, control and direct Objector Wilmington Trust, as Indenture Trustee for the 8.25% Senior Notes Due 2018 (the "**Senior Notes**").[12] The

[11] Implicitly recognizing this, the Noteholders take pains to remind the Court that they have no fiduciary duties to any other stakeholder in this case. Noteholder Obj. n.1.

[12] Wilmington Trust supports the Motion of Aurelius Capital Management, LP, and Knighthead Capital Management, LLC for Entry of an Order, Pursuant to 11 U.S.C. §§ 105(a) and 1104(a) Directing the Appointment of a Chapter 11 Trustee [ECF No. 3423] (the "**Trustee Motion**"). As set forth in the (….continued)

UMWA, along with the 1974 Plan, is—in a mere week—litigating against the Debtors with respect to the Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [ECF No. 3214] (the "**1113/1114 Motion**"). Thus, uniquely situated parties constitute a majority of the shrunken Committee.

19. Moreover, the Objectors represent radically divergent interests with respect to the core issues in this case: (a) the Noteholders fear that any 1113/1114 settlement will overcompensate the UMWA, and thus seek to minimize any compensation offered to the UMWA (seemingly by almost any means necessary); (b) the UMWA believes that the settlement offers from the Debtors do not constitute adequate compensation; and (c) U.S. Bank is trying to guard against non-consolidation of the Debtors' estates while Wilmington Trust and the Noteholders—with exactly the opposite perspective—are guarding against substantive consolidation. These circumstances demonstrate that the Objections are not motivated by the Debtors' unwillingness to negotiate with creditors but rather each of the Objectors' attempts to augment their own recoveries at the expense of other stakeholders. And this is exactly why the Bankruptcy

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Debtors' objection to the Trustee Motion [ECF No. 3675], which is incorporated herein by reference as applicable, any objection the Noteholders have to the 1113/1114 Motion can and should be voiced in connection with the 1113/1114 hearing and does not constitute an adequate reason for denying the Debtors' request for an extension of exclusivity. *See In re AMKO Plastics, Inc.*, 197 B.R. at 78 (1996) (noting that whether the termination of exclusivity will benefit the interests of one particular creditor is "unpersuasive that termination of exclusivity will benefit all creditors"). The Debtors remain willing to negotiate with the Noteholders—and all other creditors—in hopes of achieving a consensual plan of reorganization. In the meantime, this Court should not allow the voices of a few creditors with narrow, self-serving interests and a track record of aggressive litigation tactics to disrupt productive and meaningful negotiations with other creditors and threaten the Debtors' efforts to formulate a successful plan of reorganization that benefits all stakeholders.

Code puts one fiduciary both in the middle and above the fray—to try to work out a deal that is fair to all.

20. The law is clear and unambiguous—although a creditor or group of creditors may have its own vision about how to restructure a debtor, that is not a reason for terminating exclusivity: "[t]he issue to be determined, however, is not whether some other plan may exist which provides greater recovery; the issue is whether debtor has been diligent in its attempts to reorganize." *In re Express One*, 194 B.R. at 101; *see also In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) ("creditor constituency unhappiness with a debtor's plan proposals, with or without a formal plan on file [is not] one of the enumerated factors, and is not a basis for terminating exclusivity"); *In re Interco, Inc.*, 137 B.R. 999, 1001 (Bankr. E.D. Mo. 1992) (refusing to modify the debtors' exclusivity periods and noting that "[i]f as has been suggested here, conflicts of interest are shown to exist [and are] determined to be adverse to the interests of the estates, a plan of reorganization should not, and will not be confirmed . . . [h]owever this is not a confirmation hearing.").

21. Multiple competing plans advanced by various creditor groups with wildly different views and motivations, as the Objectors envision, is a recipe for chaos, delay and massive administrative expense. The case of *In re Tribune Co.*, Case No. 08-13141 (KJC) (Bankr. D. Del. 2008) provides an instructive and cautionary example. Tribune filed for chapter 11 in December 2008. Four separate competing plans were filed by various constituencies, including the debtors, multiple lender groups and certain noteholders (notably including one of the Noteholders, Aurelius). Importantly, the competing plans were filed only after Tribune's exclusivity period had expired by statute

after 18 months. After votes were solicited on the competing plans, the court held its first confirmation hearing on March 7, 2011 on two of the plans and subsequently denied both plans. Ultimately, the plan proposed by the debtors, along with the official committee of unsecured creditors and two of the debtors' lenders, was confirmed in July 2013—four and a half years after the petition date. As recognized by Judge Carey in the first *Tribune* confirmation opinion, competing plan battles fought among the various creditor groups, especially those with no fiduciary duties to any other creditor, benefit no party and may actually lead to the destruction of the estate.[13] Patriot is not Tribune and is not Lehman. It cannot survive years of jockeying, posturing and litigating by competing plan proponents.

The Debtors are the Only Parties Positioned to Achieve a Consensual Plan

22. Not one of the Objectors has presented a proposed plan term sheet or a proposal for exit financing. Moreover, the Debtors and the Committee are examining and discussing the issues of substantive consolidation and recharacterization. This fatally undermines the Objectors' suggestions that competing plans will more quickly lead to a consensual resolution of these cases.[14] If and when an impasse is reached, the Court can then consider whether terminating exclusivity is appropriate.

[13] *See* Opinion on Confirmation, Case No. 08-13141 (KJC) (Bankr. Del. October 31, 2011), at 1-2 (beginning first confirmation decision with the story of the Scorpion and the Fox, the meaning of which is "an inescapable facet of *human* character: the willingness to visit harm upon others, even at one's own peril.").

[14] The fact that the Committee offers up the *Lehman Brothers* chapter 11 cases as an analogy to these cases is puzzling. Patriot is nothing like Lehman. The multiple competing plans in Lehman arose under an entirely different set of negotiation circumstances: the plan issues had narrowed and coalesced **over three years** into one discrete intercreditor issue, namely whether the plan would provide for substantive consolidation or non-consolidation of the estates. Further, when the competing plans were proposed in Lehman, exclusivity had terminated by statute pursuant to the 18-month cap, after which time the Court has no discretion regarding whether to extend the Debtors' exclusive periods. In Lehman, after (….continued)

23. The Objections claim that terminating exclusivity and allowing any party in interest to file a plan will be the quickest route to generating a consensual plan in the near-term.[15] Yet, none of the Objectors has offered any reason why the Debtors—as the only fiduciaries for all stakeholders—are not best positioned to negotiate with all constituencies to efficiently develop a consensual plan.

24. The Debtors are the only parties able to negotiate with all stakeholders on an equal and dispassionate footing. Further, the information needed to solicit investors must come from the Debtors and the Debtors alone. Therefore, the Debtors are best situated to complete the reorganization process in a quick, efficient and consensual manner. Without providing any evidence to the contrary, the Objectors insist that it would be better for the Debtors' estates if all parties were allowed to seek out third-party investors and propose a plan. Such a result, however, would only lead to market confusion and exhaustion. No sophisticated investor would be willing to navigate through the morass of varied, idiosyncratic plan proposals from multiple creditor constituencies with little hope of gaining the necessary creditor support for confirmation.

The Debtors Have Been Working and Will Continue to Work Cooperatively with the Committee

25. As this Court knows and hundreds of docket entries evidence, cooperation between the Debtors and the Committee has been the norm in these cases. The Debtors have engaged in extensive information sharing with the Committee, including maintaining and regularly updating a confidential data room that currently contains tens

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more than three years and with a narrow set of intercreditor issues at play, multiple competing plans proved a viable solution for compromise. That is not this case.

[15] *See* Committee Obj. ¶ 6, Noteholder Obj. 22-24

of thousands of pages of information, providing the Committee with access to the Debtors' financial advisors and officers and agreeing to substantial additional reporting in their monthly operating reports, as requested by the Committee. Moreover, the Debtors have engaged the Committee in every substantive request for relief in these cases prior to the request being made, promptly addressed any comments or questions raised by the Committee and provided appropriate diligence when requested. The Debtors maintain a standard practice of providing the Committee with copies of all pleadings at least two days before filing and consulting with the Committee regarding all major decisions and initiatives undertaken in these cases. The Debtors' efforts to negotiate with the Committee have generally been successful, as evidenced by the fact that the Committee has not once, until now filed an objection to any relief sought by the Debtors. Rather, the Committee has supported all of the Debtors' major restructuring efforts.

26. The Committee disputes none of this, but instead cites only to the Debtors' failure to yet produce a plan of reorganization. Judge Glenn, in the Borders chapter 11 case, denied a very similar objection of an official committee of unsecured creditors (the "**Borders Committee**") to the debtors' request for an extension of their exclusive periods. *In re Borders Group, Inc.*, 460 B.R. 818 (Bankr. S.D.N.Y. 2011). In so doing, Judge Glenn specifically noted that "from numerous hearings in this case so far, the [Borders] Committee's and Debtors' professionals have proceeded cooperatively and resolved almost all disputes—inevitable in a case of this magnitude—between them without Court intervention. For this reason, the [Borders] Committee's Objection to an extension of exclusivity comes as a surprise to the Court." *In re Borders*, 460 B.R. at 825. Here, too, the Committee's Objection should come as a surprise to the Court, and it

did to the Debtors. Further, Judge Glenn noted that the Borders Committee had conceded that the parties were cooperating with regard to the reorganization process and that the Borders Committee had not alleged problems with information sharing. Instead, the Borders Committee objected on the narrow ground that the debtors had failed to share a draft of a plan proposal. In rejecting the Borders Committee's arguments, Judge Glenn held that "[t]he Court expects cooperation, but that does not mean that the Debtors, or the Committee for that matter, are expected to 'share' incomplete plans with other constituencies . . . . The Debtors appear willing to work with the [Borders] Committee and share draft plan proposals once the Debtors know the outcome of the sale process and the Debtors have made further progress in formulating their business plan." *In re Borders*, 460 B.R. at 825-26. Here, the Committee has not alleged that the Debtors have failed to provide them with information or refused to cooperate with them on any aspect of these cases.

The Debtors are Eager to Continue Engaging Other Creditors in the Plan Process, Including the Objectors

27. The Debtors have also been, and continue to be, willing to negotiate diligently and in good faith with other creditors. Contrary to the two Noteholders' untrue allegations that the Debtors have excluded them from negotiations, the Debtors have already entered into a non-disclosure agreement with one of them and are in the process of negotiating a non-disclosure agreement with the other (who asked for scores of changes from the non-disclosure agreement signed by its compadre). Rather than negotiate with or make a plan proposal to the Debtors, the Noteholders have resorted to

filing a flurry of unannounced litigious pleadings, which strongly suggests that they are willing to turn these cases into a protracted battle of competing interests.[16]

28. For its part, the UMWA's rhetoric in its Objection regarding failed negotiations should be recognized for what it is—an unambiguous effort to sway this Court's views on the eve of the 1113/1114 trial.

29. In fact, as described in the 1113/1114 Motion, the Debtors have engaged in months of good-faith negotiation with the UMWA in an attempt to reach a consensual resolution regarding cost savings, and only filed the 1113/1114 Motion on March 14, 2013 when negotiations reached an impasse and achieving these cost savings become absolutely imperative for the survival of this company. The Debtors have continued negotiations with the UMWA even after the filing of the 1113/1114 Motion. Such negotiations with the UMWA have shown significant progress, as evidenced by UMWA President Cecil Roberts' recent statement that the current section 1114 proposal is "a step forward by the company". *See Mine Workers Union: Patriot's New Offer 'a Step Forward'*, ST. LOUIS BUSINESS JOURNAL, April 12, 2013 *available at* www.bizjournals.com/stlouis/news/2013/04/12/miner-workers-union-patriots-new.html. Despite this acknowledged "step forward", the UMWA's Objection extends its efforts to intimidate the Debtors and this Court. UMWA Obj. ¶ 4. ("[i]f rejection [of the collective bargaining agreements] is granted, events may outpace concerns such as exclusivity").

[16] The Trustee Motion clearly demonstrates the Noteholders' willingness to resort to extreme measures in pursuit of their own recoveries—even when such measures come at the expense of all other creditors in these cases. As set forth in greater detail in the Debtors' Objection to the Trustee Motion, the proposed separation of the Debtors would be disastrous for the creditors of all of the Debtors.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in the Exclusivity Motion, the Debtors respectfully request that the Court overrule the Objections and promptly grant the relief requested in the Exclusivity Motion.

Dated: April 21, 2013
New York, New York

Respectfully submitted,

DAVIS POLK & WARDWELL LLP

/s/ Marshall S. Huebner

Marshall S. Huebner
Damian S. Schaible
Brian M. Resnick
Michelle M. McGreal
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7983

Counsel to the Debtors
and Debtors in Possession

-and-

BRYAN CAVE LLP
Lloyd A. Palans, #22650MO
Brian C. Walsh, #58091MO
Laura Uberti Hughes, #60732MO
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020

Local Counsel to the Debtors
and Debtors in Possession

Schedule A

Motion to Extend Exclusivity Beyond One Year DENIED	Motion to Extend Exclusivity Beyond One Year GRANTED
None found	AbitibiBowater Inc.
	AMR Corporation
	Arcapita Bank B.S.C.(c) (f/k/a First Islamic Investment Bank B.S.C. (c))
	Capmark Financial Group Inc. (f/k/a GMAC Commercial Holding Corp.)
	Chemtura Corporation
	Dynegy Holdings, LLC
	Eastman Kodak Company
	Extended Stay Inc.
	FairPoint Communications, Inc.
	Flying J Inc.
	General Growth Properties, Inc.
	The Great Atlantic & Pacific Tea Company, Inc.
	Hawker Beechcraft, Inc.
	Lehman Brothers Holdings, Inc.
	Motors Liquidation Company (f/k/a General Motors Corporation)
	Nortel Networks
	Old AII, Inc. (f/k/a Aleris International, Inc.)
	Tribune Company
	Visteon Corporation
	Washington Mutual, Inc.