1
2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF MISSOURI
4 -x
5 In the Matter of:
6 PATRIOT COAL CORPORATION, et al., Case No.
7 Debtors. 12-51502
8 -x
9 PATRIOT COAL CORPORATION,
10 Plaintiffs,
11 - against - Adv. Proc. No.
12 PEABODY HOLDING COMPANY, LLC, 13-04067
13 Defendants.
14 -x
15 United States Bankruptcy Court
16 111 South 10th Street, 4th Floor
17 St. Louis, Missouri
18
19 April 29, 2013
20 8:40 AM
21
22 B E F O R E:
23 HON. KATHY A. SURRATT-STATES
24 U.S. BANKRUPTCY JUDGE
25

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2 Motion for Summary Judgment by Plaintiffs (6)
3
4 Motion to Dismiss Adversary Proceeding by Defendants (11)
5
6 Motion to Reject Collective Bargaining Agreement and to Modify
7 Retiree Benefits Pursuant to 11 U.S.C. 1113, 1114, of the
8 Bankruptcy Code, Filed by Debtor (3214)
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1 P R O C E E D I N G S
2 THE CLERK: Please rise. Your Honor, we are back on
3 the record.
4 THE COURT: All right, thank you. Be seated please.
5 All right. So these are the matters that are set in
6 the Patriot case this morning, the motion for summary judgment
7 and the motion to reject collective bargaining agreements and
8 modify the retirement benefits.
9 Before we get started with the matters on the docket
10 let me get appearances in the courtroom first, please.
11 Mr. Moskowitz, I bet they want you to go first.
12 MR. KAMINETZKY: Good morning, Your Honor, Benjamin
13 Kaminetzky of Davis Polk for the debtors. I'm here with my
14 colleagues Elliott Moskowitz, Jonathan Martin; Marshall Huebner
15 is also in the courtroom, as well as some others from Davis
16 Polk. We also have local counsel from Bryan Cave, Lloyd
17 Palans. Thank you.
18 THE COURT: Thank you.
19 MR. WILLARD: Good morning, Your Honor. May it please
20 the Court, Greg Willard and Angie Schisler on behalf of the
21 official unsecured creditors' committee, the members of which
22 are Wilmington Trust Company as indenture trustee, US Bank
23 National Association as indenture trustee, the United Mine
24 Workers of America, the United Mine Workers of America 1974
25 Pension Plan, and American Electric Power.

1 Also in the courtroom with us today, Your Honor, is
2 Mr. Tom Mayer, and I'd like to introduce for his first
3 appearance, our co-counsel, Mr. Stephen Blank.
4 THE COURT: All right.
5 MR. WILLARD: Thanks, Judge.
6 THE COURT: Thank you.
7 MR. TURNER: Good morning, Your Honor.
8 THE COURT: Good morning.
9 MR. TURNER: Marshall Turner on behalf of Citibank as
10 agent for the first out DIP lenders. Also in the courtroom is
11 Joe Smolinsky, lead counsel from Weil, Gotshal & Manges.
12 MR. SMOLINSKY: Good morning, Your Honor.
13 THE COURT: Good morning.
14 MS. TOLEDO: Good morning, Your Honor. Laura Toledo
15 of Lathrop & Gage on behalf of Bank of America as a second out
16 DIP agent. With me in the court is Ana Alfonso of Willkie Farr
17 & Gallagher, lead counsel. And appearing by telephone is
18 Margot Schonholtz, also of Willkie Farr.
19 THE COURT: All right, good morning.
20 MR. PERILLO: Good morning, Your Honor. Fred Perillo
21 on behalf of the United Mine Workers of America. I have with
22 me in the courtroom today Mr. Yingtao Ho, my partner. Joining
23 us later will be my colleague Sara Geenen. And also with me in
24 the courtroom today is the general counsel of the United Mine
25 Workers of America, Mr. Grant Crandall.

1 THE COURT: Good morning.
2 MR. PERILLO: Thank you.
3 THE COURT: Thank you.
4 MR. COUSINS: Good morning. Always an honor to appear
5 before Your Honor. Steven Cousins of Armstrong Teasdale
6 representing Peabody Energy Corporation. I'm here today joined
7 by our co-counsel Jones Day, and from Jones Day we've got Mr.
8 Jack Newman who will be handling the adversary proceeding,
9 together with Mr. Robert Hamilton, and also Mr. Carl Black and
10 Mr. Brad Ayers. Thank you, Your Honor.
11 THE COURT: Thank you.
12 MS. LONG: Good morning, Your Honor. Leonora Long on
13 behalf of the United States Trustee.
14 THE COURT: Good morning.
15 MR. GOODCHILD: Good morning, Your Honor. John
16 Goodchild, the law firm of Morgan Lewis & Bockius. I'm here on
17 behalf of the UMWA health and retirement funds. I have a
18 number of colleagues and co-counsel with me down in the
19 overflow room, along with a number of beneficiaries of the
20 funds. And with Your Honor's permission we'll simply move
21 locations when Your Honor moves to the 1113/1114 proceeding.
22 THE COURT: All right, that will be fine.
23 MR. GOODCHILD: Very well. Thank you, Your Honor.
24 THE COURT: Thank you and good morning.
25 MR. SCHNABEL: Good morning, Your Honor. Eric Lopez

1 Schnabel of Dorsey & Whitney on behalf of U.S. Bank as trustee
2 to the convertible notes.
3 THE COURT: Good morning.
4 MR. SCHNABEL: Thank you, Judge. Good morning.
5 THE COURT: Thank you.
6 MR. MARSICO: Good morning, Judge. Leonard Marsico,
7 McGuireWoods. With me is Bonnie Clair on behalf of Ohio Valley
8 Coal Company and Ohio Valley Transloading Company.
9 THE COURT: Good morning.
10 MS. CLAIR: Good morning, Judge.
11 MR. SILVERSTEIN: Good morning, Your Honor. Paul
12 Silverstein and Jonathan Levine, Andrews Kurth, for Wilmington
13 Trust Company, indenture trustee for the senior notes. Thank
14 you.
15 THE COURT: Good morning.
16 MR. ROBBINS: Good morning, Your Honor. I'm Larry
17 Robbins from Robbins, Russell, for the noteholders, Aurelius
18 and Knighthead. I'm joined by my partner Alan Strasser. Good
19 morning.
20 THE COURT: Good morning.
21 MR. EARLY: Good morning, Your Honor. Blaine Early
22 from Stites & Harbinson on behalf of five of the surety
23 companies; Argonaut Insurance, Indemnity National, Travelers
24 Casualty and Surety Company, U.S. Specialty and Westchester
25 Fire. And on the phone is my partner, Brian Meldrum.

1 THE COURT: All right, good morning.
2 MR. EARLY: Thank you, Your Honor.
3 MR. DOYLE: Good morning, Your Honor. Dan Doyle,
4 Lathrop & Gage for Caterpillar Financial Services Corporation
5 and Caterpillar Global Mining Entities.
6 THE COURT: Good morning. All right, let me get roll
7 on the phone. We have Ms. McGreal on behalf of the debtors.
8 MS. MCGREAL: Good morning, Your Honor.
9 THE COURT: Good morning. We have Anu Yerramelli on
10 behalf of the creditors' committee. Ms. Yerramelli.
11 MR. WILLARD: Your Honor, she may have that on mute;
12 Ms. Yerramelli is a colleague of mine and she did previously
13 indicate her presence, Your Honor.
14 THE COURT: All right, thank you. Ms. Schonholtz on
15 behalf of Bank of America.
16 MS. SCHONHOLTZ: Good morning, Your Honor.
17 THE COURT: Good morning. And Theresa Anderson on
18 behalf of the Pension Benefits Guaranty Corporation. Ms.
19 Anderson?
20 THE CLERK: She indicated she was running late this
21 morning.
22 THE COURT: All right. And Brian Meldrum on behalf of
23 Argonaut Insurance and the other sureties.
24 MR. MELDRUM: Yes, Your Honor. Good morning.
25 THE COURT: Good morning.

1 THE COURT: All right.
2 All right. I will make my brief administrative
3 comments. I will remind the participants on the phone to place
4 their phones on mute except when speaking.
5 I would, again, like to acknowledge that I have
6 received to date over 875 letters that I have read and placed
7 on the record as correspondence. As those letters continue to
8 arrive I will continue to read them and place them on the
9 record. I thank all of those who have taken the time to
10 address the Court and to share their thoughts.
11 Again, I'll remind everybody about appearances in the
12 courtroom, all parties that have entered their appearance in
13 the case are welcome to appear in person in court or request to
14 appear by telephone in all court hearings. Again, when you are
15 provided with the call-in information as noted on the e-mail,
16 you are not to share that information with anyone else, and if
17 it comes to my attention that the call-in information is being
18 shared with other parties that have not been approved and
19 authorized to appear by telephone, all appearances by telephone
20 will be discontinued.
21 As was mentioned earlier, there is the overflow
22 courtroom is open on 5 South; therefore, the lawyers need to
23 make sure you're at the podium, not only so we get an accurate
24 recording, but also so that you can be seen on the video feed
25 that is in 5 South. And also, in addition to the court, the

1 attorney conference rooms on either side of my courtroom, also
2 the attorney conference rooms on the other side of the hallway
3 for 7 South are also open and available if needed. All right.
4 All right. Let's talk about what our agenda for today
5 will be. As we discussed last week at the pre-trial before the
6 hearing on the Section 1113 and 1114 motion, I will call
7 adversary 13-4067, Patriot Coal Corporation v. Peabody Holding
8 Company, first.
9 I imagine that after that matter I will then hear the
10 opening statements of all the parties, except the debtors, the
11 UMWA and the funds. After we've had all of the other parties
12 opening statements, we'll take a lunch break and then we will
13 return to hear the opening statements of the debtors, the UMWA
14 and the funds, and then I imagine that we will have cross and
15 redirect of at least one of the debtors' witnesses before
16 breaking for the day.
17 Pursuant to my previous order that was entered on
18 April the 5th, 2013 ten minutes will be allotted for the
19 opening statements of the parties, other than the debtors, the
20 UMWA and the funds, and we will keep that time in the
21 courtroom. Thereafter, I will leave it to the debtors, the
22 UMWA and the funds to manage their times for your presentations
23 knowing what our schedule is and that we will wrap this all up
24 by Friday.
25 All right. Therefore, I will call in the adversary

1 proceeding the debtors' motion for summary judgment and
2 Peabody's motion to dismiss simultaneously. I have reviewed
3 the motion for summary judgment, the memorandum of law in
4 support, as well as the statement of undisputed facts,
5 Peabody's motion to dismiss the adversary, the declaration of
6 Matthew Cochran, and Peabody's statement of undisputed factors.
7 The debtors seek a declaratory judgment that liability
8 for certain health benefits, for approximately 3,100 retirees
9 lies with Peabody and not with the debtors, and thus those
10 retirees should be excluded from the 1114 motion before the
11 Court. Resolution of this issue is based on the Court's
12 interpretation of the assumption agreement, particularly
13 Sections 1 and 2 and the acknowledgement and assent.
14 Peabody argues in its motion to dismiss that this
15 Court lacks subject matter jurisdiction because the complaint
16 does not constitute and actual controversy and that the issues
17 raised are not ripe.
18 In light of my review of the pleadings, I will first
19 call upon the debtors to make their arguments, both in support
20 of the motion for summary judgment and in opposition to the
21 motion to dismiss. I won't time either side's arguments, but
22 let's try not to go over about thirty to forty minutes each,
23 including rebuttal.
24 MR. MARTIN: Good morning, Your Honor.
25 THE COURT: Good morning.

1 MR. MARTIN: For the record, Jonathan Martin from
2 Davis Polk & Wardwell for the plaintiff-debtors.
3 It's clear, Your Honor, that you have absorbed the
4 papers, so I will try to get at this from a different
5 perspective today, because there are a million different ways
6 to look at this and conclude that what Peabody is doing is
7 wrong: legally wrong, and just plain wrong.
8 This motion is about Peabody's attempt to break its
9 promise to provide retiree healthcare benefits to 3,100 of its
10 retirees and their dependents. This is Peabody's attempt to
11 free-ride on Patriot's bankruptcy to escape obligations that it
12 owes to its retirees.
13 Now, as the Court is well aware, we are about to start
14 a week here where Patriot will demonstrate that it is unable to
15 pay for the retiree healthcare benefits of its own retirees.
16 There should be no mistake, Your Honor, Patriot is here
17 reluctantly and by absolute necessity without anywhere else to
18 turn. Peabody is here by choice.
19 Patriot's objective is to save this company and
20 preserve 4,000 jobs. Peabody's motive is pure unadulterated
21 greed. Patriot is here after complying with the requirements
22 of Section 1114 of the Bankruptcy Code.
23 After months of good-faith negotiations with the
24 union, after sharing reams of data showing this company's dire
25 financial condition, and after coming to this Court to prove

1 that Patriot needs the savings it is requesting in order to
2 survive and save thousands of jobs. Peabody is here to take a
3 flier on the flimsiest of contractual arguments. They want to
4 take away these peoples' retiree healthcare benefits, not
5 because they need to, but because they want to, and because
6 they have half-baked theories for why they can.
7 This motion tells us everything we need to know about
8 who Peabody is as a corporate citizen. This motion concerns
9 thousands of people who worked their entire lives for Peabody.
10 All of them retired before December 31, 2006, before Patriot
11 was even born, before it was a twinkle in Peabody's eye. All
12 of those people are currently receiving their healthcare
13 benefits pursuant to Article 20 of the CBA; that's the
14 provision that governs retiree healthcare. And there is no
15 dispute -- no room for debate, I'll put it that way, that these
16 benefits are Peabody's liability.
17 In 2007 in connection with the spinoff, Peabody
18 promised the union and it promised Patriot it would assume the
19 liability for the retiree benefits to these 3,100 people.
20 Peabody has been paying those benefits and it could continue to
21 pay those benefits; it can afford it.
22 Most importantly, Your Honor, Patriot can survive
23 without modifying these people's retiree healthcare benefits,
24 but only if Peabody, the largest and richest private sector
25 coal company in the world, is made to stand behind its word.

1 And that's why we're here, we need the Court's assistance to
2 make Peabody stand behind its word to provide the retiree
3 healthcare to these 3,100 people.
4 Patriot Section 1113 and 1114 proposals, if approved
5 by the Court, will not change the CBA as it applies to these
6 3,100 people. Patriot doesn't want to and it doesn't need to
7 touch these people's healthcare benefits. The benefits are
8 Peabody's liability, not Heritage's liability, not Patriot's
9 liability. And for these 3,100 people, Patriot wants to keep
10 the status quo. There is no earthly reason why these people
11 should lose their healthcare benefits.
12 The only reason these 3,100 people would have to be
13 included in the request for relief that Patriot is going to be
14 making as part of this trial is if Peabody refuses to stand
15 behind its obligations, because if those benefits come back to
16 Patriot, Patriot cannot afford them. And that's why this issue
17 is a gating issue for this trial that's about to start. It
18 will decide the scope of the relief that Patriot is required to
19 seek from this Court.
20 To be honest, Your Honor, we were surprised that we
21 even had to bring this action. It's, frankly, very surprising
22 that Peabody could even take the position that its obligations
23 to its retirees could be excused because of Patriot's
24 bankruptcy. But they've refused to give us comfort that they
25 will stand behind their obligations, so we were forced to bring

1 this action, and forced to bring this motion for summary
2 judgment on the plain and unambiguous contract.
3 And now we've seen their arguments for why the
4 liabilities assumption agreement supposedly allows them to take
5 healthcare benefits away from these 3,100 Peabody retirees.
6 They make two arguments.
7 The first, they claim the first time ever that these
8 benefits are Heritage's liabilities, not theirs.
9 Second, conceding that argument, they say even if they
10 are our liabilities those benefits for the 3,100 Peabody
11 retirees should be modified in the same way that the benefits
12 for Patriot's retirees get modified as a result of this Section
13 1114 trial that's about to commence.
14 Your Honor, those arguments are a disgrace. They are
15 so obviously wrong on the law, and so manifestly deplorable
16 that you have to wonder why Peabody is even making them.
17 First on the law, we'll see, Your Honor, that these
18 arguments are legally indefensible; they defy the plain
19 language of the contract. But second, Your Honor, as a matter
20 of common decency, these arguments are shocking. The arguments
21 are unthinkably wrong as a matter of law and as a matter of
22 fairness, and the arguments never should have been made in the
23 first place.
24 So we'll talk about why. And I'll preface this by
25 saying that the legal reasons why Peabody's position fails are

1 straightforward and, frankly, ho-hum. This is Contracts 101
2 stuff. So you don't have to be as offended as we are to grant
3 summary judgment here, you just have to read the plain English
4 words on the face of the contract.
5 So I'll begin with Peabody's first argument, which is
6 that the 31 -- the benefits for these 3,100 Peabody retirees
7 are Heritage's liability. Now, they say they just fund
8 Heritage's liability for these benefits and nothing more. Your
9 Honor, that argument is a nonstarter on the face of the
10 contract. You can't get past the title of the contract without
11 concluding that that argument is wrong.
12 Before looking at it, just a brief minute on the
13 relevant history here. As the Court knows, in October of 2007
14 Patriot was spun off from Peabody. One of the subsidiaries
15 that was spun off was Heritage Coal Company; it was at that
16 time Peabody Coal Company. So I'll refer to it today as
17 Heritage, but in the contracts that we look at it's referred to
18 as PCC.
19 Now, in that spinoff Peabody saddled Patriot with a
20 lot of liabilities. And as the Court knows the debtors and the
21 creditors' committee are investigating whether Peabody provided
22 sufficient assets to support those liabilities. Now, that is a
23 question for another day, but there is one thing that is
24 absolutely clear: even Peabody stopped short of imposing the
25 liabilities for these 3,100 retirees on Patriot because if they

1 had it would have raised serious questions about Patriot's
2 solvency at its birth. So as part of the spinoff Peabody
3 agreed to assume the liabilities for the 3,100 Peabody
4 retirees. Peabody agreed to assume those liabilities, to pay
5 for them, to account for them on its own books. These
6 liabilities have always been on Peabody's balance sheet.
7 In addition, Your Honor, and this is a critical point
8 we'll explore today, even as Peabody assumed the liabilities
9 for the 3,100 Peabody retirees, Peabody did not want to be a
10 party to the CBA or any future CBA that covered these retirees.
11 And as we'll see, Peabody went to the union and got
12 the union's assent to an arrangement where Peabody would be
13 directly liable for the healthcare benefits provided to these
14 retirees, but that they would not have to be a party to the CBA
15 and would not have to administer the health plan that provides
16 the benefits to these retirees. That was the deal.
17 But now Peabody comes in here and says exactly the
18 opposite. They say that the 3,100 Peabody retirees are
19 Heritage's obligation, our liability. It's the first time
20 anybody has uttered those words. They say they just agreed to
21 fund the liability. The words "to fund" must appear I don't
22 know how many times in their brief. The argument fails as a
23 matter of basic contract law. If they had agreed only to fund
24 or pay for Heritage's liabilities, it would have been an
25 indemnification agreement. That's what an indemnification

1 agreement is: you agree to pay for somebody else's liabilities
2 as they arise. Your Honor, that's not what this is. And I
3 have copies of the contracts if it would assist the Court to
4 hand up.
5 THE COURT: I believe I have copies from the --
6 MR. MARTIN: I'd like to begin, Your Honor, with the
7 liabilities assumption agreement, and we'll turn next to the
8 acknowledgement and assent.
9 THE COURT: All right. I have it here.
10 MR. MARTIN: Okay. Thank you, Your Honor.
11 THE COURT: Uh-huh.
12 MR. MARTIN: Your Honor, this contract is not titled a
13 liabilities indemnification agreement; it's a liabilities
14 assumption agreement, and that makes a big difference under
15 contract law. When you assume contractual liabilities, you're
16 not a backstop, you're not a guarantor, you're not a surety,
17 you're not a funding source. You are the primary obligor; you
18 are first in line and directly liable to the person who is owed
19 those contractual obligations.
20 The title of the contract, Your Honor, is just the
21 start. Every part of this contract makes clear that Peabody
22 assumed direct liability for the benefits provided to these
23 retirees. You just have to look at the fifth whereas clause in
24 the recitals, Your Honor. The second one from the bottom is
25 Peabody "has agreed to assume the liabilities of PCC for

1 provision of healthcare pursuant to Article 20 of the NBCWA, or
2 any successor of PCC labor contract to certain retirees and
3 their eligible dependents to the extent expressly set forth in
4 this agreement."
5 The sixth whereas clause, Your Honor, makes clear that
6 Patriot and Heritage will be their agent in delivering those
7 benefits. It says, "Contemporaneously herewith, Peabody and
8 Patriot have entered an administrative service agreement
9 pursuant to which Patriot will take certain actions necessary
10 and appropriate for the administration of any NBCWA individual
11 employer plans" -- those are the health plans, "and delivery of
12 benefits constituting NBCWA individual employer plan
13 liabilities." That last term is the defined term that
14 describes the liabilities assumed by Peabody.
15 Section 2, Your Honor, of this contract, on the next
16 page, which is titled "PHC Assumption of Liabilities" says
17 Peabody "assumes and agrees to pay a discharge when due in
18 accordance herewith the NBCWA individual employer plan
19 liabilities." Could not be more clear.
20 Let's look at the definition of the liabilities that
21 they've assumed, in Section 1(b), which is just above, Your
22 Honor. Those liabilities are defined as: "Amounts PCC, that's
23 Heritage, pays for benefits to those retirees of PCC identified
24 on attachment A hereto, and such retiree's eligible dependants
25 under the terms of the NBCWA individual employer plan." We

1 administer the plan, they're liable for it.
2 I'd like to look just quickly, Your Honor, at the
3 acknowledgement and assent because it tells exactly the same
4 story. Peabody hates this document, because it makes crystal
5 clear that its characterization of the liabilities assumption
6 agreement is unsupported.
7 In August of 2007 Peabody went to the union to explain
8 its plan for the spinoff and its plan for the liabilities
9 assumption agreement. And Peabody had one principal objective
10 here: to get the union to assent to an arrangement where
11 Peabody would be directly liable for the retiree healthcare
12 benefits provided to these 3,100 people, but would not have to
13 be a party to the CBA, or any future CBA, or administer the
14 health plan under the CBA. And the union agreed.
15 In Section A(2), Your Honor, of the acknowledgement
16 and assent, it states, "At the completion of the spinoff of
17 Patriot, Peabody will enter into an agreement, the NBCWA
18 liability assumption agreement with Heritage and/or Patriot
19 pursuant to which Peabody will agree to be primarily obligated
20 to pay for benefits of retirees of Heritage and such retirees'
21 eligible dependants under the terms of an employee welfare plan
22 maintained by Heritage, pursuant to Article 20 of the PCC labor
23 contract or any Heritage successor labor agreement." We'll
24 come back to that, too, Your Honor.
25 But what's clear from the face of this is that Peabody

1 was promising the union that it would be directly liable for
2 the healthcare benefits provided to the 3,100 Peabody retires;
3 Heritage would be its agent. Heritage has the health plan and
4 delivers the benefits; these are their liabilities.
5 And Peabody got what it went to get from the union in
6 exchange for that promise. In paragraph B on the next page,
7 Your Honor, B(2), the union agrees that the entry of the NBCWA
8 liability assumption agreement will not make Peabody a party to
9 any collective bargaining agreement with the UMWA or create a
10 labor law relationship between Peabody and the UMWA.
11 And the preamble to that section makes clear why the
12 union agreed to that. It was, "In recognition of the benefits
13 to UMWA retirees and their eligible dependents from an
14 agreement between Peabody and PCC through which Peabody would
15 undertake the assumption of liabilities as described above,"
16 which we just read in Section A(2).
17 In the face of this, Your Honor, Peabody has the nerve
18 to come in here and say that these are not their liabilities.
19 Now, I'll concede, Your Honor, that the irony will not be lost
20 on you that Jonathan Martin is up here saying that two
21 contracts entered into contemporaneously as part of the same
22 transaction should be construed together. But this happens to
23 be the correct application of that rule, unlike some other
24 cases we've seen recently.
25 This contract, Your Honor, the liabilities assumption

1 agreement, is unambiguous. This is not a reimbursement
2 agreement, it is not an indemnification agreement; it is a
3 liabilities assumption agreement. These are Peabody's
4 liabilities.
5 Which brings us to their second argument, Your Honor.
6 They say that even if they are directly and primarily liable
7 for the retiree healthcare benefits provided to the 3,100
8 Peabody retirees, that this contract requires that those
9 benefits be modified in the same way that the benefits are
10 modified for Patriot's retirees pursuant to the Section 1114
11 trial that's about to commence. That argument is outrageous.
12 It quite literally makes no sense. And it's -- the reason it
13 doesn't make any sense is that it's sheer opportunism. It
14 doesn't even come close to being right as an interpretation of
15 the contract.
16 And let me be clear about something, perfectly clear:
17 Patriot's proposals contemplate maintaining the status quo for
18 these 3,100 Peabody retirees. We don't want to change anything
19 for these people.
20 Now, Peabody argues in its papers that our Section
21 1113 proposal calls for the elimination of Article 20
22 altogether, which they say would also include the benefits
23 provided to the 3,100 Peabody retirees. Not so. Our proposals
24 are crystal clear. And if they're not, go out in the hallway
25 and we'll make them crystal clear. But they are crystal clear

1 on their face. The 3,100 Peabody retirees are not included in
2 our request for relief unless Peabody is not made to stand
3 behind their obligations, and that's exactly what they're
4 trying to do here.
5 They say that the second sentence of Section 1(d) of
6 the liabilities assumption agreement, which we'll take a look
7 at in a second, automatically marks down their liabilities to
8 whatever changes Patriot obtains pursuant to the Section 1114
9 trial, whether through an order or a consensual resolution.
10 Their argument is contrary to both the purpose and the plain
11 text of that sentence of Section 1(d).
12 Some important context here, Your Honor. We've
13 discussed that Patriot didn't want to be a party to this -- I'm
14 sorry, Peabody didn't want to be a party to the CBA. They
15 wanted Heritage to be the party to the CBA. Not having to be a
16 party to the CBA was a benefit for them, one they actively
17 sought from the union. But it also comes at a cost, and that
18 is loss of control. They would forever have to rely on
19 Heritage to negotiate with the union over what their
20 liabilities would be. That is an example of what a first year
21 law student learns is agency costs. Agency costs come when a
22 principal, here Peabody, is relying on an agent, here Heritage,
23 to act on its behalf. When you send your agent off to enter
24 into a contract for you and you're the one stuck with the
25 liabilities of that contract you never know what the agent

1 might do. They may not have your interests completely at
2 heart.
3 That was the purpose of the second sentence of 1(d).
4 Peabody wanted to make sure that Heritage, when negotiating
5 Peabody's liabilities under the CBA, would always get Peabody
6 the best deal available. There's nothing objectionable about
7 that. As I said, any first year law student would learn that
8 that's the kind of provision you put in a contract when you
9 send your agent out to negotiate your liabilities.
10 But what that means, Your Honor, is that that second
11 sentence has no application here whatsoever. We are not
12 negotiating with the union over Peabody's liabilities. We've
13 expressly excluded those liabilities from our request for
14 relief. Those liabilities will next be negotiated with the
15 union when the NBCWA comes up for renegotiation no earlier than
16 2016. So the very purpose of that section -- of that sentence
17 of Section 1(d) isn't even implicated here, and the text makes
18 it crystal clear.
19 If Your Honor looked to that second sentence of
20 Section 1(d) it's the one that begins "changes to benefit
21 levels." It's says, "Changes to benefit levels, cost
22 containment programs, plan design, or other such modifications
23 contained in PCC's future UMWA labor agreements are applicable
24 to the retirees and eligible dependants subject to this
25 agreement shall be included for the purposes of the definition

1 of NBCWA individual employer plan liabilities." Then it goes
2 on to say -- and the proviso says: we want the best deal that
3 Eastern Associated gets, too. But the predicate of this
4 sentence is that Heritage is out negotiating a labor agreement
5 that will be applicable to the retirees and eligible dependents
6 subject to this agreement.
7 Now, I'll discuss in a second why we're not even
8 negotiating a labor agreement. But you don't even have to
9 reach that issue, because the plain text of the provision says
10 the labor agreement, whatever that is, has to be applicable to
11 their retirees. Our 1114 motion and the relief we're seeking
12 excludes those retirees. We want to keep the status quo under
13 the CBA for those retirees.
14 And just a brief minute, Your Honor, on the second
15 reason why this text doesn't apply to this situation. Any
16 result -- any result of the Section 1114 trial that's about to
17 commence, whether it's an order from the Court, a negotiated
18 resolution, an order incorporated into a confirmed plan,
19 whatever it is, it is not a labor agreement as that term is
20 used in this contract.
21 How do we know that? Take a look at the fourth
22 recital of the liabilities assumption agreement. It states
23 that, "The parties desire that PCC continue to provide the
24 retiree healthcare required by Article 20 of the NBCWA, or any
25 successor PCC labor contract." The animating purpose of this

1 contract was to continue providing retiree healthcare benefits
2 pursuant to the CBA, or any future CBA that gets renegotiated
3 in the ordinary course with the union. Nobody contemplated
4 that the benefits would be subject to markdown in the event
5 that one party enters bankruptcy and has to alter Article 20 in
6 order to survive. The parties' desire -- their desire was that
7 PCC continue to provide the retiree healthcare required by
8 Article 20. And that parenthetical, "or any successor of PCC
9 labor contract," makes unmistakably clear what the parties
10 intended when they said that. They were referring to any of
11 the periodically renegotiated versions of the CBA that
12 incorporates Article 20, that are negotiated in the ordinary
13 course with the union.
14 The acknowledgement and assent makes that clear as
15 well, Your Honor. In Section A(1) it defines the PCC labor
16 contract. And it defines it as one that incorporates by
17 reference Article 20 of the NBCWA. Section A(2) says that
18 Peabody will be primarily obligated for benefits provided --
19 and this is the fourth line down -- "under the terms of an
20 employee welfare plan maintained by Heritage pursuant to
21 Article 20 of the PCC labor contract, or any Heritage successor
22 labor agreement."
23 I won't go through every reference here, Your Honor,
24 but if you look through both contracts, every time that term is
25 used it is clear as day that the parties were referring to a

1 periodically renegotiated version of Article 20 in the ordinary
2 course.
3 There's no evidence, none, that the parties intended
4 for a successor labor agreement to include a court order, or an
5 agreement for a plan of reorganization that modifies Article 20
6 under conditions of duress in order to avoid a liquidation.
7 Any argument to the otherwise is, frankly, absurd.
8 And if Peabody had wanted a Patriot bankruptcy to
9 reduce their obligations as well, they could have tried to get
10 that into the contract. Two reasons -- two obvious reasons why
11 they didn't.
12 First, Peabody didn't want a whisper of a hint of a
13 suggestion that Patriot might ever go bankrupt because that
14 would have raised serious doubt about Patriot's solvency and
15 viability at its birth. And second, even if Peabody had tried
16 to get the benefit of a Patriot bankruptcy and a markdown that
17 would result to their liabilities, the union would have said no
18 way. The very purpose of the arrangement that Peabody, itself,
19 pitched to the union was that Peabody would be directly liable
20 for these healthcare benefits.
21 And Section B(2)(c) of the acknowledgement and assent
22 provides that the union and its members can sue them directly
23 for the benefits they agreed to assume in the liabilities
24 assumption agreement.
25 The union would have said no way at the suggestion

1 that if Patriot goes bankrupt then our obligations could get
2 marked down however Patriot's obligations get marked down.
3 They'd say no, the very purpose of entering into this agreement
4 is that you're a better credit risk than Patriot is. And the
5 benefits provided to these retirees will be safe from a Patriot
6 bankruptcy. It makes no sense.
7 The next labor contract that can modify the benefits
8 for the 3,100 Peabody retirees will come no earlier than 2016.
9 And to be clear, Your Honor is not being asked to decide what
10 will happen when that contract is renegotiated. Just being
11 asked to confirm that under the plain language of the
12 liabilities assumption agreement, whatever results from the
13 Section 1114 trial cannot be a basis for them to escape their
14 obligations.
15 Your Honor, just quickly on their jurisdictional
16 arguments. They make them in a halfhearted way, so I won't
17 spend much time on them. The notion that this proceeding is
18 noncore is nonsense. This action directly affects the
19 administration of the estate because it is a necessary gating
20 issue to the Section 1114 trial that's about to commence. And
21 the core dispute here, by their own devices, is over whose
22 liability these are. Determining whether these liabilities are
23 Patriot's liabilities could not go more directly to the heart
24 of what this bankruptcy proceeding is about or be more squarely
25 within this Court's jurisdiction.

1 And just quickly, on the motion to dismiss, Your
2 Honor, this is a delay tactic. They know they lose on the
3 merits so they want to defer a decision for as long as
4 possible. They have two arguments. They say this is not right
5 because we got to wait and see what happens because there are
6 two contingencies that might make this motion completely
7 unnecessary.
8 The first one, they say, is the Court might deny
9 relief altogether. The second, they say there might be an
10 outcome of the 1114 process that looks like a labor agreement
11 in their view, and so we should wait to see what the outcome is
12 and then decide. Neither one makes any sense, Your Honor.
13 The first one is the very reason why we're here today
14 arguing this motion contemporaneously with the trial that's
15 about to commence. You can take the motion under advisement.
16 Listen to the testimony at the hearing this week. And you can
17 decide whether the motion is still ripe, at the same time
18 you're deciding whether to grant relief under 1114 or if
19 there's a negotiated resolution.
20 On the second argument they have, they say that
21 something short of the next collectively bargained contract in
22 2016 could qualify as a labor agreement. So they say let's
23 wait and see whether there's a consensual agreement or an order
24 and a confirmed plan or something else that they might argue is
25 a labor agreement. That's precisely the dispute. We say that

1 whatever you can dream up that might be the result of this 1114
2 trial, if it's something short of the next collectively
3 bargained contract entered into with the union in the ordinary
4 course, it is not a labor agreement for purposes of this
5 contract. That dispute is an actual controversy, it is a live
6 dispute, it is a ripe dispute.
7 So, Your Honor, the debtors respectfully request that
8 the Court deny Peabody's motion to dismiss and grant the
9 plaintiff's motion for summary judgment.
10 Thank you, Your Honor.
11 THE COURT: All right. Thank you. And now I'll call
12 up Peabody Holding Company to make a complete recitation in
13 support of the motion to dismiss and in opposition to the
14 debtors' motion for summary judgment.
15 MR. NEWMAN: Thank you, Your Honor. Jack Newman of
16 Jones Day on behalf of Peabody.
17 And initially, just as an administrative matter, Your
18 Honor, I would like to hand up to the Court three pieces of
19 paper that I would characterize as argument aids. They're
20 excerpts from provisions of the liabilities assumption
21 agreement. I've provided copies to counsel for the debtors.
22 MR. MARTIN: No objection.
23 THE COURT: All right. You may hand up those.
24 MR. NEWMAN: These are not exhibits, Your Honor.
25 They're just aids in understanding and I have a copy for the

1 law clerk, a copy for you and some extras if there's anybody
2 else that needs.
3 THE COURT: That's great. Thank you.
4 MR. NEWMAN: Let me begin, Your Honor, by saying
5 something that I hadn't planned to say and didn't think I would
6 have to say but that I cannot help but observe that the
7 comments of counsel for the debtors attacking Peabody on an ad
8 hominem basis using terms like greed, unthinkable, nerve,
9 challenging their corporate citizenship and assorted other
10 calumnies suggests that they were talking to someone else or
11 some other group and not to this Court, not to a court of law.
12 We stand behind our obligations, Peabody does, and it expects
13 the Court to stand behind -- help it stand behind those
14 obligations. I'm here to address the Court not some different
15 constituency.
16 By way of backdrop, Your Honor, last Tuesday, we were
17 here and there were some comments made by Mr. Perillo and then
18 followed up by Mr. Huebner that provide, I suggest, an
19 important backdrop to this argument.
20 First, Mr. Perillo said -- and it's in the transcript;
21 I'm paraphrasing but pretty close -- that for certainty, there
22 needs to be a labor deal and know the terms of the labor deal;
23 1113, 1114 will not provide certainty, he said. There needs to
24 be a labor deal.
25 And Mr. Huebner said, following up, that you can't

1 have a financeable company without the multibillion dollar
2 issues between the debtors and the union resolved. We agree
3 with those propositions.
4 So that at its very farthest reaches proceeding here
5 before the Court today is manifestly only interim and
6 temporary. Very interim and very temporary because at best for
7 the debtor/plaintiffs, there is nothing left of their argument,
8 and I mean at best, Your Honor, or of any conceivable order of
9 this Court once there is a new collective bargaining agreement,
10 that is, a deal with the union. And so what is being discussed
11 here today is only whether something that might or might not
12 happen between now and when there is a deal between the company
13 and the union that would make it financeable for exit from
14 bankruptcy whether in that interim period there is or is not an
15 effect on Peabody's obligations. And so that's an important,
16 I'd say critical backdrop, Your Honor, to the whole discussion
17 we are having today.
18 I'd like to move first to the motion to dismiss
19 because that is a threshold issue. Patriot has offered an
20 interpretation of the IEP liability assumption agreement.
21 Peabody says that interpretation is wrong so there is a
22 disagreement. A disagreement over how that -- how and when
23 that contract applies. But at its broadest on the relief -- on
24 the contentions made by Patriot and the contentions by Peabody,
25 that disagreement is of no consequence and there's no need for

1 an adjudication if -- or I should say unless there is some sort
2 of relief, an emergence from the 1113, 1114 process and there
3 is never a union bargaining agreement to go forward, only in
4 those circumstances that this disagreement here today makes any
5 difference at all. And that's without debating whether
6 whatever the relief, if there is relief under 1113 and 1114 is,
7 whatever that relief is does or does not constitute a new labor
8 agreement. That's -- without even debating that yet, that's
9 the issue in the summary judgment, Your Honor.
10 But the issue on the motion to dismiss is whether, as
11 I said, there's any consequence to the disagreement over the
12 interpretation. In the absence of relief, we say no and
13 there's no consequence unless there's never a union bargaining
14 agreement, it leaves no consequence in the longer run. And on
15 that basis, there simply is no cognizable controversy under the
16 constitution or the declaratory judgment act and no authority
17 for this Court to proceed.
18 While there's a lot of technical debate in the papers,
19 Your Honor, the proposition is pretty simple and I just stated
20 it for purposes of just fundamental jurisdictional concepts.
21 Now, I don't think there can be any dispute about
22 those concepts or about their application here. It's only in
23 certain future circumstances that the disagreement is of even
24 any consequence.
25 There is also the issue of ripeness, Your Honor. And

1 it seems like -- including in the presentation made by the
2 debtors -- on behalf of the debtors this morning, that it's not
3 even clear, at least not to us, what relief they really do
4 seek. Maybe, if we went out in the hall there would be
5 something different but that's really the point of the ripeness
6 argument which is the second aspect of our motion to dismiss.
7 There would be many ways in which, if the Court were to grant
8 some sort of relief under 1113 or 1114 that there could become
9 a cognizable dispute in the sense that it might matter whether
10 the debtors are right or we're right. Only on an interim basis
11 but it still might matter. The Court could grant 1113 relief
12 as sought in its entirety or it might not grant 1113 relief but
13 grant relief under 1114; it might grant both. There would be
14 questions of the scope and the extent. A question of whether
15 there is a consensual resolution but according to the debtors
16 not or maybe yes equivalent of or a collective bargaining
17 agreement. So there's substantial number of future facts.
18 This is not, in this respect, an issue of taking discovery to
19 find out past facts. These are facts that haven't developed
20 yet. So Your Honor would be really swimming in a sea of
21 hypotheticals in trying to make a decision here.
22 Now, Patriot says well, we'd like to know in advance
23 of our battle with others, primarily, but not exclusively, the
24 mineworkers, in case we win that bet. We'd like to know in
25 advance how Your Honor thinks about this. But, Your Honor, the

1 mere saying that makes clear, I suggest, that what's being
2 sought here is an advisory opinion, which is not permitted, and
3 an advisory opinion under circumstances where Your Honor would
4 have to guess and hypothesize at how things might happen and
5 then rule -- well, on that hypothesis the following -- on this
6 other hypothesis the following, or on this other hypothesis the
7 following. And the mere desire to have some kind of an
8 indication of what Your Honor thinks about an issue doesn't
9 make that issue ripe.
10 We also know that it's not necessary in order to frame
11 a request for relief because, in fact, the debtors have framed
12 their request for relief on an alternative contingent basis
13 recognizing that they could conceivably get some sort of relief
14 under 1113 and 1114 without having the Court rule on this issue
15 and then take steps accordingly even if the Court ruled
16 adversely to them. So it's not needed to frame or to get
17 relief.
18 And in any event, Your Honor, at least so far as we
19 have been able to determine, and I think this is pretty clear,
20 the suggestion is that the relief, if it's granted, would not
21 go into effect until July 1. I suggest to you that that's
22 purely theoretical, as well, because the relief being sought
23 with a VEBA and all the provisions that would have to be
24 determined to go into a VEBA and have it up and running by July
25 1 is exceptionally optimistic. I doubt that it's even

1 possible.
2 But in event, once this Court rules on 1113, 1114 and
3 knows whether there is any relief or what the nature of that
4 relief is, whether there has been a consensual set of
5 provisions submitted to the Court, whether there is an
6 agreement with the union, all of those things would be known at
7 least in the context of 1113 and 1114 by early June with time
8 to come back here and say, Your Honor, this is the state of
9 play, say the debtors, we say we win for certain reasons and
10 Peabody then says, no, we now know the state of play and you
11 don't win. So at that point, there can be a discussion about
12 yes or no on the meaning of the contract -- again, only on an
13 interim basis, if there is by then no collective bargaining
14 agreement, only interim on the very best day for the debtors.
15 And I suggest to you, Your Honor, that oftentimes the
16 law and practicality don't seem to intersect, but here they do
17 because practicality says why should the Court, I'll say it
18 again, swim in a sea of hypotheticals in order to make some
19 sort of ruling, a bunch of different possibilities? From a
20 practical standpoint, it seems pretty silly when it's not
21 necessary. And under the law, the law says it's not
22 permissible. That there's no controversy that is cognizable,
23 and in any event, whatever there is is not ripe because there
24 are too many other things that have to develop before it's
25 clear what the Court is really dealing with.

1 So I suggest to, Your Honor, that the motion to
2 dismiss should be granted or at the very least, the whole
3 situation held until the Court knows what it's dealing with and
4 can ask the parties to argue specifically what the positions
5 are with respect to unknown circumstance. We don't know that
6 circumstance now.
7 Your Honor, I move onto the issue of summary judgment,
8 and here, what Peabody wants is to rest and rest successfully
9 on its contractual rights. We say three things, essentially,
10 in response to the motion for summary judgment, Your Honor.
11 First of all, the same argument that we make with
12 respect to the motion to dismiss: it's all premature.
13 Secondly, the terms of the agreement do not allow the
14 interpretation that is being advanced by Patriot.
15 And third, that to the extent there's any lack of
16 clarity, to the extent that someone wants to debate the
17 drafting of the document, and how it was drafted, to the extent
18 there's some concept of intent that is separate from the
19 document itself, from the terms of the document itself, from
20 what the language of the document says to the extent any of
21 that is at all in play here -- and I suggest that the debtors
22 have tried to put it in play so the Court will think about it
23 but try not to put it in play enough to make clear that in that
24 event it requires discovery, it requires fact finding. So what
25 we're here to do is talk about the terms of the agreement

1 itself. But as I say again, to the extent there is an issue of
2 intent, what the union would have said or done under certain
3 circumstances, what Patriot would have said or done under
4 certain circumstances, the drafting of the agreement, that
5 requires factual examination and a factual presentation that's
6 not been made here. And we don't suggest on our part that that
7 is necessary. What we say is we look at the terms of the
8 agreement and that will decide if we're -- of this agreement,
9 not some other agreement, not some other pieces of paper, not
10 what people say, not intent that's imputed or asserted for
11 people, but rather the document itself.
12 So we then turn to the document, Your Honor, and the
13 question is what are the obligations of Peabody under the
14 assumption agreement and from where do those obligations flow?
15 What defines those obligations? May I ask you to look at, Your
16 Honor, at the -- what I call the argument aids that I passed
17 up. And what you have there on page 1 is excerpts from certain
18 portions of the agreement from the definitions. Not from the
19 introductory clauses. These are the definitions; these define
20 what the obligations are.
21 Page 2 is another paragraph. It's a long sentence,
22 actually. And then, page 3 is a formatted version of page 2.
23 In other words, everything follows one after the other but it
24 is formatted in a way that's designed to make it a little more
25 readable, a little more understandable. That's what the Court

1 has in front of it. And I'd like to just march down the
2 definitions here, Your Honor.
3 Number one, that "Peabody Holding assumes and agrees
4 to pay" -- yes, "and discharge when due in accordance herewith"
5 meaning in accordance with the agreement that we're talking
6 about here. Not in accordance with something else; in
7 accordance with this agreement, "the NBCWA, Individual Employer
8 Plan Liabilities." So that's what Peabody has agreed to do.
9 Well, what are the NBCWA Individual Employer Plan
10 Liabilities because that's what Peabody agreed to pay and
11 discharge? That is amounts that Heritage pays for benefits to
12 the retirees of Heritage, identified on Attachment A, under the
13 terms of the NBCWA Individual Employer Plan. So what defines
14 the obligation of Peabody, is the amounts that Heritage pays.
15 And so if Heritage is not obligated to pay anything, neither is
16 Peabody. To the extent Heritage is obligated to pay, Peabody
17 assumes those and agrees to fund them, pay them, whatever word
18 you want to use, and that's our obligation. We have stuck to
19 it, we continue to stick to it, we will continue to stick to it
20 so long as there are amounts Heritage pays the retirees under
21 the terms of an individual employer plan.
22 Then we go onto the third item because what is an
23 individual employer plan? It means, "A plan for the provision
24 of healthcare benefits to Heritage retirees, maintained by
25 Heritage pursuant to Article 20 of the NBCWA."

1 And then you have to look at a definition of what's
2 NBCWA and that's the fourth bullet. "NBCWA shall mean the
3 National Bituminous Coal Wage Agreement of 2007 as amended,
4 supplemented or replaced."
5 So as we go forward in time, if there is a new
6 agreement, a new labor agreement, calls for payment by Heritage
7 to its retirees, then Peabody is responsible for those
8 payments. That is, the retirees that are the subject of the
9 agreement to begin with. Peabody is responsible to make those
10 payments and it will.
11 We go on and it says, "Subject to the proviso of the
12 definition of NBCWA, Individual Employer Plan Liabilities."
13 Where is that proviso? Well, that proviso is in the sentence,
14 the paragraph on the next page, 1(d) second sentence where it
15 says, "provided that" and then for any successor Heritage labor
16 contract it references the provisions relating to Eastern. And
17 as counsel for the debtors pointed out, with all due respect,
18 Jonathan, it might be the only thing he said that I thought was
19 accurate here, when you're doing something like this and you've
20 put it in the hands of Patriot to negotiate, you want to make
21 sure that you have an independent yardstick. And for new
22 agreements, the independent yardstick is how the retirees of
23 Eastern are treated. It's as simple as that.
24 And so if there were to be a new agreement in which
25 Heritage has liabilities for retirees and Peabody is

1 responsible for those liabilities, maintained according to a
2 plan under a collective bargaining agreement, you look at what
3 the provisions are with respect to a sister subsidiary and it's
4 those numbers that govern Peabody's obligation for the Heritage
5 retirees.
6 Now, that's the way, Your Honor, a contract works.
7 It's the way it was -- you can derive that from the design
8 itself. So what's the meaning? The meaning is that to the
9 extent Heritage maintains a plan pursuant to a collective
10 bargaining agreement under which it must pay retiree healthcare
11 benefits, then Peabody must fund it, must step in and pay the
12 amounts that otherwise would be paid by Heritage.
13 It is true that one doesn't have to wait until
14 Heritage fails to pay; that's not it. In fact, the Union has a
15 right to come after Peabody if Peabody doesn't pay what it
16 owes. So it's not a matter of step-by-step. Peabody says and
17 the contract says if Heritage has these obligations as defined,
18 then we must pay them. And originally, they were obligations
19 that were set out in 20 of the 2007 NBCWA. There's a new labor
20 agreement now, the 2011 NBCWA. Obligations of Peabody are
21 measured there by Eastern. They will continue to be measured
22 by Eastern to the extent there is a labor agreement that calls
23 for payments by Heritage to retirees; it's as simple as that.
24 Now, the argument over primary liability, Your Honor,
25 that is not a method of analysis. What does it mean? It means

1 only that we step in and pay the liabilities, but it does not
2 say that there are liabilities independent of what Heritage
3 must pay. The contract says our liabilities, our obligation to
4 pay are what Heritage must pay. And one can imagine why that's
5 the case because to the extent the argument is correct as to
6 the reason why this was done in the first place, it's only if
7 Heritage has obligations that calls for Peabody to step in. If
8 it doesn't have those obligations, there's no occasion for
9 Peabody to step in and the contract doesn't call for it to step
10 in.
11 There is no, in this contract, you cannot find and
12 there is not a freestanding obligation on the part of Peabody
13 independent of and unconnected to what Heritage pays, what
14 Heritage is obligated to pay. And that's why what happens in
15 the future is important, and we don't know what's going to
16 happen in the future. But the dispute if there were a
17 cognizable one, Your Honor, or perhaps when there does become a
18 cognizable dispute if certain things happen would be what is
19 the effect of 1113, 1114 relief given the contract terms
20 because our obligations are governed by the contract. They're
21 not governed by anything else. What happens then gets
22 interpreted within the terms of the contract and then our
23 obligations either are or are not depending upon how what
24 happens fits within the contract.
25 If the relief is granted as requested, at least as it

1 looks to us it's requested, under 1113 such that the existing
2 labor agreement is terminated, the foundation for Peabody
3 liability then disappears, Your Honor, because our liability as
4 set out in the very provisions that we went through here
5 earlier, our liability is based upon liabilities that Heritage
6 has, obligations that Heritage has in an individual employer
7 plan maintained pursuant to a collective bargaining agreement.
8 And if the 113 relief is given then and that the collective
9 bargaining agreement is terminated, which is what's being
10 sought, then there is no such collective bargaining agreement
11 or a plan that could have been maintained pursuant to a
12 collective bargaining agreement.
13 And so a springboard for Peabody's liability is gone
14 and the most favored nation clause doesn't even come into play.
15 But if there's no determination or on some other basis there
16 remains some sort of a Heritage liability, then the question
17 becomes is whatever the result is that the Court -- that
18 emerges from the 1113, 1114 process. And I use those terms
19 advisably, Your Honor, because it could be in the form of a
20 court order, it could be in the form of a consensual
21 resolution; that is, an agreement.
22 The question becomes is whatever that result is a
23 successor or a replacement labor contract because, as you
24 recall, the provisions of the assumption agreement that we went
25 through talk in terms of and if there is a successor or a

1 replacement labor agreement, here's what happens.
2 And again, it's interim at best because we know as a
3 practical matter that for a company to emerge from bankruptcy
4 there will need to be a new collective bargaining agreement or
5 at least one that is imminent. And we're all in agreement that
6 a new collective bargaining agreement -- that there's no debate
7 that the new collective bargaining agreement then would be the
8 thing that would be looked at within the -- a thing that would
9 be looked at within the terms of the contract. So we're
10 talking here only about an interim situation.
11 But even then, Your Honor, and this is debated in the
12 papers so let's not -- need to go into great detail but if
13 there's, for example, relief under 1114(g) alone that would
14 constitute, according to the authorities, a modification of the
15 existing labor agreement and DO & W Coal speaks to that issue
16 saying it's a modification. Well, in our view within the
17 context of the agreement that is an amended labor agreement.
18 Ultimately, in any event, Your Honor, 1113 or 1114,
19 whatever relief is granted in order for there to be an
20 emergence from bankruptcy would have to be incorporated into a
21 confirmed plan which has been called a contract. If there is a
22 consensual resolution, that would require labor's consent,
23 obviously, the union's consent, and would be a labor agreement.
24 Look at the Dana case in that regard.
25 Finally, Your Honor, we -- again, I've made this point

1 several times but it's in part because it is so important, so
2 central to Your Honor's understanding of what really is at
3 issue here, one would expect a new collective bargaining
4 agreement before confirmation, in any event.
5 And so whatever the Court does here on the various
6 different hypotheses it would have to consider in order to
7 decide the issue, if it decides it has jurisdiction to decide
8 the issue, could be a declaration that would stretch only for a
9 very limited period and needs to be so defined and so limited
10 to the temporary circumstances that would precede a collective
11 bargaining agreement.
12 The debtor makes a few points -- again, these have
13 been debated in the papers, Your Honor -- suggesting, well,
14 it's only a certain kind of an agreement that would be
15 applicable here. But you should -- I invite your attention
16 again to something that we looked at before which was the
17 fourth bullet on the first page of the argument aid that I
18 passed up that defines NBCWA, means National Bituminous Coal
19 Wage Agreement of 2007, as may be amended, supplemented or
20 replaced from time to time subject to the Eastern proviso. And
21 what that makes clear, Your Honor, is that this isn't a name
22 game. This isn't a game where, well, there can be an agreement
23 with the union but we're going to call it something else.
24 We're not going to call it the NB -- we're not going to call it
25 the National Bituminous Coal Wage Agreement of 2007 or 2011 or

1 something else; we're going to give it a different name, and
2 therefore, it doesn't apply within the terms of this agreement.
3 That's not so.
4 This particular provision says as it may be amended,
5 supplemented or replaced. And if there's something that
6 replaces it that's called something else, that's a replacement
7 within the terms of this agreement.
8 The issue of bankruptcy or not, Your Honor, as
9 triggering anything. Well, under the terms of the agreement,
10 there is nothing in the agreement that says if there are
11 changes for a certain reason, those changes don't count. Or if
12 there are -- the only thing that counts are changes that arise
13 in a certain circumstance. The agreement doesn't talk about
14 the reasons why changes occur. The agreement doesn't talk
15 about why there might or might not be a union contract and
16 individual employment provisions, individual employment plans
17 pursuant to a contract. It doesn't say anything about the
18 reasons yes or no. All it says is if these things occur, then
19 these are the consequences. So bankruptcy, financial trouble,
20 financial distress, nothing one way or the other is said about
21 the reasons for why there might or might not be a contract or
22 why the contract might have certain terms. There's just no
23 basis at all for thinking that Peabody was intending to make
24 payments when Heritage was escaping under any circumstances.
25 And the very same thing that could occur in this court could

1 also occur completely outside of bankruptcy. A different deal
2 because everybody recognized that Patriot needed a different
3 deal.
4 So, Your Honor, there -- and in that event, whether it
5 was because of financial distress or other pressures, whatever
6 it was, the contract says if there is a new, a supplemental, an
7 amended, a replacement agreement, then we look at that
8 agreement to see about Heritage's obligations and Peabody's
9 obligations -- if there are obligations of Heritage, Peabody
10 has to pay those obligations but what those obligations
11 actually are are measured by the deal with Eastern, the Eastern
12 proviso, the independent measuring stick, a check, to make sure
13 that Peabody, that doesn't have control over what Patriot does,
14 has this independent check on the Eastern side.
15 There's a reference to other documents. In
16 particular, the acknowledgement and assent, a document that was
17 created more than two months, almost three, well, two-and-a-
18 half before the actual agreement that is being litigated here.
19 It's a completely separate document between different parties,
20 not contemporaneous, and even on its own terms, creates no
21 obligation.
22 No one would suggest, Your Honor, I'm sure that if the
23 spinoff had not occurred and they're -- or if there had not
24 been an assumption agreement that somehow or other there would
25 be obligations of Peabody to pay the Heritage liabilities

1 arising just out of the acknowledgment on the assent agreement,
2 that doesn't say that. What that agreement does say, and
3 there's no dispute about that, is that the obligation is
4 defined by -- or shouldn't be a dispute, I should say -- the
5 obligation is defined by the NBCWA. And the provisions of the
6 acknowledgement and assent, yes, give the union and retirees a
7 right to sue if the payments pursuant the anticipated
8 assumption agreement are not made in accordance with the terms,
9 we understand that; but it doesn't create any obligation on the
10 part of Peabody -- and you look at the language, it doesn't --
11 to pay anything.
12 And if you, in fact, look at the language there and
13 some of which was quoted but not all of which by counsel for
14 debtors, it says that "in addition to will not make Peabody
15 Holding a party to any collective bargaining agreement or
16 create any right of action by the UMWA, members or retirees
17 against PHC for benefits under any provision of the Heritage
18 labor contract or any other labor agreement including but not
19 limited to Article 20 of the 2007 NBCWA except that they could
20 file an action if Peabody doesn't carry out its obligations
21 under the Liabilities Assumption Agreement."
22 So the obligations that Peabody has are defined by the
23 liabilities assumption agreement and that only. And I don't
24 know how anyone, conceivably, Your Honor, could argue
25 otherwise. That's the document that creates the obligations.

1 And Your Honor, very much it creates the obligations by
2 stacking definitions on top of the point number one which is
3 set out on the argument aid, "PHC assumes and agrees to pay in
4 accordance herewith the NBCWA Individual Employer Plan
5 Liabilities," then you go through the definitions step by step.
6 You understand what Peabody's obligations are; they're
7 derivative of Heritage obligation. Heritage has no obligation
8 and Peabody has no obligation. And if Heritage has an
9 obligation in successor labor agreements and Peabody has an
10 obligation but it's defined by the provisions at Eastern which
11 is the Eastern proviso.
12 Your Honor, unless you have questions, I'm finished
13 with my oral presentation.
14 THE COURT: I don't have any questions at this time.
15 MR. NEWMAN: Thank you.
16 THE COURT: Thank you.
17 MR. PERILLO: Your Honor, may I address the Court?
18 THE COURT: Briefly, Mr. Perillo.
19 MR. PERILLO: Thank you, Your Honor, I want to address
20 three small issues that I don't think have been addressed by
21 the other parties.
22 First, Your Honor, the term "collective bargaining
23 agreement" has been thrown around somewhat loosely this
24 morning. A collective bargaining agreement has a particular
25 definition in the law. It's an agreement reached between an

1 employer of employees as defined in the National Labor
2 Relations Act -- that does not include retirees, by the way --
3 and the certified or recognized representative of an
4 appropriate bargaining unit of those employees.
5 I mention this because there are suggestions in some
6 of the papers that a confirmed plan of reorganization might be
7 a collective bargaining agreement or that a court order might
8 be a collective bargaining agreement. Those things could not
9 possibly be. Only a voluntary agreement between a union and a
10 company that employs the employees represented by that union
11 can have the definition of collective bargaining agreement.
12 I would amplify this by referring to the actual
13 statute, 1114, Your Honor. If we look at Section (g)(3) and
14 look at the first proviso, (g)(3) is the section that says "a
15 Court can enter an order providing for a modification in the
16 payment of retiree benefits." Please note, it's not a
17 modification of the benefits themselves. It's a modification
18 of the payment of the benefits. It can do so under certain
19 standards, and now, I'm quoting, "except that in no case shall
20 the court enter an order providing for such modification which
21 provides for a modification to a level lower than that proposed
22 by the trustee in the proposal found by the court to have
23 complied with the requirements of this subsection and
24 subsection (f): Provided, however, That at any time after an
25 order is entered providing for modification in the payment of

1 retiree benefits, or at any time after an agreement modifying
2 such benefits is made between the trustee and the authorized
3 representative of the recipients of such benefits, the
4 authorized representative may apply to the court for an order
5 increasing those benefits which order shall be granted if the
6 increase in retiree benefits sought is consistent with the
7 standard set forth in paragraph (3)."
8 There's a further proviso which says that the union
9 can make multiple such requests to the court and that --
10 without limitation, that there is no limit in the numbers.
11 So what this means is that once the Court -- if the
12 Court grants an order modifying the payments of the benefits
13 because there is no consensual agreement to do so, the union
14 could daily return to the Court and ask for an increase in
15 those benefits based on a change in circumstances; a rise in
16 the price of coal or anything. I submit to you that that
17 doesn't look like what a contract is. That's more like court
18 management of a decree which is what in reality it is but it's
19 not a contractual agreement. It's not the product of voluntary
20 assent between parties. Because when Congress modified the
21 duties of employers by forcing employers to negotiate with a
22 certified union representative, it did not go so far to say
23 that an employer could be compelled to an agreement; neither
24 can a union be compelled to an agreement. So when the Court is
25 entering an order under 1113 or 1114, it's not creating a new

1 contract. It's entering a court order that allows the debtor
2 to breach its obligations in certain ways.
3 I say this because the Peabody argument, at various
4 times, suggests an order of the court under 1113 or 1114
5 constitutes a contract. They cite DO & W Coal for this
6 proposition. I merely want to caution the Court that DO & W
7 Coal was entered into under 1113(e), the emergency preliminary
8 relief section of 1113. That's akin to a preliminary
9 injunction. And the contract expired before the Court could
10 rule on the final application. The Court, in that case, said
11 that the new status quo was set by the Court's last order and
12 that parties would have to continue to comply with a court
13 order until the Court had changed it. That is different from
14 saying that the Court had created a new contract between the
15 parties. I don't believe that is what happened in that case.
16 Lastly, Your Honor, I want to say first that I -- I
17 should have said first that the declaratory judgment should be
18 granted. This has been called a gating issue; I'm not quite
19 familiar with the term "gating" but it's what I think, as a
20 young man, I would have called a threshold issue for two
21 reasons.
22 First, if we have no agreement and the Court does make
23 a ruling under 1114, you're going to have to determine the 1114
24 factors with respect to a group of retirees, and until this
25 issue, the declaratory judgment is resolved, we don't know

1 who's in the group nor do we know how large the liability is.
2 Patriot suggested that the liability could grow
3 from -- Patriot thinks it's 1.4 billion, could grow to 2
4 billion with the Peabody assumed group. We think the liability
5 is 1.8 billion. It might grow to two-and-a-half billion but
6 those are not immaterial numbers. And how can the Court weigh,
7 then, the adequacy of the consideration, the necessity, the
8 fairness, without knowing who's in the group? So that's one
9 proposition.
10 The other proposition is that regardless of the
11 outcome of the hearing, the union and the company will never be
12 able to reach an agreement without knowing what they're
13 agreeing about, whether that group includes the Peabody people
14 or not. And so it is critical that we know the answer to that
15 question before we begin to do the analysis, before the Court
16 can do the analysis and before the parties can work further on
17 making what I loosely call the labor deal when I spoke last
18 week.
19 Thank you, Your Honor, for providing me a brief amount
20 of time.
21 THE COURT: All right. Thank you, Mr. Perillo. Mr.
22 Martin?
23 MR. MARTIN: Just briefly, Your Honor.
24 I want to make it again crystal clear that Patriot's
25 proposal here is to keep the status quo for the 3,100 Peabody

1 retirees. We don't want to touch the CBA as it applies to
2 those people or modify the retiree health benefits. That fact
3 is dispositive here. Mr. Newman said Peabody will live up to
4 its obligations under the contract.
5 Well, the contract says they have to pay whatever
6 benefits get delivered to these retirees pursuant to Heritage's
7 health plan under the CBA. That will not change under
8 Patriot's Section 1114 proposal. But before we can get there,
9 we need the comfort that our interpretation of the contract is
10 correct and that Peabody does have to stand by its word.
11 Now, their argument is, well, you're about to get
12 modifications to the retiree health benefits provided to the
13 Eastern Coal retirees and we should get the benefit of that.
14 That is not the way the contract works. They agree that that
15 second sentence, the (1)(b) which is the entirety of what they
16 rely on, was intended to keep Heritage aligned with Peabody
17 when it was negotiating Peabody's liability. That is not what
18 we're doing in this trial. We, again, we are not going to
19 touch their liabilities. So the very purpose of that sentence
20 isn't implicated here.
21 And the text makes it clear as well because for that
22 sentence to apply, you have to have a labor agreement -- I'll
23 get to that in a second -- but you don't even -- as I said, you
24 don't have to reach that issue whether the result here will be
25 a labor agreement or not because that second sentence of (1)(d)

1 says that their liabilities change only when the labor
2 agreement is applicable to the retirees and eligible dependents
3 subject to this agreement. Summary judgment can be granted
4 right there before reaching the issue as to whether the result
5 here is a labor agreement. We want a declaratory judgment that
6 that's the way the contract works. That they have to continue
7 paying for the retiree health benefits provided to these 3,100
8 people and they have to do it until there is a labor agreement
9 that is applicable to those 3,100 Peabody retirees.
10 Now, they say, well, we don't know whether there might
11 be a labor agreement that comes out of this. There might be a
12 consensual resolution. Well, that's precisely our point. We
13 need clarity that whatever results from this Section 1114
14 motion will not implicate this contract if Your Honor reaches
15 the labor agreement question.
16 I want to emphasize that the only reason we are
17 negotiating with the union about this Section 1114 relief, is
18 that they stepped in to represent these retirees. If they had
19 not, we would be negotiating with the committee. Peabody can't
20 argue that if we had negotiated a resolution of the 1114 trial
21 with a committee of retirees that that would be a labor
22 agreement as it's used in the contract. And that's because
23 nobody contemplated that a bankruptcy would affect -- a
24 bankruptcy by Heritage or Patriot would affect their
25 liabilities. It would not serve the purpose of that provision.

1 It would just give them a windfall. They can afford to
2 continue paying these benefits. They should be required to
3 until they next negotiate those benefits again with the union
4 in the ordinary course.
5 And as predicted, Your Honor, they were very
6 dismissive of the acknowledgement and asset because it is
7 dispositive here. What they never said, because they can't, is
8 that the Court can't consider that contract in understanding
9 the meaning of the liabilities assumption agreement. It is a
10 related contracted. They say so in their papers. It was
11 describing to the union what the purpose of the liabilities
12 assumption agreement would be. That is precisely the kind of
13 contract that can be used to understand the meaning of the
14 liabilities assumption agreement without violating the parol
15 evidence rule.
16 That's all I have, Your Honor. Thank you very much.
17 THE COURT: All right. Thank you.
18 Mr. Newman, briefly.
19 MR. NEWMAN: Your Honor, the proposal before the Court
20 in the 1113 and 1114 proceeding is to terminate the labor
21 agreement. The proposal is not to terminate a portion of the
22 labor agreement; it's to terminate the labor agreement. We
23 don't think it's permissible or would be permissible to pick
24 and choose in the termination but rather it either is
25 terminated or not. But in any event, if there's some different

1 proposal before the Court that we don't know about then, of
2 course, we haven't had an opportunity to address that. That
3 simply goes to the issue of this is a floating situation
4 anyway; not ripe and not a proper subject for this Court's
5 adjudication.
6 I've responded to, I believe, to all other arguments
7 subject to any questions that the Court might have.
8 THE COURT: All right. Thank you.
9 MR. MARTIN: Your Honor, just quickly. I don't know
10 how I can make it any more clear. Our proposal does not
11 propose to touch the Peabody retirees. I can read it -- I can
12 read it to the Court but the Court has it and I am representing
13 to the Court that we do not want to change the CBA as it
14 applies to the 3,100 Peabody retirees.
15 THE COURT: Thank you. All right. I'll take the
16 matter again as submitted based on the pleadings and the
17 arguments heard here today.
18 All right. Then, I believe that brings us to the 1113
19 and 1114 motion. As I indicated earlier, I'll start with the
20 pleadings of parties other than the UMWA, the fund, and the
21 debtors.
22 I want to note that many of the pleadings filed by
23 these parties seem to advance those parties' self-interests.
24 As we go forward, I would ask for those parties to keep in mind
25 the particular matter that this Court is tasked to adjudicate

1 and the legal standard against which the Court must render its
2 decision and I would appreciate comments that are tailored as
3 such.
4 But I'd first like to hear from the creditors'
5 committee. It appears as though the committee essentially
6 supports the motion but believes that the thirty-five percent
7 of the New Patriot is too much and that twenty-eight percent or
8 lower is a more appropriate percentage.
9 The committee also wants the new stock to be valued.
10 There's also some argument that imposition of the thirty-five
11 percent stake would need to be done by a separate hearing be it
12 through Section 363(b) approval or through confirmation of a
13 Chapter 11 plan. In light of my familiarity with your
14 arguments, Mr. Mayer, is there anything else that you would
15 like to say? You have ten minutes or less.
16 MR. MAYER: Thank you, Your Honor, and thank you for
17 summarizing my argument.
18 For the record, Tom Mayer of Kramer Levin, co-counsel
19 of Carmody MacDonald to the official committee.
20 Your Honor, a little history may be appropriate here.
21 The debtors' fourth offer to the retirees included a billion
22 dollar claim in which the debtors clarified would only be
23 against the obligor debtors unless the facts justified
24 otherwise. And frankly, I don't think that a billion dollar
25 claim against obligor debtors would have triggered a debate

1 over the fair and equitable treatment of creditors which is the
2 statute and is the provision that we rely on because the UMWA
3 retirees, they do have a claim against their obligor debtors
4 and that claim is not less than a billion dollars.
5 After the Court established procedures for this
6 hearing which limited witnesses, evidence and cross-examination
7 of witnesses to the debtors, the UMWA and UMWA pension plan,
8 the debtors changed their proposal. They offered thirty-five
9 percent, as you indicated, of new bankruptcy stock to the
10 union's retirees plus profit sharing and they offered to
11 effectively assume the UMWA pension or pay it over time and we
12 thought the form of the fifth proposal was, in fact, superior.
13 We wanted the debtors to make the offer directly to the
14 retirees for a while and we've argued for months that the
15 pension plan had to be assumed to pay it over time.
16 So the form of the fifth proposal was good but as you
17 noted, we felt, and we still feel today that the debtors have
18 not justified the amount of the proposal. They have made no
19 effort to establish that that proposal is fair and equitable to
20 unsecured creditors and that's in the statute. It's in both
21 1113; it's in 1114. Their proposal must assure that all
22 creditors are treated fairly and equitably and they've made no
23 showing and they can't establish that at this hearing because
24 as Your Honor knows and recognized with your order limiting
25 this particular hearing to a three-party dispute, the committee

1 cannot cross-examine, the committee cannot offer its own
2 witness -- we asked -- and that's basic due process. So that
3 evidentiary presentation has to be for another day. And the
4 statute is set up to provide references other days.
5 Your Honor, Section 1114 is just a tighter version of
6 Section 365. It governs the conditions to rejection. It does
7 not determine what the retirees get from rejection. Section
8 1114 says they get a claim but it doesn't say how much that
9 claim is.
10 Section 502 governs the allowance of claims; not
11 Section 1114. And indeed, if you look at the statute itself,
12 its language shows that's true because 1114(j) says, "No claim
13 for retiree benefits shall be limited by section 502(b)(7),"
14 which is the section dealing with compensation contract.
15 The implications of the rest of Section 502(b) must
16 apply. In particular, Section 502(b)(1) which would disallow a
17 claim for retiree medical benefits to the extent unenforceable.
18 And here, the Family Snacks case is instructive. This is an
19 opinion of the Bankruptcy Appellate Panel for the Eighth
20 Circuit at 257 B.R. 884 (2000).
21 The Eighth Circuit BAP held that Section 365, not
22 Section 1113, governed assumption of a collective bargaining
23 agreement -- kind of close to approval of a settlement,
24 wouldn't you say? -- because the assumption of an agreement
25 affects the rights of creditors generally.

1 Page 902 at note 16 is particularly relevant. There,
2 the Eighth Circuit BAP noted that "assumption of a CBA" -- a
3 collective bargaining agreement, "in the bankruptcy context
4 dramatically affects other parties as well, namely, creditors
5 and nonunion employees ... and bears directly on the final
6 distributions to creditors under the plan." And, therefore,
7 those parties, the Eighth Circuit BAP held, had to have the
8 right to participate in any hearing to assume the agreement.
9 The debtors' latest proposal by definition requires
10 another hearing because it can't be implemented without a
11 confirmation. There's no way for the debtors to issue thirty-
12 five of the stock in a reorganized company without a plan. The
13 debtors argue this is the only hearing they need but the cases
14 they cite either have no bearing or indeed support the
15 committee's position that another hearing is required.
16 The debtors cite In re Farmland Industries, 294 B.R.
17 903 at 918, (Bankr. W.D. Mo. 2003) and they cite it for the
18 proposition that a claim for retiree medical benefits is not
19 limited by Section 502(b)(7). Well, their citation misses the
20 mark. There's nothing more than a recitation of the explicit
21 language of 1114(j) and as noted above, 1114(j) supersedes only
22 502(b)(7). It doesn't supersede 502(b) as a whole implying
23 that the rest applies.
24 The debtors cite Tower Automotive, 342 B.R. 158 and an
25 unpublished order in Kodak with a proposition that it is common

1 for a VEBA to be funded through a claim pursuant to Section
2 1113 and 1114.
3 Again, the debtors' citations miss the mark. Neither
4 the committee nor any other party denies that VEBAs are common
5 or that VEBAs are often funded with claims. The issue is how
6 much is the claim? How is the settlement approved?
7 In Tower Automotive, the settlement was approved in a
8 separate proceeding where the committee had full rights of
9 participation and was criticized for not exercising them, by
10 the way.
11 The debtors also cite an unpublished order in American
12 Airlines and the published opinion in General Motors for the
13 proposition that VEBAs can be funded with equity, and again
14 they missed the mark. Of course, VEBAs can be funded with
15 equity. The issue again is whether the amount of equity is
16 fair to all parties and whether the amount of equity was
17 approved in a hearing other than a Section 1114 hearing. And
18 again, the answer is yes in both cases. The fairness of the
19 equity allocation was subject to a separate hearing in American
20 Airlines and General Motors is completely inapposite. The
21 General Motors VEBA was set up years before a bankruptcy. The
22 opinion cited was a sale of assets opinion that dealt with the
23 challenge to the allocation of value to the VEBA under Section
24 363. And I think you will agree, Your Honor, when you read it,
25 if you have not already, that GM has no lessons for Patriot's

1 case.
2 I have to pause to address a footnote in the debtors'
3 reply memorandum. About ten days ago, the debtors cut a deal
4 with the nonunion retirees' committee settling out their claims
5 at four million bucks. We didn't object for two reasons. One,
6 it was a good deal and two, the debtors really urged us to get
7 the deal done April 23, on almost no notice. And we didn't
8 object on those bases.
9 Footnote 43 of the debtors' reply brief implies that
10 our no objection to a small 1114 settlement we liked is some
11 sort of precedent that no hearing is required on an 1114
12 proposal that we dispute. I've discussed this with the debtors
13 and I understand that they are not, in fact, making that
14 argument. Last week's de minimis settlement is not precedent
15 for anything.
16 The union cites no cases at all. It merely argues
17 that once the debtors have made a proposal, Sections 1113 and
18 14 require that the proposal must be implemented without
19 further proceedings. Actually, debtors delay implementation of
20 proposals all the time. As the debtors' own cases show,
21 debtors routinely come back to court before implementation for
22 approval of their 1113, 1114 settlements.
23 Finally, the union's position is untenable because if
24 the union were right, the debtor could propose, under Sections
25 1113 and 1114 to give a hundred percent of the value of the

1 company to the union leaving zero for anybody else. And if the
2 union were right, there'd be nothing any creditor could do.
3 That would leave fair and equitable right out of 1113 and 1114.
4 Now, of course, we don't have that situation here but
5 we have its cousin. If the union is only entitled to twenty-
6 eight percent of the stock, giving the union a hundred percent
7 is way too much, giving the union thirty-five percent is still
8 too much. The debtors have to show that the offer is fair to
9 creditors generally. In particular, they have to address the
10 issue of whether the union claims against obligor debtors are
11 entitled to get thirty-five percent of the equity plus profit
12 sharing or whether the union claims can be asserted against
13 nonobligor debtor through subsequent consolidation or
14 otherwise. The debtors don't prove; they posture.
15 On page 64 of the debtors' reply memorandum, the
16 debtors state, quote, "According to comprehensive analyses
17 conducted by Patriot's financial advisors, the UMWA is not
18 receiving more value than it would if it was awarded claims
19 against only the obligor debtors," citing paragraph 47 of the
20 Huffard declaration.
21 Well, actually, the Huffard declaration says nothing
22 of the kind. Paragraph 47 reads as follows: "Giving at least
23 some weight to the possibility of substantive consolidation,
24 Mr. Huffard believes that thirty-five percent of the equity of
25 the debtors is an appropriate offer to the UMWA." Mr. Huffard

1 continues, "Even under a nonconsolidated plan of
2 reorganization, the UMWA may recover thirty-five percent of the
3 equity under certain assumptions."
4 Just a minute more, Your Honor, if it's okay?
5 THE COURT: Yes.
6 MR. MAYER: Giving weight to the possibility of
7 substantive consolidation. How much weight? When will the
8 debtors show the Court how much weight? Will other parties
9 have the ability to provide their own evidence? Even under a
10 nonconsolidation plan, the UMWA may recover thirty-five percent
11 of equity under certain assumptions. May. Certain
12 assumptions. When will the debtor show the Court those
13 assumptions? When will other parties have the ability to
14 challenge those assumptions? When will other parties have the
15 ability to introduce their own testimony on these points? Not
16 at this hearing. The debtors can't put Mr. Huffard on the
17 stand to testify against creditors who can't cross-examine him
18 and can't offer any witness or other evidence to rebut.
19 The debtors say these issues get resolved later, at a
20 later hearing on sub-con or at a hearing on confirmation of a
21 plan. And that's in the reply memorandum and that's our whole
22 point. This proposal cannot be implemented, cannot be binding
23 on creditors until there is another proceeding. And the
24 committee might very well support the debtors at that
25 proceeding, at that hearing, but we can't support

1 implementation of the proposal today because the debtors have
2 not made their case.
3 So in sum, we urge the Court to find that the proposal
4 is fair and equitable with respect to the debtors, the union
5 and the union pension plan but not authorize the debtors to
6 implement a proposal until the debtors have shown at a second
7 hearing that their proposal in the words of the statute assures
8 that all creditors are treated fairly and equitably.
9 If the Court has no questions, I'm finished.
10 THE COURT: I have nothing further. Thank you, Mr.
11 Mayer.
12 MR. MAYER: Thank you for your indulgence.
13 THE COURT: All right.
14 All right. Now, at this time, I will call upon the
15 U.S. Trustee, Ms. Long.
16 MS. LONG: Nothing, Your Honor. Thank you, Your
17 Honor.
18 THE COURT: All right. Thank you.
19 All right. Now, I will call upon Ohio Valley for
20 their comments. The most notable part of that objection is
21 that Ohio Valley does not believe that the UMWA was complete
22 information with regard to the value of contingent claims.
23 Therefore, in ten minutes or less, counsel for Ohio Valley,
24 what else would you like for me to know?
25 MR. MARSICO: Your Honor, we will defer to our papers

1 by way of opening. I will just note that we also object to the
2 inadequacy of taking into account the Peabody claims and the
3 Arch claims with respect to the proposal but we'll defer any
4 further arguments for our closing.
5 THE COURT: All right. Thank you.
6 All right. Then I would like to hear now from
7 Drummond. I believe Drummond's objection states that the
8 debtors have not shown that ceasing contributions to the 1974
9 trust is necessary. I'm sorry; Mr. Moskowitz?
10 MR. MOSKOWITZ: Apologies, Your Honor. I just want
11 clarification because counsel said that he would defer to his
12 papers. Just for the sake of the record, we assume that that
13 means the first objection that was submitted by them not the
14 second which the Court has already stricken.
15 THE COURT: Correct.
16 MR. MOSKOWITZ: Thank you, Your Honor.
17 THE COURT: Thank you.
18 All right. Drummond's objection talks about that the
19 debtors have not the cease in contributions to the 1974 trust
20 is necessary. It also notes that coal prices are cyclical and
21 should increase by 2017. Is counsel here for Drummond? I
22 can't remember who he is. Ms. Magnus, I can't remember who --
23 counsel. I've read the -- I've read a lot of things with a
24 whole lot of people's names on it.
25 THE CLERK: One second, Your Honor.

1 THE COURT: Okay.
2 THE CLERK: No, Judge. Counsel for Drummond is not
3 here or has not made an appearance at the podium.
4 THE COURT: All right. Then we will take their
5 objection on the papers. Thank you.
6 All right. And also there's an objection by Energy
7 West that seemed to be similar to Drummond's. I don't know if
8 we have counsel for Energy West present as well.
9 THE CLERK: No, Judge. Counsel for Energy West has
10 not made an appearance at the podium.
11 THE COURT: All right. And while you're checking,
12 next is Cliff's Natural Resources which seem to have a similar
13 objection to Energy West and Drummond.
14 THE CLERK: No, Judge. Counsel for Cliff's Natural
15 Resources has not made an appearance in court today.
16 THE COURT: All right. Likewise, then we will take
17 their objections on the pleadings.
18 All right. Now, would Bank of America care to make a
19 statement?
20 MS. ALFONSO: Your Honor, for the record, Ana Alfonso
21 from Willkie Farr for the second out DIP agent. We don't have
22 an opening statement. We may, after the evidence is in, have a
23 few comments at closing, but we will be brief.
24 THE COURT: All right. Thank you.
25 All right. And then would Citibank like to make a

1 statement?
2 MR. SMOLINSKY: No, Your Honor, not at this time.
3 THE COURT: All right. Thank you.
4 All right. Next is U.S. Bank. All right. It appears
5 to me from the pleadings that U.S. Bank is principally
6 concerned about whether the Court will rule on substantive
7 consolidation. In light of the fact that substantive
8 consolidation is not before me today, I will not be making
9 determinations about that. Is there anything else that counsel
10 would like for me to know?
11 MR. SCHNABEL: Your Honor, I think really just two
12 quick points. One, just to be clear, which our pleading is
13 clear in is that we are not taking a position. Let me
14 emphasize: we are not taking a position with respect to a
15 variety in the 1113, 1114 motion, with the sole exception of
16 what Your Honor just stated.
17 The second point, Your Honor -- and for the record,
18 Eric Lopez Schnabel of Dorsey & Whitney on behalf of U.S. Bank.
19 The second point, Your Honor, is I think with regards to
20 ensuring that, as Mr. Mayer's argument as well pointed out,
21 ensuring that an order of this Court, to the extent the Court
22 were to grant the motion, doesn't have a preclusive effect on
23 parties such as U.S. Bank or other creditors who don't have
24 rights to cross-examine or bring their own witnesses. That
25 that order, the language of that order reserving those rights

1 and making sure there is not a preclusive effect is something
2 we're going to be very interested in. So I think at closing
3 maybe that form of order, we may need to talk about how to
4 ensure that's consistent with what Your Honor just stated.
5 THE COURT: All right.
6 MR. SCHNABEL: And that's it, Judge. Thank you.
7 THE COURT: All right. Thank you.
8 All right. Now I'll hear from Wilmington Trust, Mr.
9 Levine or Mr. Silverstein. And after that I'll call Aurelius
10 and Knighthead. It appears to me that most of the points of
11 contention that were in your pleadings were addressed in
12 debtors' reply brief that was filed last week. Again,
13 substantive consolidation is not before me today and I will not
14 make any such determination. What else would you like for me
15 to know?
16 MR. SILVERSTEIN: Thanks. Just briefly, Your Honor.
17 THE COURT: Um-hum.
18 MR. SILVERSTEIN: Paul Silverstein, Andrews Kurth for
19 Wilmington Trust as indenture trustee for 250 million dollars
20 of 8.25 percent senior notes.
21 Your Honor, as the Court is aware, the senior notes
22 are obligations of each and every debtor. Wilmington was not
23 an investor here; it's not a noteholder. It's an indenture
24 trustee, with contractual and statutory duties under the
25 governing of indenture and applicable law.

1 As Your Honor is aware, the ninety-nine -- there are
2 ninety-nine debtors before Your Honor that are being jointly
3 administered for procedural purposes only. They have union
4 mining operations and nonunion mining operations. As
5 Wilmington understands it, thirteen of the ninety-nine debtors
6 are unionized, and those thirteen are liable for union and
7 retiree benefits. The other eighty-six have no such liability.
8 No one genuinely disputes that, Your Honor. The
9 debtors seek relief under 1113 or 1114 as for the unionized
10 debtors. Although Your Honor will have to sit through a lot of
11 long days here, I'm sure, Wilmington believes that the debtors
12 will be able to establish that they are entitled to such relief
13 to this Court's satisfaction. If our belief is the correct,
14 the union on behalf of its members and retirees will have a
15 resulting claim against the thirteen unionized debtors as a
16 consequence of such relief. That's really not Wilmington's
17 issue, and that's really not why I stand here.
18 Here is where the problem lies, Your Honor. The
19 debtors' original proposal -- going back to that as an example
20 because it's not really changed in substance, it's changed in
21 form -- provided for a claim against all of the debtors. As I
22 said, the form has changed, as we know. It's an equity stake
23 in the reorganized debtor plus various other benefits. The
24 problem, however, remains the same.
25 If Your Honor, for example, looks at paragraph 69 of

1 the affidavit of Paul Huffard of Blackstone dated March 14th,
2 2013, it values a result in retiree healthcare claim, assuming
3 Your Honor grants such relief, at approximately one billion
4 dollars. Based on a forty-nine cent trading price for the
5 senior notes, which are the obligations of all of the debtors,
6 not thirteen of the debtors, Mr. Huffard, in his declaration or
7 affidavit, goes on to value the one billion dollar resulting
8 claim at approximately 500 million dollars.
9 Such a valuation cannot be supported by any evidence
10 in this proceeding because the trading price of the senior
11 notes which are obligations of all the debtors cannot be a
12 proxy or a comparable for obligations of only thirteen of the
13 debtors that are liable for the union's claims. Certainly,
14 that cannot be binding on Wilmington Trust or the senior notes,
15 because they are not participating on an evidentiary basis in
16 this proceeding under 1113 and 1114.
17 Now, the current proposal by the debtors to the union
18 is similarly flawed and cannot be approved by this Court. The
19 debtors have offered the union thirty-five percent of the
20 equity of the reorganized debtors. The debtors have made no
21 showing, however, that thirty-five percent equates to the value
22 of a billion-dollar claim that the union would have against the
23 thirteen debtors which are liable.
24 And even if the debtors intend to do so at this
25 hearing, Wilmington and the senior notes and other affected

1 parties would have to have the ability to challenge this
2 evidence and/or introduce their own evidence on value. We
3 don't have such ability, and that inability is consistent with
4 a need for a separate proceeding to address how -- to address
5 the claim and how such claim would be treated consistent with
6 Mr. Mayer's comments on behalf of the committee earlier.
7 Secondly, the profit sharing component of the debtors'
8 current proposal involves sharing of profits of all the
9 debtors, not just those debtors who are liable. Again, no
10 factual legal basis for such remedy.
11 Your Honor, every other component of the debtors'
12 proposal similarly siphons value from debtors who have no
13 liability for the union's claims, without any factual or legal
14 basis for such relief. That cannot be done ever, and certainly
15 cannot be done in the context of a proceeding under 1113 and
16 1114 where we do not have the ability to participate.
17 Wilmington does understand that the union would, if
18 this Court grants relief, have a claim against the thirteen
19 debtors, but it does not follow and cannot follow that
20 nonobligor debtors somehow become liable on such claims, and
21 that those estates essentially become substantively
22 consolidated such that all the debtors' assets are pooled.
23 Any relief granted by this Court with respect to that
24 treatment must await a separate proceeding, specifically, in
25 our view, the plan process in which creditors are accorded full

1 disclosure and an opportunity to participate fully. I thank
2 Your Honor for the time.
3 THE COURT: All right. Thank you.
4 All right. And then Aurelius and Knighthead, Mr.
5 Robbins or Mr. Strasser.
6 MR. ROBBINS: Thank you, Your Honor and good
7 afternoon.
8 I want to start by focusing on precisely the question
9 the Court asked at the outset, which is enjoining us to focus
10 on the legal standard. The legal standard is whether, in fact,
11 the proposals being presented to the Court meet the fair and
12 equitable standard under the statutes. On this record I do not
13 see how the Court could reach that conclusion. And in that
14 respect I want to associate my views with those of Mr. Mayer
15 and Mr. Silverstein on behalf, respectively, of the committee
16 and of Wilmington.
17 The Court said just moments ago that it does not
18 intend to resolve the question of substantive consolidation in
19 this hearing, and we're glad to hear that. We don't see how
20 the Court could do so given the fact that the parties most
21 likely to object to substantive consolidation, including my
22 clients, are not able witnesses or examine witnesses. So that
23 issue cannot be resolved in this hearing.
24 But the fact is that the debtors tell us in their
25 reply brief that the thirty-five percent equity proposal that

1 they've made to the unions, they tell us in no uncertain terms
2 at pages 57 and 58 of their reply brief, that thirty-five
3 percent figure, they tell us, has been adjusted upwards by some
4 undefined amount to take account of the probability or
5 possibility that substantive consolidation will, in fact, be
6 ordered. That very possibility is something which this Court
7 cannot approve in the current proceedings and which none of the
8 parties with a stake in opposing that proposition are going to
9 be heard in any way.
10 So although the noteholders are not opposed in
11 principle to the debtors' request for relief from collective
12 bargaining and retiree benefit agreements, we do object to any
13 proposal under 1113 or 1114 that would work in effect a
14 substantive consolidation, even by according some equity share
15 based on a probabilistic view of whether at the end of the day
16 the Court will grant substantive consolidation. And of course,
17 any offer that takes account of that probability or possibility
18 and that resolves that probability or possibility would, in
19 effect, shift assets from the nonobligors who do not -- as to
20 which there are no claims by the unions, to obligors as to
21 which the unions do have claims. And, of course, that
22 shifting, even in this probabilistic sense that the debtors
23 advance in their papers, that shifting is precisely what the
24 law forbids.
25 The fact is, Your Honor, this thirty-five percent

1 proposal that the debtors make, there is simply no basis on the
2 present record for any stakeholders like my clients to tell
3 whether it is fair or equitable, and there is no basis for
4 concluding that it is. We have no idea on the present record
5 what assumptions went into making that offer: what the
6 enterprise value is, what the size so the union's claim is,
7 what the valuation of the obligors are, the valuation of the
8 nonobligors. There is simply no way to tell what the
9 assumptions underlying the thirty-five percent are. The only
10 thing we do know is that it accords some value based on some
11 assumption about the probability that this Court will one day
12 order substantive consolidation. I suggest that this court
13 cannot make any judgment at all even as to that probability,
14 much less approve an equity offer based on whatever that
15 probability may be.
16 Compounding matters, the proposal also fails to
17 specify whether this thirty-five percent takes account of the
18 additional benefits being offered to the union in the form of
19 profit sharing and royalties. And the debtors' reply,
20 respectfully, does not answer that question.
21 And of course, the previous proposal that the debtors
22 made gives us cold comfort with regard to what the thirty-five
23 percent -- what really lies behind the thirty-five percent
24 because the previous proposal, which would have given the union
25 an unsecured claim at all the subsidiaries as far as we can

1 tell from the face of the proposal, leads us to think that in
2 order to make a settlement under 1113 and 1114, in order to get
3 a proposal adopted, the debtors are prepared, in fact, whatever
4 they may say, to shift assets among the different debtor
5 estates.
6 We join the committee, Your Honor, in saying that this
7 court cannot approve any proposal that presupposes in whole or
8 in part that the separate debtor estates should be
9 substantively consolidated. And I note the Court has said that
10 it won't do so, but I emphasize again that the proposal of
11 thirty-five percent, by the debtors' own admission, in so many
12 words in their reply brief takes some undefined amount as a
13 reflection of their assessment, the assumptions behind which we
14 have no knowledge of. It takes as a predicate that there is
15 some probability that substantive consolidation will in fact be
16 ordered.
17 And as I say it especially important not to resolve
18 that question in this hearing because, as I say, we don't have
19 the opportunity to call witnesses and as a result -- or examine
20 the witnesses who are called. And as a result none of the
21 parties presenting evidence today has any incentive to show
22 that the proposals are unfair to noteholders, even if in fact
23 they are. Under these circumstances it would be wrong not only
24 as a matter of bankruptcy practice, but as a matter of
25 constitutional due process to adjudicate the propriety of any

1 proposal that rests for its validity on even the possibility of
2 sub-con.
3 If the Court has no questions, I thank the Court for
4 its time this afternoon.
5 THE COURT: All right. Thank you.
6 All right. And then next on my list is Argonaut
7 Insurance Company for any additional comments.
8 MR. EARLY: Thank you, Your Honor. Blaine Early for
9 Argonaut and for other sureties.
10 We filed this response really in reservation of rights
11 out of concern for our contractual rights of indemnity, and the
12 rather extensive common law and statutory rights of sureties
13 and performing sureties. The debtors' omnibus reply brief
14 states that substantive consolidation is not before the Court,
15 and perhaps this is more an issue for later on at the plan
16 stage and we'll just rely on the papers then. Thank you.
17 THE COURT: All right. Thank you.
18 All right. Are there any other parties that wish to
19 be heard with an opening statement on this matter other than
20 the debtors, the funds and the UMWA?
21 All right. Then hearing none, what I will do now is
22 it's about 12:30 so we will recess one hour for lunch, and then
23 we'll proceed on then at 1:30. All right. Then we'll be in
24 recess.
25 (Recess from 12:26 p.m. until 1:40 p.m.)

1 THE CLERK: Please rise.
2 Your Honor, we are back on the record.
3 THE COURT: All right. Thank you. Be seated, please.
4 All right. Now I believe we are ready for the
5 debtors' opening statement.
6 MR. MOSKOWITZ: Good afternoon, Your Honor. For the
7 record, Elliott Moskowitz from the law firm of Davis Polk &
8 Wardwell, representing the debtors.
9 THE COURT: Good afternoon.
10 MR. MOSKOWITZ: Your Honor, I would like to begin
11 today with some important thank yous as a preliminary matter.
12 In a mega bankruptcy case such as this one the debtor and the
13 Court are, of course, in regular contact with one another. And
14 often the debtor makes a lot of demands on the Court's time.
15 And I'm sure the Court and the clerk would agree that this case
16 is no exception to that, and perhaps it is even exceptional in
17 the demands it has imposed on the good graces of this Court.
18 So I just wanted to say at the outset before we got
19 into the substance of the matter, on behalf of the debtors
20 there are thousands of employees and all of the attorneys and
21 professionals working on this case, we thank and appreciate the
22 Court's patience, the Court's cooperation and the Court's
23 availability. And particularly express thanks to Ms. Sonette
24 Magnus, the Court's clerk, Mr. John Howley, the Court's deputy
25 clerk, Diane (sic) and all the staff of this court for their

1 help, their flexibility, their availability and for all they've
2 done in bringing us to this point. And we particularly want to
3 thank the Court for its flexibility in moving heaven and earth
4 to schedule the hearing for this week, which I know was not an
5 easy thing to do, as we discussed in chambers some weeks ago.
6 And I think if there's at least one thing the parties can agree
7 upon today it's that this thanks is certainly well-deserved.
8 THE COURT: Thank you. And I'll pass that along to
9 Ms. McWay and her other staff as well in the clerk's office.
10 MR. MOSKOWITZ: Absolutely. Absolutely.
11 Your Honor, I've prepared, actually, just a chart that
12 I think will be helpful in sort of organizing the oral
13 argument -- or I should say the opening statements that I
14 intend to put before you today. It's not a whole set of
15 slides; it's just really what I would call a table of contents.
16 And we're going to go ahead and put that up on the screen if
17 technical issues permit.
18 THE COURT: All right. Mr. Perillo, I assume you have
19 no object -- have you seen this?
20 MR. MOSKOWITZ: Technical issues do not permit, I am
21 advised. This was some slide, let me tell you.
22 MR. PERILLO: I had not seen the slide, but I don't
23 object to using a demonstrative exhibit for purposes of
24 exhortation.
25 THE COURT: All right. Thank you.

1 MR. MOSKOWITZ: This is becoming very anticlimactic,
2 Your Honor. It's going to get up there eventually. I'm going
3 to go ahead and begin, though.
4 THE COURT: Yes, it is.
5 MR. MOSKOWITZ: Okay.
6 Your Honor, we open this hearing with a sense of both
7 sadness and conviction. Sadness at the fact that we have to
8 have a hearing at all and that we could not reach a consensual
9 agreement with the union, and sadness at the fact that the
10 relief we are seeking will admittedly impose hardship on the
11 thousands of individuals who are relying on Patriot for their
12 jobs, for their benefits and for their retiree healthcare.
13 But, Your Honor, we also open this hearing with a
14 sense of conviction. We are convinced that Patriot has cut its
15 expenses to the bone and needs every penny of the savings it is
16 requesting on this motion in order to survive. We are likewise
17 convinced that Patriot has done everything possible and has
18 gone far beyond what many debtors have done in the past in
19 order to reach a consensual deal with the union.
20 We are convinced that Patriot not only has satisfied
21 every element of the 1113 and 1114 statutes, but has actually
22 gone beyond what the statutes require in order to prove that it
23 deserves and merits the relief it is seeking today. And we are
24 convinced that once we have our labor issues resolved either by
25 order of this Court or far more preferably through negotiations

1 that are still ongoing, that a great deal of the uncertainty
2 that is plaguing this company will be resolved.
3 In short, if Patriot gets the relief it is seeking, it
4 can survive and we believe that it will survive to provide
5 good-paying jobs for thousands and benefits for tens of
6 thousands. If the Court denies the motion and Patriot is
7 unable to secure this relief then we are headed for a
8 catastrophic scenario where Patriot is forced to liquidate.
9 Now, we should make no mistake, Your Honor, under a
10 liquidation scenario a lot of people will turn out just fine.
11 The DIP lenders will likely be just fine under a liquidation
12 scenario. Distressed debt hedge funds, some of whom you heard
13 from this morning who purchased their investment in Patriot for
14 cents on the dollar, will likely also be just fine in a
15 liquidation scenario.
16 So who will suffer if Patriot liquidates: all of the
17 people sitting in the back of the courtroom for starters, Your
18 Honor. All of the thousands of retirees watching these
19 proceedings and hoping that the union and the company can get
20 this right. And all of the active employees, most of whom I
21 should note are nonunion, who at this hour are, among other
22 things, toiling in Patriot's coal mines bringing forth coal
23 from the ground and need the company to survive so it can
24 continue to provide good jobs and benefits for their families.
25 If this motion is denied, all of that will be lost and we will

1 have presided together over one of the great tragedies of
2 Chapter 11.
3 Over the course of this week we will prove to the
4 Court that Patriot deserves the relief it has sought and that
5 such a tragic result can absolutely be avoided.
6 In order to set the context for what is to come this
7 week let me begin by giving the Court just a sense of the
8 company's dire financial condition and the need for major
9 changes. Obviously, these facts are laid out in great detail
10 in our papers and, of course, the Court will hear more about
11 them this week. But I just want to highlight a few of the
12 facts that are actually not in dispute between the company and
13 the union. And they are all stipulated and part of the record
14 before the Court.
15 Fact: In 2012 Patriot lost 730 million dollars, some
16 three-quarters of a billion dollars. That point is a matter of
17 public record. Without the relief Patriot is seeking on this
18 motion the company will run out of money and be forced to
19 liquidate early next year. That point is also not in dispute;
20 the union agrees, at least, that we are approaching this cliff.
21 Without a resolution to the 1113, 1114 issues that are
22 before the Court on this motion, Patriot will be unable to
23 secure exit financing and emerge from bankruptcy. That is also
24 not in dispute, it's a fact that was conceded by the union's
25 expert in depositions and as you'll hear later this week.

1 The company's labor situation is completely upside-
2 down. You have a small number of workers supporting healthcare
3 for an extremely high number of retirees; a totally
4 unsustainable situation that needs to be corrected through this
5 hearing if Patriot is to survive. And this point also is
6 actually not in dispute. And Your Honor need not take my word
7 for it, I'm going to quote to you directly from the union's own
8 objection to Patriot's motion. And here I am quoting from page
9 7, note 7.
10 "Unionized employees and retirees comprise more than
11 15,250 of those persons covered by Patriot healthcare plans.
12 The union-related Peabody retirees" -- this is the Peabody
13 assumed group that we debated this morning -- "who may lose
14 coverage if Patriot does not prevail in its declaratory
15 judgment constitute another 3,100 people. Thus a company with
16 1,657 unionized employees supports 13,000 retirees and their
17 families and potentially 16,000 others." That is from the
18 union's brief.
19 And the union has it exactly right. This is,
20 obviously, an unsustainable situation. The union refers to it
21 on page 9 of their brief as a company that was doomed to fail,
22 their words, and we agree. You cannot just have a few miners
23 support costly healthcare for thousands upon thousands upon
24 thousands of people. It's a situation that needs to rectified
25 immediately or this company will be forced to liquidate.

1 And let's talk about that healthcare that is the
2 subject of the hearing this week and has been the subject of
3 negotiations with the union for just a moment. Because what
4 exacerbates the situation that we're in and what adds to our
5 inability to get to a deal with the union is the complete
6 unwillingness of the union to budge on the level of active and
7 especially retiree healthcare benefits that they are willing to
8 accept. Some might think that they would actually rather see
9 this company liquidate and provide no healthcare for anyone,
10 than make their members pay a premium, a deductible,
11 coinsurance or reasonable copays that, frankly, are a feature
12 of virtually every healthcare plan in the country with what
13 people are familiar with.
14 And look, I think we can all agree that mining coal is
15 one of the most difficult jobs in the American workplace. And
16 I think we can all agree that such work can take a toll on
17 someone's body and that a person may need good-quality
18 healthcare in their retirement years. But the benefits that
19 the union is demanding the company continue to provide are
20 completely out-of-step with the market today. In fact, they're
21 out-of-step even within Patriot's own company because all
22 Patriot has proposed with respect to the active employees is
23 that the unionized employees, active workers of the company,
24 take the same health plan that the nonunion active employees
25 have -- are showing up to work and enjoying each day. And that

1 they've refused as well.
2 And that's also why we're having such a debate over
3 the proper level of funding for the VEBA. I think it can be
4 sort of beyond debate that the hundreds of millions of dollars
5 that we anticipate will fund the VEBA will go a lot farther if
6 the VEBA is managed wisely and provides a benefit level that is
7 consistent with the market, not the benefit levels that the
8 company is obligated to provide retirees with today, which some
9 refer to as Cadillac benefits, if that term is familiar.
10 Section 1113 and 1114 is about flexibility, it's about
11 negotiation and it's about bargaining in good faith. On the
12 subject of retiree healthcare in particular, we acknowledge
13 that the union, after a number of months, finally agreed to a
14 VEBA concept, and that is something that the company
15 understands and the company appreciates.
16 But they tethered that proposal to impossible
17 conditions. They first asked that the VEBA be funded with a
18 billion dollars, a total impossibility for this company. Then
19 they asked some months later that it be funded with 800 million
20 dollars, again, a total impossibility for this company. And
21 that's actually where they were up until this past Saturday
22 night when the union made their latest proposal, which I will
23 discuss in a few minutes. But an 800 million dollar VEBA. We
24 don't even know if this company has net distributable value of
25 800 million dollars, yet that's how much they were demanding

1 get put into this VEBA. Even the union's own financial advisor
2 admitted at his deposition that that structure and that
3 proposal may not have been feasible after all.
4 So just to sum it up, we agree that our miners should
5 have extraordinary healthcare; they deserve it. And we agree
6 that if Patriot could afford to provide it we wouldn't be here.
7 But this is a company with an upside-down labor situation and a
8 company that will run out of cash very shortly. Patriot has
9 put forward proposals that we believe will provide the retirees
10 with meaningful healthcare for years to come, especially if the
11 VEBA is managed wisely and prudently and in conjunction with
12 government programs like Medicare and the Affordable Care Act
13 that are available to this population. Whether it's union
14 politics or if there's some other motivation going on here,
15 after almost six months of negotiations, Patriot cannot wait
16 for the union to wake up and agree to a realistic funding
17 mechanism for the VEBA or to finally accept attributes of
18 healthcare plans that are, frankly, familiar and almost
19 universal to virtually every other American. And that, too, is
20 part of the reason why we are here before the Court today.
21 Let me turn to the question of Peabody. How did
22 Patriot end up in the situation that it's in? How did Patriot
23 end up with this reverse pyramid situation where it has just
24 1,600 unionized employees paying for the healthcare of more
25 than 10,000 retirees plus their own healthcare? Well, of

1 course, our brief discusses at length the deterioration in the
2 coal markets over the last two years and the financial
3 challenges that that has brought about for the company.
4 And the Court now also has the benefit of an expert
5 declaration from Mr. Seth Schwartz, who is perhaps the
6 preeminent coal market specialist in the country, that reflects
7 in exhaustive detail these coal market trends and his
8 expectations for the future. The Court also has the expert
9 declaration of Mr. Paul Huffard of Blackstone, a preeminent
10 restructuring professional, that recites in exhaustive detail
11 the impact that the weakening coal markets have had on Patriot
12 and its ability to survive.
13 But if you want to look at who is to blame for the
14 structure, the reverse pyramid structure that we have today
15 where a very few employees are struggling to pay for more than
16 a billion dollars in retiree healthcare for more than 10,000
17 retirees, you need only look at Peabody Energy Corporation. If
18 there is a villain in this sad tale of Patriot, I think we can
19 all agree that it is Peabody. And I'm sorry if that insulted
20 Mr. Newman that we said a bad word about Peabody. His feelings
21 really are not at issue here because, frankly, the facts speak
22 for themselves about what Peabody has done in this matter.
23 Peabody created Patriot and set it up this way. And
24 this is something the union and the company agree upon, as
25 well. Everyone in this courtroom, everyone, except for perhaps

1 Mr. Newman, who got up this morning and argued that Peabody can
2 use Patriot's bankruptcy to throw another 3,100 people under
3 the bus, everyone except for Mr. Newman wants to see Peabody
4 held responsible for any misconduct associated with the
5 creation and failure of Patriot. And as the Court well knows,
6 Patriot and the committee are engaged in a serious,
7 comprehensive, diligent and extremely important investigation
8 of Peabody so such causes of action can be developed and
9 brought. And make no mistake, if there are viable causes of
10 action to be brought against Peabody, they will absolutely be
11 brought and prosecuted with the maximum intensity.
12 But for purposes of this week, the question for the
13 Court is this: where does Peabody fit in these Section 1113
14 and 1114 proceedings. In other words, is the question of who
15 is to blame for Patriot's misfortunes legally relevant to
16 whether Patriot needs the savings it is seeking in order to
17 survive. And the answer is the issue of blaming Peabody simply
18 cannot be part of these proceedings. Nowhere in the 1113
19 statute do you see any reference to fault. Section 1113 and
20 1114 are not about whose fault it is that the debtors are
21 before the Court seeking relief, it is simply about whether the
22 relief is necessary.
23 And I think there's a certain irony here, Your Honor,
24 because in many 1113 cases you actually have the union coming
25 before the Court and blaming current management for the

1 debtor's predicament and arguing that because current
2 management messed up the company the debtors don't deserve the
3 relief that they're asking for and the relief isn't necessary.
4 And courts actually routinely reject that argument by just
5 focusing on the necessity prong of the statute, regardless of
6 how the debtor got there.
7 What's ironic is that I believe, at least they've told
8 us privately, that the union has confidence in the debtors'
9 current management. The CEO, Mr. Ben Hatfield, has a good
10 working relationship with the union's international president,
11 Mr. Cecil Roberts. And Mr. Hatfield was never around when the
12 Peabody matters occurred, and the same goes true with other
13 members of senior management of the debtor. So we're not even
14 in the situation where the union is blaming current management
15 or suggesting that current management is not doing a good job.
16 In any case, the case law is clear that the 1113, 1114 inquiry
17 is focused on necessity, not on who is to blame for the
18 bankruptcy.
19 Now, the union is going to point to the potential
20 causes of action and argue that one day in the future Peabody
21 (sic) may win a lawsuit against Peabody -- I'm sorry, Patriot
22 may win a lawsuit against Peabody and a ton of money is going
23 to come back into the estate. And to be sure, that is
24 definitely possible. The problem is no one can know today
25 whether that's ever going to happen or even if it will happen,

1 when it will happen. As we've seen from just this morning
2 Peabody fights everything. They can't even concede what should
3 be an open-and-shut issue that they can't use Patriot's
4 bankruptcy to better their own financial position.
5 And as I'm sure the Court has noticed, they have
6 sprinkled through every filing that they have put on file with
7 this court a preview of their defense against the fraudulent
8 transfer actions that the committee and the debtors are
9 investigating and may one day bring. That's everywhere. It's
10 even in their motion to dismiss. So it is a super-safe
11 prediction to say that Peabody will contest any claims
12 vigorously and it may be years before the estate is able to
13 realize any recovery on these claims, if any recovery is
14 possible at all. And this is something, of course, which the
15 union has to agree upon with the debtors. They said it at
16 depositions. We just don't know for sure today if money will
17 every come from Peabody.
18 So how can Patriot today decide that it needs less
19 money in savings and bank on these speculative recoveries? It
20 simply cannot. Patriot needs what it needs in order to
21 survive. And if one day money falls from the sky from Peabody
22 or from any other source the union will benefit from that in
23 any number of ways, including with respect to the equity that
24 they may still hold in the company or through profit sharing if
25 the recovery is material or through other ways.

1 And I also refer Your Honor to pages 72 to 75 of our
2 opening brief, where we lay out the case law on this issue,
3 because there is law on this issue, including law in this
4 circuit, in particular the Mesaba case. So to sum up this
5 portion of my statement, Section 1113 and 1114 are about the
6 changes the debtor needs in order to survive.
7 Of course, Peabody is important. And Patriot's
8 creditors will have their day in court with respect to Peabody.
9 But that day is not today; that day is not this week. So let
10 us put Peabody aside for the moment and focus on the statute
11 and on saving this company, which is what the law requires us
12 to do.
13 Let's move away now in discussion from Peabody and
14 return to the UMWA and the debtors, which, of course, is the
15 focus of the statute. I would be remiss, Your Honor, if I
16 didn't observe that the Court may be surprised, and even
17 disappointed, to see all of us here today. And I can
18 understand that, because I was here also a few days ago when
19 Mr. Perillo stood in front of you and, I think, said a couple
20 of times that he was optimistic -- I think he even once said
21 "very optimistic" about the negotiations that were still going
22 on between the parties and that the parties would try hard to
23 maybe even avoid the need to have a hearing altogether. And
24 when Mr. Huebner addressed the Court, he embraced that
25 sentiment and advised the Court that Patriot's senior

1 management team would be flying soon to Triangle Virginia, the
2 union's headquarters and be prepared to negotiate around the
3 clock, until Monday morning, in the hopes of getting a deal.
4 Well, it turns out that that was all just a big joke
5 to the union. And it, frankly, calls into question whether
6 they have the will, or the ability, to ever get to a consensual
7 deal with the company because let me tell you what actually
8 happened last week. Patriot's negotiating team, including our
9 CEO, flew down to Triangle, Virginia to start negotiations on
10 Wednesday morning.
11 We spent hours and hours, sharing details about our
12 most recent proposal, answering any questions they had -- and I
13 should note, parenthetically, that some of their questions
14 actually were rather basic and suggested that they may not have
15 even read all aspects of the proposal. And Patriot, in that
16 session, begged for a counterproposal. And you know what
17 happened? At 4:30 p.m., the union said, "Okay. We've had
18 enough for today. See you tomorrow." What a disappointment.
19 No sense of urgency; no sense that we're trying desperately to
20 bridge differences and reach a deal.
21 And the next day was even worse than that. Patriot's
22 team, this time accompanied by its financial advisors,
23 assembled at union headquarters and made a presentation. And
24 again, begged for a counterproposal. This time at 2:30, the
25 union said, "Okay, we've had enough for today. We'll send you

1 a counterproposal at some point." Suffice it to say, that we
2 could not have been more disappointed and surprised by these
3 discussions and we hope that the Court may share in that
4 disappointment, given the statements that were made last week.
5 Now, I should note, for completeness, that the news is
6 not all glum. It is mostly glum, but it's not all glum. On
7 Saturday night, at 10:27 p.m., less than thirty-six hours
8 before the hearing, the union finally sent us a
9 counterproposal. Let me say that it would have been a lot more
10 productive if the parties could have negotiated about that
11 proposal when they were meeting in person a couple of days
12 before, but we can leave that aside. The new proposal, which I
13 suspect Mr. Perillo will mention in his discussion with the
14 Court, is not part of the evidentiary record before the Court.
15 It was not introduced by the time we had exhibit lists and made
16 submissions to the Court. But I do think it is helpful to
17 discuss.
18 It's helpful because, for the first time, after six
19 months of negotiations, the union has expressed at least a
20 willingness to agree to some important elements of our
21 proposals. For example, the union now appears to recognize and
22 agree that Patriot's proposals must secure relief all the way
23 through 2018 and not end at 2016 or an earlier time. And
24 that's a point that's very important to Patriot and the
25 potential exit financiers who are looking to invest in the

1 company.
2 The union has also now agreed to abandon its own
3 proposals for VEBA funding, which, as I said before, their own
4 witness agreed may have not been feasible, and to agree, at
5 least in concept, on the structure of Patriot's proposal. In
6 other words, to fund the VEBA with an equity stake. The
7 problem is, the parties are still light years apart on a
8 multitude of issues, including the size of that equity stake.
9 And I will tell the Court that the union has proposed it be
10 granted a whopping fifty-seven percent equity stake in the
11 company. They want to own the new company.
12 So this is all a long way of saying that, more than
13 two weeks after Patriot delivered its most recent proposals to
14 the union, and after giving us literally nothing during our
15 pilgrimage to UMWA headquarters last week, the union has
16 finally, finally put a new proposal on the table. But in so
17 many respects, it still lacks seriousness and does not allow
18 the parties to come even close to doing a consensual deal.
19 Another interesting attribute of this bankruptcy
20 megacase, I think we all saw this morning when the other
21 parties gave their opening statements. And Your Honor has
22 wisely managed the participation rights of these other parties
23 because, ultimately, Section 1113 and 1114 is about the
24 debtors, and it's really about no one else. But I do think
25 that these other parties, in their papers and in their opening

1 statements, have offered an interesting context for these
2 proceedings because as Your Honor can probably already
3 appreciate, this is a case that is marked by wildly different
4 perspectives. And I think you can put these different
5 perspectives into roughly three camps.
6 The first camp, of course, is the union's perspective.
7 And for these purposes, I will lump in the UMWA funds. The
8 union, at this point, agrees that Patriot requires at least
9 some savings, but it also agrees, and believes -- I should say
10 believes -- that Patriot's proposals are far too stingy.
11 Patriot offered the union thirty-five percent of an equity
12 stake. But for the union that's not enough; they're seeking a
13 fifty-seven percent equity stake.
14 But they're not only seeking that. Their new proposal
15 asked for much more than that. Their new proposal has in it
16 the same profit-sharing mechanism that was a feature of their
17 prior proposals. And I think even profit-sharing is a misnomer
18 because when you use the word profit-sharing, you actually have
19 to have a profit to share. I would just call this a sharing
20 provision because what it suggests is that no matter what
21 Patriot's EBITDA is, there should be a minimum threshold each
22 year, a minimum amount, that Patriot needs to share with the
23 union.
24 And then, how did the union respond to Patriot's
25 royalty contribution proposal, where Patriot agreed to give a

1 percentage of each -- of the revenue from each ton of coal
2 that's produced to the union, starting from the first ton of
3 coal? The union's proposal was to quintuple that amount. So
4 the union believes that Patriot is giving it way too little in
5 this bankruptcy, and I think that that point is sort of beyond
6 debate. And that's the first perspective of three.
7 Another perspective, and I want to treat this very
8 briefly, is what I would call the competitors. All of the
9 other companies who filed pleadings with the Court but didn't
10 bother to show up in court this morning to advance their cause
11 and to give an opening statement to the Court. I'll just
12 briefly say that I agree with the Court; these competitors are
13 certainly motivated by their own self-interest. They don't
14 have much to say, other than Patriot should continue to
15 contribute to the 1974 pension plan. Our latest proposal
16 addresses that in spades. And I really think that whatever
17 complaint these competitors think that they have, it's being
18 addressed by our proposals and, frankly, cannot be the focus of
19 the Court's inquiry this week. And again, I think it speaks
20 volumes that they didn't bother to show up today to advance
21 their cause before the Court. So that's the second perspective
22 of three.
23 The third perspective, the Court heard, in spades,
24 this morning. And that is the perspective of five parties, all
25 of whom are saying, essentially, the same thing, each with

1 varying degree of misstatements. The parties that I'm talking
2 about, of course, are the creditors' committee, the Aurelius/
3 Knighthead funds, U.S. Bank, and Wilmington Trust. Let me just
4 briefly address some of the points that Your Honor heard this
5 morning from these parties because I believe it's important to
6 dismiss them at the outset.
7 First of all, these parties spoke about due process,
8 whether their due process rights were somehow infringed by Your
9 Honor's ruling with respect to participation in this hearing.
10 First of all, none of these parties, except for the -- none of
11 these parties at all; it was only the funds that filed a motion
12 to intervene -- none of these parties actually filed a formal
13 motion to intervene with the Court. And that's not surprising,
14 because you never have these parties participating in an 1113
15 process. Once in a while, you'll see the committee engaged in
16 some limited participation at an 1113 hearing, but you never
17 see hedge funds cross-examining witness and having the kinds of
18 participation rights that they seemed to complain about this
19 morning, at the 1113 hearing. And that makes sense because, of
20 course, the statute determines what rights other parties have
21 with respect to the 1113 hearing. Both the 1113 statute and
22 the 1114 statue state clearly, "All interested parties may
23 appear and be heard." That's what these parties have done.
24 Your Honor has given them, actually, a generous amount of time
25 in order to appear and be heard. They've said their piece;

1 that's all the statute requires. And any suggestion that
2 they're being denied due process rights or that there's some
3 sort of constitutional infirmity with the Court's ruling as to
4 their participation, I think is completely, completely hollow.
5 One of those complaints, I thought, was even more
6 hollow than the rest of them. And I'm talking now about the
7 complaint of the official committee unsecured creditors. You
8 heard Mr. Mayer say, and you see it in their brief, that there
9 may need to be a second hearing, or that the Court is even
10 unable to issue any relief with respect to an equity stake
11 because the equity stake is at thirty-five percent. He invokes
12 Section 502. I think that that's very disingenuous because if
13 you look at his papers, he says, by the way, if it was twenty-
14 eight percent, everything would be cool. So his whole -- the
15 whole notion that he feels that there's some statutory bar for
16 the debtors to offer the union an equity stake in the 1113 or
17 the 1114 context doesn't really make sense and is internally
18 inconsistent if his position is, in the same breath, oh, by the
19 way, you can do it; just take the percentages down just a few
20 percentages lower. I do think it's worth noting
21 parenthetically, though, that the union -- I'm sorry -- the
22 debtors and the committee are actually not that far apart, when
23 it does come to the equity stake that the debtors have
24 proposed.
25 Let's move, now, to the point about sub-con. Sub-con,

1 sub-con, sub-con. We heard all about it this morning. We
2 heard all about it at the trustee motion that was argued before
3 the Court a few days ago. Your Honor, we agree. Sub -- with
4 you, not with them. Sub-con is not before you, and you need
5 not make a finding at sub-con at this hearing.
6 But there is a really fatal flaw in their argument.
7 Why is sub-con different than any other aspect of our proposal
8 when it comes to the fair and equitable inquiry? Every aspect
9 of a debtor's proposal has the potential to affect the rights
10 of other parties. And I'll just give you an example. Let's
11 say the debtors offered the union a wage-cut of eight percent.
12 And the hedge fund felt, you know what debtors, you left money
13 on the table; you should have offered the union, and you should
14 have forced through, a nine percent cut. And because you're
15 only asking for eight percent, you left money at the table, and
16 there's less money in the estate as a result to go around to
17 other creditors. Would we say, then, that the hedge fund has
18 the right to participate in the hearing, to cross-examine the
19 debtor's witnesses, to ask all about the eight percent versus
20 the nine percent, to produce evidence on that subject? Of
21 course not. You never have that in Section 1113 or 1114
22 hearings.
23 So I don't see, really, an analytical difference,
24 frankly, between the sub-con element and all of the hundreds of
25 other elements that go into whether or not a proposal is fair

1 and equitable. The Court needs to consider the proposal as a
2 whole. This is not going to be a litigation about sub-con, nor
3 is it appropriate. And could you imagine if it would be?
4 Could you imagine where we allowed fifteen parties to come in
5 and have a six-month litigation about sub-con in order to
6 determine whether the Court has any authority to implement
7 Section 1114 relief? I'm shuddering right now at the thought.
8 And I'm sure the Court is as well.
9 And now this notion that you need a second hearing,
10 I'm not aware of that every having been done before in Section
11 1113 or 1114. And I want to be clear about this. If we were
12 to reach some consensual deal with the union, it would at least
13 be our view that we would present that deal to the Court for
14 approval under Section 9019, as is common when settlements are
15 presented to the Court. And there, there would be a canvassing
16 exercise, in which other parties could comment. But for there
17 to be a second hearing, essentially a second 9019 look at the
18 Court's order with respect to 1113 or 1114, you never have
19 that. Nor would that be appropriate.
20 Let me also address some of the misstatements that the
21 parties made when they presented argument to this Court. And
22 I'm actually disappointed in some of the comments that were
23 made because I believe that these parties have failed to read
24 our proposal carefully. I believe that they have failed to
25 read our declarations carefully. And you saw that in their

1 presentation to the Court today, and, frankly, you saw it in
2 their presentations to the Court some days ago, at the trustee
3 hearing. Let me just tell you why.
4 The parties pointed to paragraph 47 of Mr. Huffard's
5 reply declaration, and the said, aha, here is where they say
6 that we're doing sub-con by giving the thirty-five percent.
7 Well, they forgot to read the rest of the paragraph, where Mr.
8 Huffard says quite clearly, and I'm quoting now, "Even under a
9 nonconsolidated plan of reorganization, the UMWA may recover
10 thirty-five percent of the equity under certain assumptions."
11 And everybody will agree, there are many, many assumptions at
12 play with respects to what equity stake is appropriate.
13 There's valuation; there's giving the effect of intercompany
14 claims; there's the size of the claims pool. There's a million
15 variables, none of which, necessarily lead you to have to
16 conclude that sub-con is appropriate before you get to thirty-
17 five percent. The variables are so broad that you can probably
18 come to a conclusion that you can give the union as low as
19 twelve percent or as high as something much higher than thirty-
20 five percent. It's all a matter of all of these variables.
21 And is there any suggestion, and is it even possible, that the
22 Court has to hold, for the first time in 1113 history, a second
23 evidentiary hearing after it rules on whether the proposal is
24 fair and equitable? I think not.
25 Other misstatements that were made by the parties.

1 Mr. Mayer referred to our prior proposal as a one-billion-
2 dollar claim. Not true; not true. Our proposal was just to
3 offer the union a claim in an amount to be negotiated and
4 monetized. He just got that wrong. The counsel for Aurelius
5 and Knighthead suggested that the billion-dollar claim -- of
6 course, it's not a billion-dollar claim -- but the billion-
7 dollar claim would be against all debtors. Not true. Our
8 proposal said nothing of the sort. Just not a true statement.
9 Mr. Silverstein pointed to paragraph 69 of Mr.
10 Huffard's initial declaration. And I could swear this was
11 discussed a few days ago at the trustee hearing. In Mr.
12 Huffard's initial declaration, he compared, for purposes of
13 illustrating potential recoveries on the union's unsecured
14 claim, he compared it to bond trading. And that has caused the
15 parties to go into a tizzy about whether Mr. Huffard has
16 concluded that sub-con is appropriate. Of course, here again,
17 they're not reading the entire paragraph. Mr. Huffard says at
18 the end of paragraph 69 that -- and I'm quoting now -- "of
19 course, actual recoveries" -- this is with respect to the
20 union's unsecured claim -- "will depend on a large number of
21 factors, including, but not limited to, the financial
22 performance of the company, overall market conditions, and
23 negotiations of an actual plan of reorganization among the
24 various creditor groups of the company, resolving complex
25 issues regarding the size, nature, and effective priority of

1 various claims, among other things." I don't even understand
2 why we're having this debate again today. I thought it was
3 done when we had the trustee hearing several days ago.
4 And here, again, more canards that they put before the
5 Court from the trustee hearing. I think Mr. Silverstein and
6 counsel for Aurelius and Knighthead both suggested that the
7 debtor's profit-sharing proposal would, I think it's, siphon
8 assets and steal assets from all the debtors. Not true; not
9 true. And it cannot be debated. I have in front of me, of
10 course, our 1114 proposal -- and it's a shame that we have to
11 waste this time; I'll be brief with this, your Honor, because
12 it's sort of beyond dispute. Page 2 of the 1114 proposal, and
13 this is the same in all the prior iterations, refers to a
14 definition called the "obligor companies". And there's an
15 exhibit attached to the proposal that identifies what they are.
16 It doesn't have ninety-nine debtors in that exhibit. It's just
17 the debtors that have a CBA with the union. And, or course, if
18 you turn to our profit-sharing proposal, in the proposal
19 itself, paragraph 8, you'll see it says -- not all the
20 debtors -- it says, the obligor companies would agree to create
21 a profit-sharing mechanism as an additional funding source for
22 the VEBA. Under this arrangement, the obligor companies would
23 agree to contribute to the VEBA.
24 Same thing with respect to the royalty contribution.
25 Same exact issue. They suggest that oh, the royalty

1 contribution is being paid by all the debtors. Not true.
2 Paragraph 9 of our proposal: The obligor companies would also
3 agree to pay a per-ton royalty to the trust. It would be nice
4 if in the ten minutes that the Court allotted them, they had
5 actually taken the time to get it right. And I hope that they
6 will be more judicious with their time in closing argument.
7 So where does that leave us on the sub-con issue?
8 There are a ton of factors that go into whether the proposal is
9 fair and equitable and whether thirty-five percent is an
10 appropriate proposal. Sub-con is merely one aspect of that,
11 and Mr. Huffard testified in his declaration, and he'll testify
12 on the stand, that because of the host of factors at issue, you
13 can absolutely get the thirty-five percent without giving any
14 weight to sub-con at all. You can tweak any of the other
15 variables in order to do that. So I think that this whole
16 complaint as it was advocated by these parties, rings extremely
17 hollow and, frankly, is a distraction from the serious issues
18 that we need to confront this week with respect to the union.
19 And that's really what 1113 and 1114 is all about.
20 While we are on the subject of the views of other
21 parties, besides the debtors and the union, let's talk for just
22 a few minutes about the UMWA funds because in a bankruptcy case
23 with difficult moments and disappointments, the funds are one
24 of the stars of the show.
25 First of all, who are the funds? The funds consist of

1 three separate benefit plans. There is the 1974 benefit
2 plan -- and I'm using the short names for them and not the more
3 lengthy names; I think we all know who we're talking about --
4 the 1974 benefit plan, which is the largest of the three and
5 the most significant part of Patriot's request for relief. The
6 debtors currently contribute approximately twenty million
7 dollars per year to this fund. And under the fund's own
8 published numbers, that amount is scheduled to go up to over
9 thirty-five million dollars per year, starting in 2017, and to
10 over sixty million dollars per year in 2021. Needless to say,
11 these scheduled increases would present a crushing burden for
12 Patriot to endure, and if it were to leave them in place, would
13 chase away, in Patriot's judgment, all potential exit
14 financiers. Now, that's the 1974 benefit plan. There's also
15 1993 benefit plan and the 2012 bonus trust. These plans are
16 smaller, but the debtors contribute another eight million
17 dollars to them each year, which they also can no longer afford
18 to do.
19 Now, although the funds filed a motion to intervene in
20 this case, which the Court mostly granted, it is worth noting
21 that only one of the three funds has any special role here, to
22 the extent the funds are special at all. Only the '74 plan has
23 this clause, which you've seen in the papers, and which I'm
24 sure will be discussed today, called the evergreen clause,
25 which has been incorporated into the CBAs. The other two funds

1 don't have that feature, and the fact that Patriot contributes
2 to them is simply a function of an agreement between Patriot
3 and the union, and that agreement can be altered at any time by
4 Patriot and the union, in or out of bankruptcy. With respect
5 to the '93 benefit plan and the 2012 bonus trust, they're
6 really like any other creditor of this bankruptcy case whose
7 interest will be affected by the outcome of this motion.
8 So when we talk about the funds, we really should
9 direct our focus to the '74 benefit plan because that's where
10 there is this extra contractual issue to address. And I refer
11 to it as a contractual issue because, ultimately, it's
12 contractual, and it can be addressed through the bankruptcy
13 process. But again, I just -- I'm noting for clarity that when
14 we say funds, we're always talking about the three of them;
15 we're really talking primarily about the '74 benefit plan in
16 terms of having any special say before the Court.
17 Now, I mentioned that the funds have been incredibly
18 disappointing. And let me explain why that is. The funds are
19 the one creditor of this bankruptcy case who feel they should
20 give up nothing; zero. Their position from day one is that
21 Patriot should continue to contribute every single dollar to
22 all three funds forever. And while you will hear from the
23 funds complaints about being included, complaints about
24 necessity of the debtor's proposals, the fact of the matter is,
25 we have bent over backwards, backwards, to try to reach a deal

1 with the funds. And of course, they've been given copies of
2 all the proposals in real time; they've been given a huge
3 amount of data over the last six months; we've held meetings
4 and conference calls with them. And we've done all that even
5 though they are not -- and I don't think that they would
6 dispute this -- they are not the authorized representative of
7 the union members. But we've done all of that with them even
8 though the road has been bumpy at times.
9 And in terms of judging how far the debtors have come,
10 when it comes to the funds, you don't need to take my word for
11 it. All you need to do is look at the evolution in our
12 proposals. And I'm talking, in particular, about the last
13 several evolutions in our 1113 proposal which has focused quite
14 a bit on our relations with the funds in an effort to try to
15 bridge a deal with them.
16 The very first proposal proposed very simply that
17 Patriot withdraw from the funds entirely. It would save
18 twenty-eight million dollars a year which is desperately needed
19 cash, and it would just leave the funds with unsecured claims
20 like any other creditor in the case. When we made that
21 proposal, the funds, the committee, and other parties expressed
22 concern because the size of the unsecured claim would be quite
23 significant. And let's not debate today what the size of that
24 claim would be. The funds believed it would be close to a
25 billion dollars. We're not here today to debate claim size.

1 Certainly we can say that he claim would be significant, and
2 that's why creditors had a problem with it.
3 So after a lot of soul-searching, we felt we had no
4 choice but to modify our proposal, which would mean a further
5 substantial drain on our cashflows. So we revised our proposal
6 to provide that although we would withdraw from the '74 plan,
7 we would take steps to ensure that the plan does not get an
8 unsecured claim. How would we do that? As the Court may have
9 seen in our papers, there is a provision of ERISA that allows
10 employers who withdraw from a multi-employer pension plan to
11 pay the withdrawal liability in annual installments.
12 And for Patriot, those installments would be
13 approximately -- rough numbers -- twenty-five million dollars a
14 year. Obviously, Patriot doesn't have an extra twenty-five
15 million dollars a year, but we recognize this as being such an
16 insurmountable issue in the bankruptcy case that we felt we had
17 no choice but to include it in our proposal and find the money
18 later, either though a financing source or through some
19 negotiated resolution with the funds, where we would time the
20 payments in a way that would be more manageable to Patriot.
21 But in all circumstances, under that proposal, we believe that
22 there would be no unsecured claim for the '74 plan, which was
23 an issue vexing the committee and other creditors.
24 And I'll note for completeness that there's a legal
25 debate between Patriot and the funds as to whether our legal

1 position in that regard is correct. We believe it's correct.
2 They don't agree. They believe that because Patriot is in
3 bankruptcy, it's different.
4 What did the funds say to that proposal? No. No,
5 they don't agree. They don't agree that we can do that. They
6 want us to keep contributing to the plans.
7 So we didn't give up. We tried to address the funds'
8 concerns. We explained that our primary concern really is not
9 necessarily our short-term obligations to the funds with
10 respect to contributions, but to those escalations that I
11 mentioned before, in 2017, escalating all the way to sixty
12 million dollars in 2021, those escalations that are part of the
13 rates that have been published. In response to that
14 discussion, the funds told us don't worry, the rates are not
15 going to change because once we hit 2017, there's almost zero
16 chance that anyone's going to think it's a good idea to keep
17 those rates in effect; they're going to have to change because
18 they would be unsustainable.
19 So we heard the funds loud and clear on this
20 assurance. But we explained that we still had to make sure
21 that we can show investors that we're not just going to take
22 the funds' word for it, but -- and we have to show them that
23 there's some assurance that we're not going to be subjected to
24 these skyrocketing rates just a few years from now. So we
25 tailored our proposals even further to address this specific

1 concern. And in our latest 1113 proposal that is before the
2 Court, we caved almost completely to the funds' demands. We
3 said, we're not going to withdraw. We won't withdraw from the
4 '74 plan -- basically a total victory for them; it's what they
5 wanted from the beginning. Just give us some assurance that
6 what you're saying is true. We said to the union, give us an
7 assurance that you won't amend the CBA between now and 2017 to
8 increase the rates, and to the funds, give us an assurance that
9 if the rates escalate to a certain level, more than we would
10 have to pay under the ERISA installment plan, that we would
11 have the right to withdraw at that future time. And so just to
12 be clear, we would not be withdrawing from the 1974 plan at
13 all, and maybe we would never withdraw if the funds would make
14 us this simple promise. And you'd think it would have been
15 easy for them to make that promise, since that was their
16 assurance to us, that these eventualities will actually never
17 come to pass.
18 And we didn't take this lightly. These are
19 obligations that we continue to make at a substantial cash
20 drain to the debtors. But we were willing to reach a deal with
21 the funds in order to break this log jam in the bankruptcy
22 case. And what did the funds say? To quote Margaret Thatcher,
23 "No. No. No. No. No." That's my best Margaret Thatcher,
24 Your Honor. After all this movement on the part of Patriot,
25 almost complete capitulation on this point, the funds remain

1 today exactly where they were six months ago when this all
2 started.
3 And I want to read to you from an e-mail that we
4 received the other night from the funds' counsel because it
5 says it all. And I'm quoting now from an e-mail from Mr.
6 Goodchild to Mr. Huebner. "It is the position of the funds
7 that Patriot must continue to contribute to the 1974 pension
8 plan, the 1993 benefit plan, and the RBAT" -- that's the bonus
9 plan -- "consistent with the provisions contained in the
10 current collective bargaining agreement. Given that your
11 current proposal does not do so, it is not acceptable. I
12 believe that we will oppose any relief that alters the
13 contribution obligations set forth in the current collective
14 bargaining agreement with respect to any of these three funds."
15 So to sum it up, the funds believe they should be the
16 one stakeholder in this bankruptcy case who gives nothing,
17 sacrifices nothing, and for whom everything should be exactly
18 as it was the day before Patriot filed for bankruptcy. Well,
19 they fought to be involved in these 1113 proceedings, and here
20 they are. And we are hopeful that the Court's ruling in this
21 matter helps the funds understand what 1113 is all about:
22 bargaining, compromise, sacrifice. As of today, the funds have
23 totally failed to be a constructive part of this process, and
24 they continue to just say no.
25 Let me discuss, for a moment, one of the few legal

1 issues that the parties have been debating. And I don't want
2 to spend too much time on it because in the end, I don't think
3 it really matters. The union has suggested that based on the
4 frontier decision in the Southern District of New York, only
5 the proposals that Patriot made before filing can count for
6 purposes of the determination as to which proposal is necessary
7 under the statute. Although this is not entirely clear from
8 the union's papers, I believe that all parties concede that
9 Patriot's most recent proposals can and should be considered by
10 the Court for purposes of determining whether Patriot has
11 engaged in good faith bargaining. So they are before the Court
12 for that purpose. The sole debate is whether the proposals can
13 be considered for the necessity prong of the inquiry.
14 Now, I said before that this shouldn't matter because
15 we believe that both our pre-application proposals and our
16 post-application proposals each satisfy the 1113, 1114 statute,
17 both as to necessity and as to the other prongs as well. So
18 whether the Court looks at the earlier proposal or the current
19 version, ultimately, in our view, the outcome should be the
20 same. But just in case there is any debate about this, I just
21 would refer the Court, respectfully, to pages 38 to 41 of our
22 reply brief, where we lay out the legal rationale for the
23 Court's ability to consider every single proposal made by the
24 debtors up until the commencement of the trial, which is
25 exactly what the statute says and what we believe Congress

1 intended. And obviously, if the Court is interested in hearing
2 more about this legal debate, we are happy to address it
3 separately in these proceedings or at closing argument.
4 Your Honor, you are going to hear testimony this week,
5 and you may have seen it already in the union's papers, that
6 union workers are more productive, that union workers are
7 safer, and that union workers are just better employees for the
8 company. Now, I'm not here, and Patriot is not here, to be
9 critical of unions. Patriot's management team has spent
10 decades in the coal industry and well understands the role the
11 UMWA has played over the years in advocating for its
12 membership. And this case is not a case about union bashing,
13 and we will not let it become such a case.
14 But the specific allegations that the union has
15 raised -- you might call it nonunion bashing -- have all been
16 proven false. And the depositions really were completely one-
17 sided on this issue. The notion that union -- that nonunion
18 mines have top-heavy management, which is what the union
19 charged, proven totally false during depositions. Both union
20 and nonunion mines are staffed according to their needs. The
21 notion that union mines are safer than nonunion mines -- also
22 you see that in the union papers -- proven totally false during
23 depositions. Nonunion mines have a better safety record than
24 union mines. And the notion that union mines are somehow more
25 productive than nonunion mines, also proven totally false.

1 Productivity, or coal production, is a function of the type of
2 coal being mined and the conditions of the mine. There is zero
3 correlation between productivity and whether the workers of the
4 mine happen to carry a union card.
5 Now, all of this is not to say that union mines are
6 unsafe or that union mines are less productive, or that union
7 mines are managed poorly. The point we're making is, the
8 safety or productivity or staffing of a mine just has nothing
9 to do with this issue. Every mine is different, and Patriot
10 has cut its staffing to the bone, while maintaining one of the
11 best safety records in the industry, both at its union and
12 nonunion mines. This trial will not be won by union bashing,
13 and it won't be won by the UMWA bashing Patriot's more than
14 1,000-strong nonunion workforce either.
15 Now, I will follow the lead of the Court and close my
16 presentation in the same manner Your Honor closes each one of
17 these proceedings. Like Your Honor, we are well aware that
18 over 800 letters have been written to the Court from Patriot's
19 retirees. And like Your Honor, we have read every single one
20 of those letters. We have found many of them to be
21 heartbreaking. And many of the letters rightly point to
22 Peabody and Arch as the real culprits in this entire episode.
23 And despite the dispute we have with the union,
24 everyone in this courtroom and beyond should understand that
25 Patriot cares deeply about its active employees and its

1 retirees. Patriot cares deeply about the 23,000 people whose
2 lives are being affected by these bankruptcy proceedings. And
3 I will say that if Patriot didn't care deeply, it would not
4 even have brought the declaratory judgment action it brought
5 and argued about this morning, and it just would have included
6 these retirees in its request for relief, and let the chips
7 fall where they may.
8 There's been a huge amount of hyperbole, even open
9 threats, in this case. The union has engaged in street
10 marches, inflammatory statements in the press, and even
11 repeatedly threatened this Court, as well as the court in New
12 York, that it will force the liquidation of the company if
13 things don't go its way. And perhaps the most absurd and
14 insulting statement of all is the union's accusation in its
15 brief that the retirees "will slowly die while Patriot watches
16 form a discreet distance" if the relief Patriot is seeking is
17 granted.
18 Well, I want to put all of that hyperbole and rhetoric
19 aside for this week, and let's just look at the facts.
20 Fact: Patriot has tried to reach a deal with the
21 union for the last six months on its proposals.
22 Fact: Patriot has made 1113 proposals that will leave
23 the union workforce in at least as good a position as Patriot's
24 nonunion workforce.
25 Fact: Many of Patriot's 1113 proposals were already

1 accepted by the UMWA, on a small scale, at the Gateway Mining
2 Complex. These proposals are not groundbreaking or
3 unprecedented.
4 Fact: Patriot's 1113 proposal, which gives the union
5 a thirty-five percent equity stake in the company, plus
6 royalties, plus profit sharing, plus litigation trust proceeds,
7 will leave the union with a VEBA that we anticipate will be
8 funded with hundreds of millions of dollars and the ability to
9 provide meaningful healthcare for years to come. And again,
10 Patriot would agree, even to stay in the '74 plan at a cost of
11 twenty million dollars per year, approximately, if only we
12 receive the exceedingly modest assurances I described before.
13 Fact: Patriot will run out of money very soon if it
14 does not obtain the relief it is seeking on this motion. Fact:
15 If Patriot is forced to liquidate, all 4,000 jobs will be lost
16 and the company will be unable to provide health care for
17 anyone. And we need only look at the Hostess bankruptcy where
18 18,500 employees lost their jobs and where it was just reported
19 that pieces of the company have been sold off and restaffed
20 with non-union labor to see exactly what would happen here in
21 this catastrophic scenario.
22 Ultimately, we all want the same thing. We want the
23 company to survive so it can continue to provide good jobs and
24 benefits for a long time to come for literally tens of
25 thousands of people. Patriot believes that the only route to

1 survival is through the proposals it has made to the union. We
2 have worked for six months trying to get a consensual deal with
3 the union. We are going to continue to work towards that goal
4 with the union, both during the hearing, and if that's not
5 successful, even after the hearing is over.
6 But we are fiduciaries for the entire estate and to
7 all creditors and we believe that unless we get the relief set
8 forth in our proposals, this company will not survive. We do
9 not want this to be the next Hostess. We do not want this to
10 be the Horizon Coal. We want Patriot to emerge from bankruptcy
11 and to succeed and thrive. And with the Court's help, we are
12 confident that we can achieve that goal.
13 Thank you, Your Honor.
14 THE COURT: Thank you.
15 Mr. Perillo?
16 MR. PERILLO: Good afternoon to the Court; Fred
17 Perillo on behalf of the United Mine Workers of America. I
18 rise this afternoon, Your Honor, knowing that I have grave
19 responsibility but also the distinct honor representing the men
20 and women of the United Mine Workers.
21 I passed Methuselah on the way here and asked him what
22 a proper function of an opening statement is at a trial and he
23 said well, everybody knows that's the part of the trial where
24 the attorneys tell the Court what they believe the evidence
25 will show. And I said are you sure that it doesn't include

1 premature legal argument and haranguing of opposing counsel.
2 And he assured me it does not. So you can imagine my surprise.
3 And I commit to the Court that I will give the traditional
4 opening statement in a moment, but I first must address two
5 issues that have been raised by various counsel.
6 I want to address first the arguments -- frankly, they
7 were arguments not statements of anticipated evidence -- about
8 the meaning of 1114, and in particular, to address the
9 completely erroneous claim that 1114 is a mechanism that is an
10 adjunct to Section 502 for the determination of unsecured
11 claims. I will show that this claim is false using the actual
12 statute which I think is the best way. Mr. Mayer criticized me
13 for not citing any cases; I think Mr. Moskowitz correctly
14 pointed out that there are no such cases supporting Mr. Mayer's
15 view of how 1114 works. And in my experience of doing this for
16 many years, I agree with Mr. Moskowitz; I have never seen a
17 case where a Court determined that retiree benefits on the
18 payments for retiree benefits could be modified under 1114 and
19 then not immediately order that those payments be made, but
20 postpone it to some later time for a 502 determination.
21 But let us go immediately to the language of 1114 in
22 (e), paragraph 1. It says, "Notwithstanding any other
23 provision of this title" -- that includes, by the way, 502
24 because that's a provision of this title -- "the debtor-in-
25 possession shall timely pay and shall not modify any retiree

1 benefits." So we know that the affirmative obligation placed
2 upon Patriot by 1114(e)(1) is to make actual payments of
3 retiree benefits. There's an exception and the two exceptions
4 are the order that may be granted by the Court after certain
5 evidentiary showings or agreement between Patriot and the union
6 in this case, but more broadly, any authorized representative
7 and the debtor. And that's immediately followed by this
8 phrase: "after which such benefits as modified shall continue
9 to be paid".
10 So right now, in the opening of 1114, we can see there
11 is no circumstance where, after agreement or after court order,
12 there isn't a direct congressional mandate that the debtor must
13 make the payments. It uses the mandatory word "shall"
14 immediately after that section; in (2) the statute says, "Any
15 payment for retiree benefits required to be made before a plan
16 confirmed under Section 1129 has the status of an allowed
17 administrative expense as provided in Section 503". So we can
18 immediately see that 502 has nothing to do with these payments.
19 Congress orders that they be treated not as administrative
20 expense requests but as allowed expenses of administration
21 without any further action required by the Court. It's
22 automatic in the statute.
23 Afterwards, there follows what is now probably to the
24 Court a section it has read many, many times but (g) which
25 outlines what the standards are for modifying the payments. As

1 I pointed out earlier today, the Court is not allowed to modify
2 the benefits; the Court is allowed to modify the payments that
3 the debtor is required to make for benefits. It says, "The
4 Court shall enter an order providing for modification in the
5 payment of retiree benefits if the Court makes certain
6 findings" and I will not read the section on the findings, but
7 you're familiar with the general test of necessity and
8 fairness.
9 And then there follows the part that I read earlier
10 today that the Court shall modify that amount up or down
11 depending on the subsequent motions that are allowed by the
12 union and the company. It says, however -- worth repeating --
13 that in no case shall the Court enter an order providing for
14 benefits at a lower level than the one that the employer has
15 recommended or proposed. Because it says, "In no case shall
16 the Court enter an order", that means that the Court
17 specifically is prohibited by Congress from doing the thing
18 that Mr. Mayer is asking you to do which is to say that the
19 proposal is fair to the union, fair to the company, the
20 benefits should be reduced, and then say but don't pay them
21 because we'll come to that later under 502. That's something
22 that Congress specifically wrote into the statute that you
23 could not do.
24 When Mr. Mayer read to you the one line of the statute
25 that says, "No claim for retiree benefits will be limited by

1 Section 502(b)", he omitted the previous section which casts
2 light upon this. In (i), there is a ruling that "no benefits
3 that have already been paid in the case will be deducted from
4 any future claim for unpaid benefits". The assumption here is
5 that if the debtor modifies its payments, there will be an
6 unpaid portion and the unpaid portion, whatever it is, will
7 become a claim which will be allowable under 502 and that you
8 can't offset against that anything that's already been paid and
9 you can't limit that with a two-year limitation in 502(b)(7).
10 But that's an entirely different question about whether the
11 debtors' proposal requires there to be payments.
12 And I know that I'm jumping ahead to the evidence, but
13 why not? The evidence this week is going to show that, in
14 fact, the debtor has not proposed modifying the benefits at
15 all. The debtors' witnesses, in fact, have steadfastly refused
16 to say what co-premiums should be required, what reduction in
17 benefits should be made, who will become ineligible for
18 benefits, how treatments will be reduced or certain treatments
19 removed. The debtor doesn't propose any of those things. The
20 debtor proposes a different funding vehicle and the creation of
21 a VEBA trust which will make those other determinations to
22 reduce benefits, change eligibility, or not.
23 All the debtor has proposed is a different funding
24 vehicle, period. In other words, the debtor has proposed to
25 pay benefits in a different way in a different amount. And

1 that is what 1114 contemplates. And if you grant the 1114
2 order, the statute says you must order those payments to be
3 made no matter whose ox is gored.
4 Now, you might decide not to gore those other oxes.
5 That's true. But then you cannot modify the payments. Then
6 the debtor must continue to make them. Those are the only two
7 choices Congress gave you in this statute with one caveat. You
8 can do something in the middle because you could lower the
9 payments but not all the way down to the level the debtor says,
10 or you can choose not to lower them at all. But the one thing
11 you can't do is modify the benefits and not order them to be
12 paid. And if there were any doubt about that, all we would
13 have to do is look forward to 1129(a)(13) which is the
14 companion section to 1114 and that says that one of the
15 requirements that the Court must find in order to confirm a
16 plan is that the plan provides for the continuation after its
17 effective date of the payment of all retiree benefits as that
18 term is defined in Section 1114 at the level established
19 pursuant to (e)(1)(B) or (G) of Section 1114 at any time prior
20 to the confirmation of the plan for the duration of the period
21 the debtor has obligated itself to provide such benefits.
22 So, in other words, if the Court were to make the
23 order that benefits would be modified but not paid, it would
24 become impossible to confirm a plan in this case and the case
25 would have to be converted to a Chapter 7 case.

1 I think I have demolished the ideas proposed by some
2 of the other counsel this morning about how 1114 could be
3 sidestepped. I have exhausted what I want to say on that
4 subject and I now want to address the Frontier issue raised by
5 Mr. Moskowitz.
6 This is not the first time that my firm and Davis Polk
7 have faced off against each other on this issue; we were
8 opponents in the Frontier case, a case remarkably like this
9 one. In Frontier there was a DIP covenant negotiated which
10 created a crisis for the debtor and required that there would
11 be certain relief that had, absolutely had to be granted.
12 There were lengthy periods where very little movement occurred
13 in bargaining and then a flurry of proposals that happened
14 close to the date of the hearing and then continually during
15 the hearing. And finally, on the very last day of the hearing,
16 there was actually a colloquy between the judge and Frontier
17 and an attorney from Davis Polk where they negotiated the terms
18 of the final offer while the union attorney sat looking on
19 unable to participate.
20 I hope that nothing like that occurs here. The
21 future's unwritten, of course, but the Frontier case
22 illustrates why the procedure being employed here creates a lot
23 of confusion and is directly contrary to the statute. We'll
24 return to the language in the statute in a moment, but in
25 Frontier, the court determined -- and I mean the appellate

1 court in Frontier determined -- that it's the pre-hearing
2 proposal that is the one the court judges for its necessity and
3 fairness and that subsequent proposals made back and forth by
4 both parties can be used to determine issues such as good faith
5 and good cause.
6 The reason why it is important that subsequent
7 proposals cannot be used to determine necessity and fairness is
8 illustrated here. For the first almost five months, there was
9 almost no movement at the bargaining table here. Around April
10 10th, when it became clear that the debtor might lose
11 exclusivity, there was a sudden flurry of great movement at the
12 bargaining table; proposals made by the debtor in rapid
13 succession and counterproposals by the union. And I think now
14 there may actually have been more proposals made and exchanged
15 since April 10th than before April 10th. Today is April 29th.
16 Almost all of the depositions, almost all of the litigation, I
17 think all of the original declarations rather than the reply
18 declarations, were made prior to or within a day of getting the
19 changed proposal. So the evidentiary record before you is
20 talking about a ship that has sailed.
21 The parties, frankly, both of us -- well, all three of
22 us; I'm sorry -- are not prepared to put on a trial about the
23 changes in the proposals because they're still going on. And
24 so the Court observed in Frontier, "Giving the words 'prior to
25 the hearing' and 'ending on the date of the hearing' their

1 plain meaning also permits judicial fact-finding to be focused
2 on a fixed, rather than a moving, target. Section 1113(c)
3 requires a Court to determine whether a proposal meets the
4 statutory criteria in (b)(1) and whether subsequent
5 negotiations have been in good faith. Judicial evaluation of
6 proposals which are shifting during the course of the hearing
7 is at least unwieldy", and the judge there was making an
8 understatement. It would be impossible -- it's even possible
9 in a case like Frontier, that the proposals will change from
10 the beginning to the end of the trial and some of the testimony
11 already given, will be a better proposal that is gone. That's
12 certainly the case here with the declarations which are
13 functioning as direct testimony. I don't know how the Court
14 will be able to weigh the factors without actually knowing
15 what's the current proposal on the table and what the parties
16 say in their declarations about that specific proposal. And so
17 the Court in Frontier determined that "Proposals made after" --
18 I'm reading then -- "after the debtor's application for
19 rejection but prior to commencement of the hearing play an
20 important part in the statutory scheme. They are relevant to
21 the statute's good faith negotiation requirement and to whether
22 a union has good cause to reject the debtor's proposal.
23 Inadequate proposals made during the negotiation period could
24 doom the debtor's application because they may reflect a
25 failure to negotiate in good faith. Nevertheless, a proposal

1 which is scrutinized for compliance with (b)(1)(A) is the
2 initial proposal made prior to the pre-hearing negotiations
3 that follow."
4 And I believe, then, that is not the thirty-five
5 percent equity stake proposal; it's not the counterproposal
6 that the union most recently made; it's the debtor's proposal
7 that existed on March 14. I will ask Your Honor -- I know that
8 asking for a preliminary ruling is both dangerous and rude and
9 I apologize to the Court for my rudeness -- but it would be a
10 great boon to the parties if we knew what proposal you were
11 evaluating before we started to put on our cases, to the extent
12 that we could, through redirect and cross, get to those other
13 proposals.
14 I now, Your Honor, will do what I promised you I
15 should have done originally which is to give you a more
16 traditional opening statement.
17 The debtor, of course, has the burden of proof as to
18 all factors in Section 1113 and I will attempt to analyze the
19 presentation of evidence by the American Provision Test which
20 discusses those factors. First and foremost, of course, is the
21 discussion of necessity. And here when I am speaking, I am
22 speaking of the debtor's proposal as it existed on March 14.
23 The debtors sought relief for five years. It did not
24 even make projections in the fourth or fifth years of the
25 proposal. So there is no -- there is no evidentiary

1 underpinning to the need or relief in the fourth and fifth
2 years other than the statement that the debtor needs certainty
3 in order to emerge. We believe that the evidence is going to
4 show that the certainty argument has nothing behind it. No
5 actual discussions with lenders; no actual investigation. We
6 believe that the evidence will show that the certainty argument
7 is a guess and that it's actually more of an assertion by the
8 debtor that having a court-imposed solution is greater
9 certainty than having the parties continue to negotiate to
10 reach a consensual solution. I believe that that is self-
11 evidently wrong, but I trust in the Court's judgment in that
12 regard.
13 If we put aside that necessity is predicated on the
14 need to emerge and look only at the first three years, we can
15 see that the debtor did what is known as building necessity
16 from the bottom up, that is by cutting costs where it could and
17 then declaring that the remainder, whatever the rest of its
18 need is, would have to come from union workers and retirees.
19 And earlier in this case you saw already Mr. Hatfield give that
20 presentation when he said he's going after union retirees and
21 union workers because that is where the money is.
22 The company set the concessions first in these
23 covenants, and I would refer the Court to the Huffard
24 declaration, paragraph 79, where it is admitted that the banks
25 originally wanted specific 1113 and 1114 relief just as they

1 did in Frontier and that, instead, the debtor set the covenants
2 at levels called liquidity and EBITDA covenants but
3 unachievable without 1114 and 1114 savings. So, functionally,
4 they were 1113, 1114 savings covenants.
5 The concessions are determined by -- and I think,
6 again, the evidence will show -- the debtors worst-performing
7 years in 2013 and 2014 and does not take into account an
8 expected rebound in 2015 and ultimately 2016. I think the
9 evidence will also show that the debtor unreasonably refused to
10 give the union a snapback agreement that would allow the union
11 to make deep cuts in the time when it was needed but to get
12 some of the cuts back at the time when they were no longer
13 needed. I would point out that I think the evidence will show
14 both sides believe that there will be such a rebound. The
15 question is the union believes the rebound will be bigger and
16 the debtor believes the rebound will be smaller and who is
17 right about that.
18 There are dueling experts on this issue. I believe
19 that although Mr. Schwartz is a preeminent expert, he will say
20 that he used averages in making his determinations rather than
21 adjusting those averages specifically for the type of coal that
22 Patriot mines and sells. Patriot is the sixth-largest coal
23 company in revenue but the tenth-largest in tonnage. That is
24 to say, Patriot's coal-per-ton is worth more than what its
25 competitors get. That's the only way it could be sixth-largest

1 in revenue and yet have smaller tonnage. And I believe that
2 the CEO will testify, as he did in his deposition, that that's
3 because Patriot has better quality stuff. And the better
4 quality coal that Patriot sells, then, we would expect would
5 rebound to higher prices when the rebound comes.
6 I think the evidence will show that Patriot's worst
7 years were worsened by the Peabody and Arch contracts that it
8 assumed at spinoff to sell coal below market and below cost. I
9 believe the testimony will show that in 2011 alone, 180 million
10 dollars of the debtor's revenue loss in that year was due to
11 these below-market contracts and that ninety percent of the
12 value of the flowed through to EBITDA. So a stunningly large
13 loss coming from just that one source.
14 I think the evidence will show that even at this late
15 date, the company is still seeking concessions for which it
16 will not provide monetary quantification. An example of this
17 is a requirement that supervisors be allowed to perform work
18 that is covered by the collective bargaining agreement and
19 belongs to our members. We assumed that the displacement of
20 those workers by their supervisors doing the work instead would
21 result in a cash savings for the company. The company refused
22 to apply a cash savings to that activity. So it is a
23 concession the debtor is seeking that has zero value to the
24 debtor in dollars and yet is claimed that it is needed because
25 of a potential breach of EBITDA and liquidity covenants.

1 And we believe the evidence will show that the company
2 at this late date is still seeking basically to level union
3 standards to the non-union level by eliminating decades of
4 gains that workers have gradually made through collective
5 bargaining.
6 That brings us to the fairness point. We think there
7 will be evidence on both the quality and the quality of
8 sacrifices that are being made by the various constituencies in
9 the case. First as to quantity; our expert, using the
10 company's business plan, valuating its operational costs,
11 calculated that union workers -- and these are using just the
12 company's numbers, Your Honor -- that union workers are making
13 eighty-seven percent of the operational sacrifice. This is,
14 again, using the company's numbers. That union versus non-
15 union, the union is making about a nine-to-one sacrifice even
16 though it is roughly three-to-two in terms of numbers. That's
17 because the non-union employees are making about sixty-two
18 million dollars of sacrifice over this period and the union
19 employees are making roughly nine times that amount of
20 sacrifice.
21 In some cases, workers are going to take thirty-
22 percent wage cuts. In the case of the retirees, the company
23 says that the annual cost of providing the benefits is about
24 seventy-five million dollars and the savings is about seventy-
25 five million dollars. In other words, the company is going to

1 achieve approximately a hundred percent savings just by
2 shifting that responsibility away from itself and toward the
3 VEBA. I'll talk about the funding of the VEBA in a moment
4 because that's a critical component to the 1114. I believe
5 that the evidence will show these things that I have said.
6 At the same time, the debtors' business plan, I
7 believe, will show that it includes approximately sixty-two
8 million dollars in bonuses; some of this is not in cash, but
9 still about half of it is in cash. And so what we have is not
10 so much a cutting across the board due to necessity, but a
11 value choice made by the company to whose labor should be
12 compensated more highly and whose should be compensated less.
13 I believe that the company will be unable to make the fairness
14 showing on that basis. I believe that a, sort of a bait-and-
15 switch is being contemplated here, that the argument is being
16 made that union compensation is it is cut will be fair relative
17 to non-union compensation. But these employees were lower paid
18 to begin with, the non-union employees. The union employees
19 achieved what they did over years of collective bargaining as
20 provided for in federal stats and the debtor is employing a
21 presumption that those benefits and increased wages that the
22 union was able to negotiate over a series of decades are
23 somehow illegitimately obtained and that they should all be
24 disappeared before we ask the non-union employees to make cuts.
25 I don't believe that that is the law.

1 Regarding the quality of sacrifice, there is a dispute
2 between the parties over how to calculate the size of the
3 retiree claim that's clearly an important component to
4 determining how the claims should be paid. The calculation
5 made by the company, it's been mentioned loosely at about one
6 billion dollars, includes current retirees but omits the
7 Peabody assumed group and omits active employees who are vested
8 or who are going to vest during the term of the current
9 contract and who might then retire. If we add this last group
10 in, the active employees, the company thinks the claim goes up
11 to about 1.4 billion. Our expert believes and will testify
12 that that claim is actually closer to 1.8 billion. And I think
13 both parties agree that if we add in the Peabody assumed group,
14 it increases by another at least 6- to 700 million. So the
15 ultimate amount of the retiree liability would be somewhere
16 between two- and two-and-a-half billion.
17 As I mentioned before, the company doesn't actually
18 propose what should be cut from the retirees. Their expert on
19 this was quite explicit in his deposition that he was not
20 recommending any particular cuts or that even that they should
21 be cut. He was recommending that this problem be given to
22 trustees who would then become fiduciaries and have to make
23 those difficult decisions. He suggested that one thing they
24 could do is cut the eligibility; that means in plain English,
25 throwing people out of the plan; that means putting some

1 retirees beyond coverage. Or they could require that the
2 retirees make co-premiums; that is in plain English, requiring
3 the retirees to fund their own benefits rather than Patriot.
4 Or they could cut the benefits; cutting the benefits means some
5 people will get less treatment or will have higher co-pays,
6 higher deductibles and so forth. And then another way, he
7 said, would be to eliminate certain treatments entirely.
8 Those, Your Honor, I think are qualitative cuts that
9 have to be evaluated even though no number is being assigned to
10 them because the debtor isn't actually designing a specific
11 plan. In addition, the debtor's expert in this regard referred
12 to what is known as a spiral effect; our expert did as well.
13 And that is the phenomenon that occurs when a VEBA is
14 underfunded to the point that the people participating in it
15 can no longer afford to stay in it. And so the group begins to
16 shrink as people drop out. The evidence, I think, shows before
17 you already, Your Honor, that the average mine worker pension
18 is about 580-and-some dollars a month, a little bit less than
19 600 dollars. And it is not difficult to see that under the
20 estimated premiums, under the Affordable Care Act, that soon
21 miners will be paying all or most of their income just to stay
22 in the VEBA if we were to use that as the measure of what the
23 premiums would be. So that the spiral effect, we believe, will
24 be proven to be more likely than not to occur.
25 And finally, on the quality of sacrifice, Your Honor,

1 I'd simply point out that miners have -- unionized miners have
2 for many decades chosen to take less in wages and in pension
3 for the purpose of getting the promise of lifetime guaranteed
4 care. And that money, the money that they could have taken on
5 the check is gone. Years ago, decades ago, instead of getting
6 those wages, they got this promise. By wiping out the promise,
7 the Court will be putting them in a far worse position than the
8 non-union employees who didn't get that promise but got the
9 money. That money they spent on something that they have,
10 whether it's a house or a car, or whether they spent it on a
11 good time. But they spent it; they used the value of it. Our
12 people didn't. They chose to defer that so that when they were
13 old and broken, they would not die. There would be a place
14 that they could go and get care.
15 I make no apologies for saying that putting them into
16 an unfunded VEBA, or some of them at least, puts them staring
17 into the abyss.
18 I think the evidence will show that as of the date
19 that this proposal was made that the debtor proposed to put
20 about one percent of the VEBA in cash, that the debtor proposed
21 a profit-sharing mechanism which is not predicted to provide
22 any consideration until 2016 and in that year would provide
23 only about two-and-a-quarter million dollars, two-and-a-half
24 million dollars, a small amount of money. And that the
25 remainder is this unmonetized, either a claim or an equity

1 stake depending on which proposal you look at. And famously,
2 Your Honor, and you've heard from many parties, that everybody
3 is worried that it's either too big or too small. It's smaller
4 than a fly or it's bigger than a breadbox. We don't actually
5 know. And I submit to you that in the prior cases where courts
6 have allowed VEBAs to be used as an alternative payment form,
7 they have insisted on a showing that there is sufficient cash
8 in the VEBA to bridge the gap so that retirees will actually
9 have coverage and then some additional consideration, whether
10 equity or a claim, that allows the VEBA to provide the benefits
11 over a longer term. We do not believe the evidence will show
12 that the debtors' proposal meets that standard.
13 The next issue, Your Honor, is the provision of
14 information. I do agree that there has been a haystack of
15 information provided. The question is whether there were any
16 needles in the haystack that the union could find. A key
17 dispute between the parties will be over the dynamic model or
18 whether it is in fact a dynamic model with reference to the
19 Mesaba decision where the court said that a dynamic model is
20 required. I think, however, Your Honor, apropos of the last
21 subject we were discussing about the VEBA, almost all parties
22 agree that insufficient information has been provided to value
23 exactly what is being put into the VEBA. If there were
24 sufficient information, the various parties who are objecting
25 to it would much more crystallized objections to what it is

1 rather than the unanimous opinion that we can't tell.
2 With respect to the good and bad faith, and here I
3 want to discuss some things going on in the most recent
4 negotiations, Mr. Moskowitz was appalled and maybe even
5 offended at how unprepared the union was last week to discuss
6 the latest proposal. When we knew that the debtor was making a
7 new proposal, we asked within days of the fifth proposal, for
8 key information about the proposal. And we were told by the
9 company that they wouldn't have that ready until the Wednesday
10 meeting on April 25th. I don't want to throw stones too hard
11 at the company over this, things are happening on a very
12 compressed time schedule. However, when we got to the meeting,
13 the company still didn't have the information. And so, yes, we
14 asked what -- Mr. Moskowitz didn't say stupid -- questions, as
15 we meant -- I mean, we asked questions that people would ask
16 when they hadn't been provided the fundamental information
17 about the proposal. And a lot of those questions were of the
18 reassurance kind: Did you mean this? Did you mean that?
19 They said then that their advisors would provide the
20 information on the next day. On the next day, some of the
21 information was provided and some was not. And this has been
22 the story of these negotiations since last November. It is the
23 reason why, I believe, the Frontier court said we shouldn't
24 evaluate proposals in this context. The court's supposed to
25 have that fixed evidentiary record that it could weigh and

1 balance as to whether the debtor has met its burden of proof on
2 issues like necessity and fairness and so on.
3 But during that period that we are discussing,
4 starting last November, the debtor barely budged on its offer
5 for months. Nearly all of the progress has been made just in
6 the last three weeks. During that period of time, the debtors
7 didn't give us the dynamic model. That made our assumptions
8 virtually immune from testing by the union. So that we could
9 propose alternative scenarios or understand what the
10 sensitivity is of the model to a specific change. Throughout
11 the period, and still to today, the debtor insists on this
12 leveling strategy of making union employees no better off than
13 non-union employees without restoring to them the deferred
14 wages for decades that they put aside, the promise of health
15 care. I think -- you know, Mr. Hatfield told me in his
16 deposition that all of the things being equal, he'd rather have
17 a non-union company. That's his belief, I mean, but it's not
18 his choice. Federal law gives our employees the right to be
19 unionized.
20 The debtors insist of putting on the retirees extreme
21 risk, and I think there's an irony here. Retirees are asked to
22 take the risk of monetizing this unknown claim; bankers are
23 being told you'll lend into an operation with certainty, free
24 of risk. I don't know that that's a choice that 1114 allows.
25 The entrepreneurs, people who take risk for a living, are being

1 told that they should get certainty. Retirees, people on fixed
2 incomes who worked and earned their daily bread in the sweat of
3 their brow, are being told they should take entrepreneurial
4 risk.
5 The debtors refuse to reconsider the bonuses. That
6 sixty-two million dollars, by the way, in the business plan
7 includes in it the seven million dollars that's pending before
8 the Court for decision now, and obviously it includes a lot
9 more. But this is, again, not a question about the quality of
10 sacrifice or necessity. It's about who's sacrifices ought to
11 pay for whose emollience. And the debtors have met us at the
12 union with a wall whenever we make a suggestion, defended their
13 non-union operations against every criticism. It made every
14 excuse. But they vigorously prosecuted against every benefit
15 that union workers have.
16 I will leave it to you to decide whether that is a
17 picture of good faith.
18 The union has provided counterproposals to the debtor
19 and we have endeavored to provide the debtor what it needs to
20 get out of Chapter 11. Despite the charges of foot-dragging,
21 we've made counterproposals that are serious. This is the
22 first time ever that this union has proposed to an employer
23 that has previously promised the guarantee of lifetime health
24 care that we would take something other than that. That was a
25 huge move, a huge concession, by this union.

1 I want to turn -- Your Honor, I apologize for going on
2 at such length -- but I want to turn now to the balancing of
3 the equities which is the last factor. I want to address
4 factors one and three and the balancing of the equities
5 together. These are the likelihood and consequences of
6 liquidation, if rejection is not permitted, and the likelihood
7 and consequences of a strike if the bargaining agreement is
8 voided. I wanted to mention the strike, as Your Honor, as Mr.
9 Huebner said I never miss an opportunity to mention the word
10 strike and I was fearing I was going to run out of time before
11 I got the chance to do it.
12 But I think, Your Honor, we should ask ourselves has
13 there ever been evidence that Patriot's future had certainty.
14 In 2007? In 2008? 2010? The early stages of this bankruptcy?
15 Where has this mythical certainty existed? I'm anxious to hear
16 that from the debtors. The consequences of a liquidation are
17 virtually unknown. The debtor has not provided a liquidation
18 analysis to anyone in this case that I'm aware of. The
19 likelihood of liquidation is unknown and that is because it
20 depends on first the renegotiation of the covenants with the
21 banks and secondly, whether the debtor reaches a deal with the
22 union regardless of the outcome of these proceedings.
23 The argument based on uncertainty, I think is not
24 going to be supported by anything tangible, anything that the
25 Court can get out of the mouth of a witness. The consequences

1 of a strike, I think, are probably known. The likelihood of a
2 strike, I think, is probably high. I think that the debtor is
3 aware of that. I think that the evidence will show that the
4 CEO testified he has no contingency plan for that eventuality.
5 If we look at two other of the factors in the
6 balancing of the equities, the likely reduction in the value of
7 creditors' claims if the bargaining agreement remains in force,
8 and the possibility and likely effect of any employee claims
9 for breach of contract if rejection is approved; those are
10 factors two and four. The value of creditors' claims if the
11 bargaining agreement remains in force, I think, is an unknown
12 question. We know that it won't include a massive withdrawal
13 liability claim and we know it won't include this massive OPEB
14 claim, the retiree healthcare claim, except by virtue of a
15 consensual agreement on how to fund the VEBA. Leaving the
16 agreement in effect, though, will not dilute creditors;
17 rejecting the agreement will dilute the creditors' claims
18 hugely because of the billion-dollar withdrawal liability claim
19 and then obviously the effect of the very large healthcare
20 claim.
21 I think lost in the discussion of the pension by Mr.
22 Moskowitz is that pensions aren't merely liabilities. They're
23 also benefits. If the pension is eliminated, current employees
24 who get pensions may not be -- current retirees, rather, who
25 get pensions may not be affected. But current employees who

1 are earning pensions certainly will be affected because they
2 will, when they retire at sometime in the future, no longer
3 have that 582 dollars a month which pays their rent and buys
4 their groceries and maybe goes to VEBA premium.
5 And then the last equity, Your Honor, is the cost-
6 spreading abilities of the various parties, taking into account
7 the number of employees covered by the bargaining agreement and
8 how various employee wages and benefits compare to those of
9 others in the industry. I think it goes without saying that
10 retirees actually don't have cost-spreading abilities given the
11 fact that they're retired and no longer have an income. The
12 evidence on union wages in the industry versus productivity, I
13 think, will be very interesting to the Court. Even by the
14 debtors' own reckoning, we are fifty-seven percent of the
15 miners and fifty-nine percent of the production. I asked the
16 CEO in his deposition what percentage of the EBITDA comes from
17 union miners and he did not know -- which was something of a
18 surprising answer, that the CEO did not know the answer to that
19 question. And perhaps he will know it in a day; I don't know.
20 But the debtors' expert on coal pricing calculated
21 that the differential between union and non-union workers
22 including the cost of the retiree benefit -- including that
23 cost -- amounts to about $2.75 a ton which comes out to be
24 roughly 36 million dollars per year over the period we're
25 talking about. The debtor is seeking 150 million dollars per

1 year in concessions.
2 I want to end, Your Honor, with something that you
3 probably read as a law student in Prosser's Handbook of the Law
4 of Torts. It's a famous quote from Lloyd George, the British
5 Prime Minister who was from Wales, a great mining region in the
6 world. He said, "The cost of the product must bear the blood
7 of the working man." I think in this case, Your Honor, the
8 cost of the coal has got to bear the blood of the miner.
9 Thank you, Your Honor.
10 THE COURT: Thank you.
11 (Pause)
12 THE COURT: You may proceed.
13 MR. GOODCHILD: May it please the Court; good
14 afternoon, Your Honor. My name is John Goodchild. I'm with
15 the law firm of Morgan Lewis and, along with my co-counsel from
16 Mooney, Green and from the Dowd Bennet firm, I represent the
17 UMWA Health and Retirement Funds.
18 There's been some confusion about who the funds are.
19 It might make sense to clear some of that up. Two of the funds
20 are parties to these proceeding by intervention. There are
21 seven funds altogether; two are parties. There's a third fund
22 that has filed a joinder to the objections filed by the other
23 two. And in accordance with Your Honor's rulings from April 2,
24 this opening statement is on behalf of the two intervening
25 parties; those are the 1974 Pension Plan and the 1993 Benefit

1 Plan.
2 I'll talk about the 1974 Pension Plan first. First of
3 all, it's not the 1974 Benefit Plan; it's the 1974 Pension
4 Plan. The distinction is important because pension plans
5 provide income for retirees and benefit plans provide
6 healthcare. We're here on behalf of the 1974 Pension Plan and
7 in support of the 1974 Pension Plan's objection, we've
8 submitted the declaration of Dale Stover. He's the director of
9 finance of the UMWA Health and Retirement Funds. Mr. Stover's
10 here in the courtroom. He'll be here all week and he is
11 prepared to testify if called as a witness. And although Your
12 Honor ruled on April 2 that the funds could call up to two
13 witnesses live, our current plan is to present Mr. Stover's
14 declaration as his direct testimony because his declaration
15 contains specific facts and figures related to the numbers of
16 beneficiaries and precise dollars involved here. And all of
17 which, we think, is best stated in precise written form.
18 We also intend to move for the admission of the
19 exhibits attached to Mr. Stover's declaration. We don't think
20 there are any objections to those. The debtors have stated
21 they intend to cross-examine Mr. Stover here in the courtroom
22 and we will examine him on redirect, if appropriate.
23 Now turning to the 1974 Pension Plan itself; it's an
24 ERISA multi-employer plan. What that means is that although
25 its establishment was pursuant to an agreement, a collective

1 bargaining agreement, it is governed in many respects by the
2 strictures of a federal statute. There are precise ways in
3 which the pension plan must be administered. There are precise
4 ways in which the pension plan must behave if an employer
5 withdraws either in full or in part. And the formulae for that
6 is set forth within ERISA.
7 The 1974 Plan is the successor plan to the UMWA 1950
8 Pension Plan. The 1950 Pension Plan was established as a
9 direct result of the federal government's intervention in the
10 bitter strike in the late 1940's. That was ended by the
11 historic Krug Lewis agreement of 1946. And that agreement
12 established the system of health and retirement benefits for
13 unionized coal miners in this country. The 1974 Plan carries
14 on that history. It is important, as Mr. Perillo said, to keep
15 in mind that the system of benefits, both pension and health,
16 for unionized coal miners has been something that the federal
17 government has been involved in numerous times and is subject
18 to a lengthy history which has involved both peaceful
19 negotiations and some conflict.
20 In any event, returning to the 1974 Pension Plan, the
21 1974 Pension Plan makes payments to about 93,000 people.
22 You've hear some numbers of people already, Your Honor. Today
23 you've heard 4,000 employees, 3,100 beneficiaries when we were
24 talking about the Peabody issue. Well, the 1974 Pension Plan,
25 we're talking about 93,000 people. All of those people are

1 retired coal miners or a surviving spouse of coal miners.
2 These people's pensions are vital to their survival; there's no
3 dispute over that. Mr. Perillo gave you a figure of 580-some
4 dollars as an average pension monthly. That's true. What Mr.
5 Perillo did not tell you is that the majority of the 93,000
6 people in the 1974 Pension Plan receive less than 500 dollars a
7 month.
8 Patriot is obligated to make contributions to the 1974
9 Pension Plan for two reasons. You've heard them discussed and
10 alluded to. First, it's obligated to do so because that's what
11 the collective bargaining agreement says. The current
12 collective bargaining agreement is the 2011 contract. The 2011
13 contract runs until the end of 2016. That date is important
14 because when we talk about the pension plan, what's really at
15 issue is what happens after 2016 and not what's going to happen
16 in the next three-and-a-half years.
17 The second reason the debtors are obligated to
18 contribute to the 1974 Pension Plan is because since 1978,
19 every single trust document for the 1974 Pension Plan has
20 contained something called an Evergreen clause. And the
21 Evergreen clause says that if at any time you are a
22 contributing employer to the pension plan, you are required to
23 continue to contribute at the levels set in the current
24 contract. Patriot is the second largest contributor to the
25 1974 Pension Plan. Its contributions are about twenty million

1 dollars a year, you've heard that. That's seventeen percent of
2 the total annual contributions made by employers to the pension
3 plan. There is only one employer who contributes more.
4 Patriot's contributions, however, are projected to
5 decline over time. This is another important fact. They're
6 projected to decline over time as the number of Patriot's union
7 hours decrease. You see, pension contributions are a function
8 of the rate-per-hour multiplied by the number of hours worked
9 by unionized coal miners. And as Patriot changes it workforce,
10 its pension contributions will decline. And looking at the
11 numbers that even the debtor proposes, the contributions to the
12 '74 Pension Plan are projected to go down.
13 The level of pension contribution rates, currently
14 $5.50 an hour, is relatively certain between now and the end of
15 2016. I say "relatively" and not "absolutely" because there is
16 a federal statute that requires modest increases in that rate.
17 The maximum that rate can be, between now and the end of 2016,
18 is $6.05 an hour. Even at that rate, we are still talking
19 about roughly twenty million dollars a year for Patriot for the
20 life of this contract.
21 The obligations to the 1974 Pension Plan are joint and
22 several among all of the debtors. Five of the operating
23 debtors are direct signatories to the collective bargaining
24 agreement and they must make contributions. But under ERISA,
25 all of the other debtors are obligated as well because ERISA

1 imposes joint and several liability on all members of a
2 signatory employer's controlled group. So the issue that we've
3 been talking about at different points during the day and last
4 week about obligated debtors and nonobligated debtors, that
5 issue's not present when we're talking about pension. It is an
6 every-debtor issue.

7 Now, let's look at what the debtors are saying. The
8 debtors are requesting that the Court permit them to terminate
9 the current contract. And they say that will have the effect
10 of terminating the obligation to contribute to the 1974 Pension
11 Plan. Now, if that happens, every single debtor will face a
12 withdrawal liability claim, and you've heard numbers thrown
13 around. The amount calculated pursuant to an approved
14 methodology, litigation-tested, is about a billion dollars
15 against every single debtor. Now, as debtors' counsel
16 indicated, there is a dispute about whether the debtors could
17 have the option to make installment payments on their
18 withdrawal liability. And it's true; there is a dispute. But
19 what is not disputed is that the smallest number of dollars for
20 that annual installment payment, the smallest number of dollars
21 if the debtors prevailed on every single issue, would be
22 twenty-five million dollars.

23 Put differently, even if the debtors obtained the
24 relief they are seeking and withdrew from the pension plan and
25 then litigated and then prevailed, they would have a twenty-

1 five-million-dollar obligation every single year, joint and
2 several, every debtor in perpetuity. And that is because the
3 twenty-five-million-dollar installments, undisputedly, will
4 never touch the principal of the withdrawal liability.
5 Now, with that as a backdrop, the relief the debtors
6 are asking for regarding the pension plan simply does not make
7 any sense. The debtors will spend less on pension
8 contributions between now and the end of 2016 if they just
9 continue to contribute to the 1974 Pension Plan, just like the
10 rest of the industry. The difference is about five million
11 dollars a year; the twenty-million-dollar figure Your Honor has
12 heard now many times and the twenty-five-million-dollar figure
13 that would be the debtors' absolute best case in a withdrawal.
14 So why are the debtors asking the Court to allow them
15 to terminate the collective bargaining agreement as it relates
16 to the pension? Well, it's because they say that contribution
17 rates, pension contribution rates, will skyrocket. Let's be
18 clear about when we're talking about skyrocketing. That's
19 2017, Your Honor; three-and-a-half years from now in a contract
20 that has not been negotiated yet. It is impossible to say what
21 contribution rates in the 2017 contract will be. It's
22 impossible even to say that there will be a 2017 contract.
23 It's impossible to say that even if there is a 2017 contract,
24 it will have a precise provision related to contributions to
25 the 1974 Pension Plan as opposed to some other way of dealing

1 with post-retirement income.
2 And one significant reason why that's true is because
3 the rate depends upon a great number of variables. One of the
4 biggest of the variables is the performance of the assets of
5 the pension plan. Those are investments in the market, Your
6 Honor. To give an example of how significant that one variable
7 is, if you were to go back to the end of 2006, six-and-a-half
8 years ago, the 1974 Pension Plan was nearly fully funded and no
9 contributions were due. No participating employers had to make
10 a contribution on an ongoing basis. Of course, what happened
11 in the last six-and-a-half years was unanticipated at the time,
12 December 31st, 2006, but well-known to us all today in
13 hindsight. You had a collapse of the financial markets. The
14 asset performance of the 1974 Pension Plan declined. That has
15 resulted in a funding deficiency. And that funding deficiency
16 means that there has to be an ongoing pension contribution for
17 employers like Patriot.
18 Asset performance isn't really the only thing, though,
19 that makes knowing the 2017 rate an impossibility. Another
20 reason is that pension rates negotiated as part of all of the
21 different issues on the table between the two bargaining
22 parties in the collective bargaining agreement process. Now,
23 the union is on one side and the trade association is on the
24 other. That's the Bituminous Coal Operators' Association.
25 Those two parties, as you might expect, go through a host of

1 different issues that they're working on. Pensions is just one
2 of them. The resolution of the pension issues depends upon the
3 resolution of all of the other issues.
4 Could it be said with certainty that pension rates
5 will certainly rise? No. Can it be said that pension rates
6 will change, contribution rates will change? No. Can it be
7 said that pension rates will be one topic for bargaining? No,
8 although I think that's probably a pretty good guess. One last
9 reason why pension rates -- I'm going to be careful to say
10 rates rather than total contributions but one reason why rates
11 themselves are not predictable for 2017 and beyond is that
12 pensions, especially pensions like the 1974 Pension Plan have
13 been the subject of legislative activity.
14 And Your Honor's probably aware of the Pension
15 Protection Act and that's the federal statute that requires the
16 modest increases from 5.50 dollars an hour to $6.05 dollars an
17 hour. But the Pension Protection Act is going to sunset before
18 the expiration of the current collective bargaining agreement
19 and we have no idea what, if anything, will take its place.
20 And in addition to the Pension Protection Act, there
21 are other legislative initiatives, some of them very specific
22 with respect to industries like coal that would have the effect
23 of reducing the funding deficiency that leads some to speculate
24 that pension contribution rates are going to go up.
25 Now I mention speculation and I -- here I have to

1 pause and refer to the document named the Funding Improvement
2 Plan. Now that is the document that the debtors referred to in
3 their opening statement. The 1974 Pension Plan like many other
4 institutional investors experienced a big loss in the recent
5 financial crisis and as I mentioned, if you were to roll the
6 clock back to before that crisis, the 1974 Plan was essentially
7 fully funded. After the crisis, the funding level is now
8 stated at about seventy-two percent. And the Pension
9 Protection Act has a trigger in it. The trigger essentially
10 says that if funding falls below eighty percent, the Fund is
11 required to do a number of things but one of the things that
12 it's required to do is prepare a document every single year in
13 which it lays out a scenario in which pension rates would be
14 increased in order to close the gap between its current funding
15 level and the eighty percent trigger level. And so, the 1974
16 Plan did one last year and it's in the process of doing another
17 one as we speak.
18 That document presented two different hypothetical
19 scenarios in which if things stayed as they are and if there
20 were no changes, and if the change in pension contribution
21 rates were the only way for the 1974 plan to restore to eighty
22 percent of funding, rates would have to go up and there are
23 stated rates and those rates are the basis of what the debtor
24 is saying.
25 Your Honor, we believe the evidence will show that

1 that is a far cry from saying the contribution rates will rise
2 at all, let alone to some predictable rate that could form the
3 basis of relief under Section 1113.
4 Now so far I've been talking about contribution rates
5 and I said I'd be careful about that. The focus here is on the
6 amount that Patriot will have to pay and not just the rate. As
7 I said, there is no way to predict how many hours Patriot's
8 unionized workforce will actually work in 2017 and beyond.
9 We're here this week as part of a shift in Patriot's labor
10 force. There is an attempt going on; that attempt is to change
11 the composition of labor within this debtor.
12 Well, the degree of success of that attempt is going
13 to drive how many unionized hours Patriot has in the future.
14 The number of hours has a direct impact on how many dollars of
15 contributions Patriot will owe to the 1974 Plan; speculation on
16 top of speculation, Your Honor and the evidence will show it is
17 nothing more than that.
18 Even more important than the truisms that it's
19 impossible to say what the contribution rate will be in 2017,
20 and it's impossible to know how many hours Patriot will have in
21 2017, there's this; we don't have any information about
22 Patriot's projected financial performance in 2017 and beyond.
23 The projections that form the basis of the debtor's motion go
24 through 2016. We don't know, and the record will not show,
25 that Patriot indubiously will have any necessity at all related

1 to pensions when the time comes, when the hypothetical
2 skyrocketing rates might possibly come into effect.
3 Put differently, how can anyone know what might be
4 necessary for Patriot regarding pension contributions when we
5 don't even have a projection of cash flow and financial
6 performance for even the first of the years in that new
7 contract.
8 So, Your Honor, we believe the evidence will show that
9 withdrawing from the 1974 Pension Plan is not necessary. It's
10 not even advisable, Your Honor, but it certainly isn't
11 necessary.
12 We believe the evidence will show that for the entire
13 period of the projections submitted by the debtors, which in
14 our view, is the debtors' foreseeable future, the debtors are
15 better off staying in the Pension Plan and participating just
16 like the rest of the industry.
17 Now after I talk about the 1993 Benefit Plan, I will
18 talk about the status of negotiations but it is worth pausing
19 right here to say we do not apologize for telling the debtors
20 repeatedly that it is not a good idea for them to withdraw from
21 the 1974 Pension Plan because they are financially much better
22 off staying in and if that amounts to a no, I won't even try to
23 do a Margaret Thatcher but if that amounts to a no, good; then
24 it's a no.
25 So let's talk about the 1993 Benefit Plan. We talked

1 about pensions. Let's talk about health benefits. The 1993
2 Benefit Plan is a multi-employer healthcare trust. It also is
3 governed in many respects by ERISA. The 1974 plan has 93,000
4 beneficiaries. The 1993 plan has 11,000 beneficiaries. Who
5 are these people; because that's important. The 11,000 people
6 are retired coal miners, their spouses and their dependents.
7 But that's not what makes this population special. What makes
8 this population special is that for every single one of those
9 beneficiaries, the company that last employed the miner is no
10 longer in business. These are what the industry refers to as
11 orphans and there's been some talk already in the opening
12 statements about how Peabody wants to take care of its people,
13 Patriot wants to take care of its people. There's a discussion
14 about how in the collective bargaining agreement, there's the
15 articulation of the lifetime promise of healthcare. That
16 promise has been part of the contracts for years; decades.
17 But the people in the 1993 Benefit Plan have already
18 had happen to them the very thing that Patriot is saying will
19 be the doomsday scenario to its own people. These people have
20 already suffered the very thing Patriot says it wants to avoid.
21 That does not make them the same as other populations. That
22 makes them special, Your Honor.
23 A couple of other things about the population; one of
24 them is the 1993 Plan provides benefits to these people and for
25 many of them, we believe a majority of them, it's their only

1 source of healthcare. The majority of these people are not
2 eligible for Medicare.
3 And one last thing; the 1993 Benefit Plan is what's
4 known as a defined contribution plan and that isn't
5 juxtaposition to a defined benefit plan. Defined benefit plans
6 provide a given level of benefits to people and they have to go
7 out and find the funding that's necessary to provide those
8 benefits. But that's not what the 1993 benefit trust is. The
9 1993 plan is a defined contribution plan and what that means is
10 it provides a level of benefits that is defined by and limited
11 by the amount of money it brings in. And what that means in
12 this case is that if Patriot stops contributing, the orphans in
13 that plan will see a direct reduction in their benefits.
14 Now let's talk about the contributions themselves.
15 The debtors are like the rest of the industry and they make
16 about a 1.10 dollar per hour contribution to the 1993 Plan; the
17 amount on an annual basis: 3.7 million dollars. I would like
18 to pause over that number. You have heard numbers measured in
19 the billions today. You have heard a desire for savings from
20 the debtors of 150 million dollars. You have heard VEBA claims
21 and healthcare claims that are hundreds of times the number
22 that represents the annual contribution for the 1993 Benefit
23 Plan.
24 But two other elements of context on that number are
25 very important; one is --

1 THE COURT: Just a second, Mr. Goodchild. I'm sorry.
2 Somebody is on that phone that's not muted. We could hear you
3 typing. Please mute your phone. All right, Mr. Goodchild, you
4 may continue.
5 MR. GOODCHILD: Thank you, Your Honor.
6 THE COURT: I apologize again for the --
7 MR. GOODCHILD: No apologize necessary. Thank you,
8 Your Honor.
9 Two other areas of context on that 3.7 million dollar
10 number and they're important: (1) On the pension side, the
11 Funds have been trying to help Patriot save the five million
12 dollars between its best case scenario and withdrawal and what
13 it's going to pay if it stays in the plan. That five million
14 dollars is bigger than the entire annual contribution it has to
15 make to the 1993 Benefit Plan. We're talking about an
16 incredibly small number relative to the importance of that
17 beneficiary class.
18 Last point of context: 3.7 million dollars is about
19 half of what Patriot has asked this Court to approve in
20 management bonuses. Six weeks ago there was litigation over
21 management bonus plans. Your Honor had an evidentiary hearing
22 on that. That issue was before Your Honor and the important
23 point is we're talking about an annual cost of half of what the
24 debtors are asking for in those bonuses.
25 But that 3.7 million dollars is sixteen percent of the

1 total income stream for the 1993 Benefit Plan; sixteen percent.
2 That is a huge number when we're talking about providing
3 healthcare benefits. The loss of that money would make a great
4 deal to the beneficiaries.
5 Your Honor, we don't think that the evidence will
6 support a finding that it's necessary to cease making
7 contributions to the 1993 Benefit Plan, nor do we think that
8 the evidence will show that doing so would be fair and
9 equitable. Patriot has a special responsibility to do its
10 share to provide healthcare for those industry orphans and it
11 cannot show that the burden of making such a small annual
12 contribution is unsustainable.
13 Now, Your Honor, for those reasons, we believe the
14 debtors will not be able to carry their burden and it is their
15 burden, Your Honor, to show that the rejection of the
16 collection bargaining agreement is justified. Before I sit
17 down, however, I do want to talk about what's happened in the
18 last week, two weeks. The notion of the participation of the
19 Funds was something that the debtors resisted quite vigorously.
20 Back when negotiations began between the debtors and the union,
21 back in November of last year, the Funds wrote -- I personally
22 wrote to the debtors informing them that we desired to
23 participate in the negotiations and that we wanted to have
24 information and we were ready to sign whatever agreement they
25 wanted in order to permit that.

1 And although the debtors permitted us to sign a
2 confidentiality agreements, they refused to involve us at all
3 in the negotiations with the union. Now I appreciate the legal
4 position that drives the debtors to say that. The debtors are
5 entitled to take whatever legal position they're entitled --
6 that they think they're entitled to take. That having been
7 said, Your Honor, it comes will ill-grace to criticize a party
8 for not speaking up when the debtors have barred their
9 participation.
10 Moving forward, it took a motion to this Court after
11 the debtors wrote a letter preemptively seeking to bar the
12 participation of the Funds. It took a formal motion for
13 intervention, so that I could be standing here before you, Your
14 Honor. The Funds have had to litigate in order just to be
15 heard in this and that litigation was recent. Now we're
16 talking about an order issued on April the 2nd and up until
17 that time, there had been zero communication of any substance
18 between the debtors and the Funds related to the very proposals
19 that the debtors are talking about. The first time there was
20 any sort of substantive discussion between the debtors and the
21 Funds was April the 1st.
22 Now since then, and I again make no apology for this,
23 we have attempted to show the debtors that there is no good
24 reason why the debtors need to stop contributing to the 1993
25 Benefit Plan and the 1974 Pension Trust. We continue to

1 believe that. We have been providing information, in some
2 cases I would characterize it as tutoring, related to the
3 obligations here because it is a complicated subject matter
4 area and it is difficult to understand the differences among
5 the different benefit plans and the Pension Trust. We have
6 done that. I personally have done that.
7 When the latest rounds of proposals came out, this
8 appears to be where the debtors are unhappy with the Funds'
9 behavior, I think the debtors have characterized it as the
10 debtors bent over backwards. Your Honor, I don't think it's
11 bending over backwards to acknowledge that it makes more sense
12 economically for the debtors to stay in the Plan. The debtors
13 talked about conference calls. It's true. There have been
14 conference calls and it takes two to have a conference call.
15 We've been participating in those; that has been going on.
16 And then last, moving to the latest proposal in what's
17 happened over this past weekend. The debtors continue to look
18 at the Funds as an entity that by themselves can agree to
19 concessions. And, Your Honor, our position on that is in
20 accordance with the law. The Funds are not independently in a
21 position to grant concessions. The Funds work together with
22 the two bargaining parties that created these obligations in
23 the first place.
24 So when the debtors' counsel complains that the Funds
25 would not make this simple promise, I think those were his

1 words, the answer is that the Funds simply cannot make their
2 simple promise -- that simple promise by themselves. The
3 negotiation related to the Funds is part of the overall
4 negotiation and you've heard chapter and verse about the back
5 and forth of that overall negotiation. We are glad to be a
6 participant and we have always wanted to be a participant in
7 that overall negotiation. And I don't believe that the history
8 of the negotiations or the behavior of the Funds supports any
9 kind of finding that the Funds have been anything but helpful
10 in this process.
11 Now, Your Honor, I've covered what I needed to cover
12 and unless the Court has questions --
13 THE COURT: No, I don't have any questions at this
14 time.
15 MR. GOODCHILD: Thank you, Your Honor. I appreciate
16 your time.
17 THE COURT: All right. Thank you.
18 MR. HUEBNER: Your Honor, may I be heard for one
19 moment?
20 THE COURT: Yes, Mr. Huebner.
21 MR. HUEBNER: Good afternoon, Your Honor. For the
22 record, I am Marshall Huebner of Davis, Polk & Wardwell on
23 behalf of the debtors. Your Honor, taking Mr. Perillo's cue to
24 think iteratively as we're proceeding along about possible
25 procedural rulings, I think there's actually something that

1 probably needs to be reconsidered with respect to the next four
2 days and I say this tentatively and respectfully. I will
3 certainly be accused of ill-grace but I think it's appropriate.
4 On April 2nd, Your Honor, at the time that you entered
5 your ruling allowing the Funds essentially to make this two
6 against one, our proposal at the time, in fact, proposed to
7 withdraw from the '74 Plan and the gravitas behind their
8 request was, we might be a billion dollar claimant.
9 Ironically, the first ninety percent of the longest opening
10 argument, longer than either of the two parties to 1113, that
11 you just heard, was entirely premised on the pre-April 2nd
12 proposal, that's not only one proposal-old but two proposals-
13 old.
14 Since then, we have said and Mr. Moskowitz couldn't
15 have been more clearer, we're not withdrawing. All we need is
16 for somebody to put to paper the two things they have told us
17 up and down in blood, sworn, for-real, trust us, it will never
18 happen, that pre-2016, they won't open the contract, the
19 National Coal Contract, to raise the premiums before 2017 and
20 that after 2017, this extraordinary set of increases that Mr.
21 Goodchild just eloquently explained will almost surely never
22 happen because it's such a complicated, multi-faceted thing
23 that the industry can't afford that we don't really need to be
24 worried about it.
25 So what we're asking for with respect to the '74 Plan

1 right now is teeny-weeny-weeny, which is just for somebody to
2 commit to us what they've told us will be the case, essentially
3 insurance policies that we will never need.
4 But then there's the second thing he said near the
5 end; Your Honor, please don't be mad at me and don't let the
6 debtors be mad at me because it turns out legally, I have no
7 ability to negotiate or concede anything. The Funds, by law,
8 can't. It's the two other parties.
9 Well, Your Honor, if he can't concede and he can't
10 negotiate, and he can't reach a deal, then what is he doing at
11 the podium except to be a free second shot for someone else?
12 You know, you heard Mr. Moskowitz tell you only one of the
13 three plans have the Evergreen clause. That in or out of
14 court, we and the union could agree tomorrow -- and the union
15 could agree with any coal company, you don't have to contribute
16 to the '93 Plan anymore or to the bonus plan; right? Those are
17 just optional things that we can either agree to or not -- or
18 agree not to do. Just like the other coal companies, just like
19 any other item. He has no special rights of any kind.
20 If we agreed the day before bankruptcy with the UMWA,
21 you know, we'd rather pay an extra dollar an hour to current
22 workers than contribute to the '93 Plan or the Bonus Plan, they
23 know they would have nothing to say. They have no right to be
24 at this podium and the fact that he gave the longest of the
25 three openings is a harbinger of terrible things to come for

1 the next four days.
2 He spent an hour talking to you about a proposal
3 that's on the ash heap of history because we did what we're
4 supposed to by statute. We listened. We learned. We're
5 flexible. We amend. We change. We hereby further for the
6 gazillionth time in the last two weeks say, we will stay in the
7 '74 Plan, as long as the UMWA will tell us, that between now
8 and 2016 they will not open the National Contract to raise the
9 premiums which everyone has said they're not going to do. So,
10 just say it in a way that's binding and we can get exit
11 financing and survive. And we will not withdraw from the plan
12 after 1/1/17 unless the premiums exceed the withdrawal ERISA
13 installment.
14 Now his numbers are right too and they're so important
15 to understand. Let's pop them for everybody. By the end of
16 2016, it is projected that our annual contributions staying in
17 the plan are only about seventeen million dollars, whereas our
18 withdrawal ERISA payments are about twenty-five million
19 dollars. That's an almost fifty percent increase in the
20 premiums that would have to happen for us to withdraw.
21 Everyone says it's never going to happen. You guys are fencing
22 at windmills.
23 So all we say is we need something to take the
24 financing market that gives credibility to the fact that your
25 own funding improvement plan is not going to be the real world,

1 that it won't happen. So to be clear, Your Honor, I rise
2 procedurally because I'm very concerned that someone who I view
3 never having had skin in the game, and to be clear, so that we
4 understand how anomalous this is and how incredibly generous
5 Your Honor has been -- I've been in lots of 1113s, a bunch of
6 them contemplated withdrawals from multi-employer plans. I
7 have never seen a multi-employer plan be given any air time,
8 let alone -- and not only co-equal but more than equal. And I
9 just -- I'm very concerned, especially because the first almost
10 hour was about a proposal that's long gone and he knows it
11 because he discussed it for the last ten minutes, to then close
12 with the zinger of, and please don't be mad, I have nothing to
13 give; if he can't be a counterparty and he can't negotiate and
14 he can't facilitate 1113, he could only tutor us and lecture
15 us, then he shouldn't be at the podium for the next four days.
16 THE COURT: All right. Thank you. Let me take a
17 brief recess. Give me about ten minutes. We'll be in
18 temporary recess.
19 (Recess from 4:08 p.m. until 4:36 p.m.)
20 THE CLERK: All rise. Your Honor, we are back on the
21 record.
22 THE COURT: All right. Thank you. Please be seated
23 please. All right. I have considered the debtors' oral
24 request to limit the participation of the Fund and I am going
25 to grant that request. The written objection that the Funds

1 filed doesn't address the issues that were raised in the
2 opening statement that was presented here today and the motion
3 to intervene only discussed those issues generally.
4 The motion to intervene discussed the Funds'
5 responsibility to collect withdrawal liabilities and it also
6 discussed that the VEBA was to be administered by the Fund and
7 that could be significant risk and responsibility to the Funds.
8 However, those issues were not addressed in the opening
9 statement today.
10 Likewise though, certainly Mr. Stover's declaration
11 exhibits can be offered into evidence and if there aren't any
12 objections or if objections are overruled, I would allow that
13 to be presented -- him to be presented as a witness for the
14 debtors to cross-examination -- for cross-examination and then
15 I would allow Mr. Perillo to conduct any direct. All right.
16 (Stover declaration was hereby received into evidence, as of
17 this date.)
18 Likewise, Mr. Perillo, you also raised the issue of
19 which proposal we're considering. I will consider the last
20 proposal that was made prior to the commencement of the hearing
21 and I believe that's appropriate with what the Code says but I
22 also, in part, I'll certainly consider all of the proposals
23 that have been made to ensure that each proposal that was made
24 was better than the last one.
25 All right. Mr. Moskowitz or Mr. Huebner, are there

1 any other procedural requests?
2 MR. MOSKOWITZ: No, Your Honor. Thank you.
3 THE COURT: All right. Mr. Goodchild, was there
4 something else that you had briefly?
5 MR. GOODCHILD: Yes, Your Honor. I understand your
6 ruling except for one thing. I understand the Court to rule
7 just now that the proposal under consideration is the last
8 prior to the commencement of the hearing. Did Your Honor mean
9 to rule that the proposal that is being considered with respect
10 to the relief requested is that or was Your Honor's ruling that
11 for purposes of determining good faith, it is only the last
12 proposal prior to the commencement of the hearing?
13 THE COURT: Well, I think that I am considering the
14 last one as I indicated prior to the hearing that would be
15 considered today because that's the last proposal that was out
16 there. I will look at all of them, I guess as I look at all of
17 the factors but I don't think I'm limiting it to which factors
18 I'm considering. That's the last proposal that was out there.
19 I think that is the most efficient way to proceed. That's the
20 last offer that was made and I think that's what the Code calls
21 for, that proposals can be made up until that date. It
22 certainly calls for that.
23 And the debtors made a proposal and they were kind
24 enough to likewise wait more than fourteen to twenty-one days
25 for us to hear it, so I don't think we should have made them go

1 back and withdraw that proposal and make a new one. I think
2 that's the last proposal that's out there. So that's what I
3 will be considering as far as all of the factors that are out
4 there.
5 MR. GOODCHILD: Okay. I think I understand that. If
6 you could indulge me for just a little bit more time here. The
7 confusion that I have right now is over whether the debtors are
8 requesting as relief to withdraw from the 1974 Pension Plan.
9 And, Your Honor, I understand that Mr. Huebner just got up and
10 said that they don't want to withdraw but perhaps lost in
11 everything that Mr. Huebner was saying was that little tiny bit
12 in there in which he said we just want that one thing that we
13 can go out to the financing market with. The one thing is the
14 agreement that Patriot would have the right to withdraw later
15 from the Fund and the 1974 Pension Plan.
16 THE COURT: I don't think that's what he said he
17 wanted. I think he said what he wants is to know that the --
18 and Mr. Huebner, I don't want to put words in your mouth, I
19 think what you said is you wanted to know that the
20 contributions weren't going to go up before 2017.
21 MR. HUEBNER: Let me --
22 THE COURT: That there wasn't going to be a new
23 negotiation.
24 MR. GOODCHILD: Your Honor, then you and I heard
25 something different, so I would yield.

1 MR. HUEBNER: Sure, Your Honor. I'm sorry. Let me
2 explain for a second. I think the answer is sort of everybody
3 is kind of right. We have received very strong assurances that
4 it is extraordinarily unlikely that they will go up after 2017.
5 I think you heard Mr. Goodchild, frankly, say related things
6 during his presentation that it's a very complex, multi, et
7 cetera, et cetera, one can't know the like.
8 What our proposal is is that we be permitted to
9 withdraw, which but for the Evergreen clause, we could
10 absolutely get an agreement with the union on. We also think
11 that this Court is actually free to order that as part of 1113
12 because nobody argues -- nobody -- that we're bound to the 1974
13 Plan by statute. You're not obligated to be in a multi-
14 employer plan.
15 The only obligation is that we signed a CBA with just
16 the union and that CBA incorporates by reference this 1974 Plan
17 and this 1974 Plan has a really weird provision that none of us
18 have ever seen before that says that only other people and not
19 us, can determine our pension contribution rate. That's the
20 Evergreen clause.
21 But any way you slice it, that's only because we're
22 bound to the CBA. 1113 is how you get changes to provisions in
23 CBAs that are necessary for your reorganization. So our
24 proposal is that this Court order that we be allowed to
25 withdraw after 1/1/17 if the "unthinkable" happens, which is

1 our premiums rise so much -- frankly by about fifty percent
2 which is an astonishing increase, that they would actually
3 exceed the ERISA installment plan withdrawal.
4 So the answer is kind of everybody is sort of right;
5 the proposal is that the only thing we need is a ruling from
6 this Court or an agreement that we are allowed to withdraw
7 after 1/1/17 if the "unthinkable" happens, which everyone says
8 will never happen and then the other little thing, just so I
9 don't forget it, it's not a Mr. Goodchild thing, but it is a
10 UMWA thing that for the period prior to 1/1/17, everyone has
11 said that the current rate in the National Contract, I think it
12 -- somebody said it is never in history been reopened mid-
13 contract. We'll never, ever, ever, ever happen. So we just
14 ask that our -- if they want to reopen it for others, that's
15 fine but we need certainty. So the other request which again,
16 I hope we would be able to get someday maybe hopefully as part
17 of a global deal, that the union -- and this is a purely
18 bilateral issue with the union, this I don't think as much an
19 Evergreen issue, that the union would agree not to reopen the
20 contract and change the pension contribution rates in a way
21 that applies to Patriot prior to 1/1/17.
22 So -- and then there's the last point, Your Honor,
23 which is that as Mr. Goodchild said at the very end of his
24 remarks, he has no ability to negotiate anything. So he can't
25 give us any concessions or relief for anything which I think

1 frankly was a critical factor in whether or not -- and we are
2 obviously grateful and delighted at what we believe is the
3 propriety of Your Honor's ruling in light of the changed
4 circumstances, in light of the admission that he's not a
5 counterparty because he has nothing to give, so he should not
6 be getting extraordinary rights. He's already been given far
7 more participation than probably any non-union in the history
8 of 1113.
9 MR. GOODCHILD: Your Honor, I think I heard two things
10 there; the first was that the debtors are specifically asking
11 for this Court's authority to withdraw from the 1974 Pension
12 Plan. Now, Your Honor, the Evergreen clause which was the
13 subject of our motion to intervene, is implicated. Mr.
14 Huebner, I believe just said that.
15 A piece of litigation, a proceeding in which the end
16 result is a request by the debtors to withdraw from the 1974
17 Pension Plan implicates that clause and I believe the ground on
18 which we moved to intervene is -- remains valid today with
19 respect to that.
20 Now with respect to the assurance about the union not
21 seeking to reopen, I agree with Mr. Huebner in that if Mr.
22 Huebner's asking the union to agree to something that obviously
23 that's not a Funds' issue, but I did not hear Mr. Huebner say
24 that he was expecting the Court to order that. And I think,
25 Your Honor, there is a very significant difference between a

1 litigated outcome here and a negotiated outcome.
2 On the litigated outcome, the debtors are looking for,
3 they are asking for, they are asking for things that implicate
4 our motion to intervene on behalf of the 1974 Pension Trust, I
5 believe that our participation is not only warranted but
6 perhaps necessary given that there's an independent obligation
7 there under the Evergreen clause.
8 With respect to a negotiated solution, Your Honor
9 although it is true that the Funds don't have an independent
10 unilateral right and that is all I was trying to say, an
11 independent unilateral bargaining position, the Funds are the
12 conduit through which negotiations related to pensions and
13 benefit levels are -- that is the way these things are
14 negotiated.
15 And, Your Honor, the reason why it has been a good
16 idea for the debtors to engage the Funds in this is because
17 that's how the negotiation over pensions and benefit levels
18 gets done. And if Mr. Huebner is interested in a negotiated
19 solution, it is important that the Funds remain at the table.
20 The Funds should have been at the table all along. It is
21 important that they remain at the table. Excluding the Funds
22 from this proceeding will not advance the cause of a negotiated
23 solution which is something that I think we would all like.
24 Now one last thing, Your Honor; I had a thirty-minute
25 opening statement. The debtors had an hour. Mr. Perillo had

1 forty-five minutes. Every minute of my participation comes out
2 of Mr. Perillo's time. There is in no way a double-teaming
3 going on. I have one witness. I told Your Honor I was
4 presenting him by declaration only. Your Honor has already
5 indicated that that testimony will be received.
6 As a practical matter, we are talking about the
7 ability for the Funds to ask a few questions after Mr. Perillo
8 on cross-examination of the debtors' witnesses. We have no
9 questions for the union witnesses and the ability to make a
10 closing argument. That is all that's at stake right here. And
11 given that the Evergreen clause is very much in play on the
12 litigated outcome, we would respectfully request that Your
13 Honor reconsider.
14 MR. HUEBNER: Can I just help with the facts for one
15 second, just so the record is clear?
16 THE COURT: Yes.
17 MR. HUEBNER: Your Honor, our last proposal on page 6
18 says the UMWA agrees that prior to January 1, 2017, they will
19 not amend this agreement or take any other action to increase
20 contribution rates above 5.50 per hour work. So, just to
21 answer kind of the metaphysical question, I guess we're very
22 much hoping as we keep saying every time we possibly can to
23 reach a deal but this is our last proposal and if we don't yet
24 have an agreement by the time the Court rules, then if history
25 is a guide, if we prevail, and I certainly do not presume that,

1 but were we to prevail, courts don't normally say the contract
2 is rejected; do whatever you want. They say I found the last
3 proposal, justify the standard and that's what you should
4 impose.
5 So to answer Mr. Goodchild's question, I guess,
6 indirectly the Court would be imposing the pension elements of
7 our proposal and then in terms of just due process, let me be
8 very clear, so that there's no doubt about any of this. We are
9 delighted to negotiate with anybody that has authority and
10 interest in talking to us. Our frustration that you heard
11 today was precisely we felt we were negotiating and then we got
12 this, we are totally done, see you in court; everything we
13 thought we were talking about there's nothing further to
14 discuss, e-mail on Saturday evening.
15 If Your Honor were to limit the Funds' participation
16 at the trial to what is still far, far greater than any party,
17 I don't really know why the threat that they just won't
18 negotiate with us anymore should be taken at face value. I
19 would also note that the issues that he really is bringing to
20 the Court about the '74 and the Evergreen clause are pure legal
21 issues. Those -- no witness is going to testify about how an
22 Evergreen clause works. He's just there to punch necessity and
23 hardship and equity; all the things that the union will surely
24 be doing and they just don't have the right to double-team us,
25 especially now that our proposal says we're only going to

1 withdraw if we don't get this teeny-weeny-weeny little thing.
2 So, with all due respect, you know, there's kind of
3 any implied threat in there that they'll be so angry, they
4 won't talk to us anymore. We'd love to talk to them. We're
5 desperate to reach a deal. We've conceded, I genuinely believe
6 about ninety-nine percent of what people were asking of us on
7 the '74 Plan and we don't think that his legal -- on his legal
8 argument, he can make the same length closing statement as all
9 the other non-union parties. He's gotten a very long opening
10 statement and he filed his papers on the Evergreen clause. The
11 witnesses will not be testifying about how Evergreen clauses
12 work under the law.
13 So with all due respect, I would ask the Court not to
14 reconsider your ruling, which I think is sort of just right and
15 I stood up with, as I said, great hesitation to make the oral
16 motions. I think it was quite appropriate in that the facts
17 have changed quite substantially since the original
18 participation was set.
19 THE COURT: All right. Mr. Perillo, did you have any
20 comments since it kind of infringes on your time or not kind of
21 does infringe on your time.
22 MR. PERILLO: It's always a pleasure to use some of my
23 own time, Your Honor. I would ask that the Funds be allowed to
24 participate for the limited purposes that they've stated.
25 Thank you.

1 THE COURT: All right. Mr. Goodchild, yes, it's a
2 legal argument I think. We'll get your witness in but I'm not
3 inclined to reconsider. We've got to move things along here
4 and as I indicated, when I granted the motion to intervene, I
5 guess I was looking at and I went back and looked at the motion
6 to intervene, again the Fund saying that they would be
7 responsible for collecting this liability and the VEBA issue
8 and all that and that certainly doesn't seem to be an issue now
9 at this point, so --
10 MR. GOODCHILD: Your Honor, I apologize for that but
11 Your Honor, the issue related to the beneficiaries coming into
12 the 1993 Plan becomes a serious issue if the debtors dump those
13 beneficiaries. In other words, if the VEBA fails, those
14 beneficiaries will come into the 1993 Plan.
15 Now, Your Honor, I chose not to make that a part of my
16 opening statement. I did not believe that in doing so, I was
17 limiting what we've already stated in the papers. I simply
18 thought I was giving you an opening statement of what I thought
19 the evidentiary presentation would be.
20 Make no mistake about it, Your Honor, we do stand on
21 our papers and we believe that those objections are still very
22 much in play but Your Honor, in order to avoid the very
23 harbinger that I've been accused of raising, I didn't feel it
24 was necessary to restate my papers, especially because Your
25 Honor has demonstrated that Your Honor reads all of the papers.

1 So, duplicating them did not seem to be something that I needed
2 to do.
3 Now, Your Honor, with respect to which proposal, the
4 last proposal versus -- you know, before the hearing, Your
5 Honor, if Your Honor is going to consider the last proposal
6 prior to the commencement of the hearing, then obviously some
7 things have changed since we filed our objection. You heard
8 from counsel that there have been many proposals back and
9 forth, right up until this weekend.
10 And finally, with respect to the weekend, we're
11 talking about the conduct of whether the Funds could
12 independently agree to something between a late Friday night
13 call and a late Friday night e-mail. And, Your Honor, to blow
14 that into some sort of suggestion that the Funds were not
15 proceeding in good faith or would not proceed in good faith is
16 just not fair.
17 THE COURT: I don't think that's what Mr. Huebner
18 said. I think he was -- you indicated that the Funds -- this
19 is what I wrote down -- cannot independently make concessions.
20 So, I think that's where he was going. You can't independently
21 make concessions. You can work with the two parties and that's
22 fine and the parties may have some discussions going on in the
23 hours that we are not in court while we're here and certainly
24 if you -- it sounds like you have been participating somewhat
25 and I would continue to have you participate. I think Mr.

1 Huebner made it clear as well that's what he would want.
2 MR. GOODCHILD: Your Honor, one last thing.
3 THE COURT: Yes.
4 MR. GOODCHILD: You've heard Mr. Perillo on this.
5 I've already stated what the Funds' plans were with respect to
6 the evidence. We would like the ability to examine our own
7 witness. What it really comes down to is we would like the
8 ability to conduct the redirect of Mr. Stover ourselves. We've
9 prepared him. We defended his deposition. We've participated
10 in the discovery. I don't think that will take up any
11 additional time. Your Honor wants to move things along.
12 And furthermore, I don't have very much planned at
13 this point for closing remarks. I would, of course, be happy
14 to live within Your Honor's ten minute time limit on other
15 parties. And so, Your Honor, we're really not talking about
16 anything other than the time to redirect a witness and the time
17 for me to stand up as I would, as any other objecting party has
18 the right to do.
19 THE COURT: Mr. Moskowitz?
20 MR. MOSKOWITZ: I'm just rising to say that unless
21 Your Honor wants to entertain argument on this for a fourth
22 time, we're ready to call our next witness.
23 THE COURT: All right. No, I will not. My ruling
24 will stand. All right. Then we'll proceed. Mr. Moskowitz,
25 you may call your witness -- your first witness.

1 MR. MOSKOWITZ: Thank you, Your Honor. Your Honor,
2 the debtors call Mr. Greg Robertson. I'll just give a two
3 second introduction as to who he is. Mr. Robertson is a
4 partner in the Richmond, Virginia office of the law firm of
5 Hunton & Williams, LLP. He serves as chair of his firm's
6 global employment litigation and labor management relations
7 practice. He serves as co-counsel to Patriot. He's been a
8 member of the negotiating team since last fall. He submitted
9 an opening declaration dated March 14, 2013 and a reply
10 declaration and I'm introducing formally, his two declarations
11 as his direct testimony. And I am tendering him now for cross-
12 examination.
13 THE COURT: All right. Mr. Robertson, if you'll hold
14 on just a minute and let us swear you in there at the podium,
15 please.
16 (Witness Sworn.)
17 THE CLERK: Please have a seat in the witness box,
18 sir. There's a step up.
19 THE COURT: All right. Mr. Perillo?
20 MR. PERILLO: Your Honor, Sara Geenen, a colleague
21 from my office, is going to be the attorney with the Court's
22 permission, to cross-examine Mr. Robertson.
23 THE COURT: All right. That's fine. And Ms. Geenen,
24 you may proceed then with your cross-examination.
25 CROSS-EXAMINATION

1 BY MS. GEENEN:
2 Q. Good afternoon, Mr. Robertson.
3 A. Good afternoon.
4 Q. I'm going to warn you there are some large binders
5 alongside you.
6 A. Okay.
7 Q. Mr. Robertson, what was your involvement in -- what is
8 your involvement in the negotiations with the UMWA?
9 A. I'm a member of Patriot's negotiating team.
10 Q. In your declaration, you categorized yourself as lead
11 negotiator. What does that entail -- as a lead negotiator.
12 What does that entail?
13 A. Well, there's four of us on our team and we all speak
14 periodically. I speak periodically on behalf of the company.
15 I think it means a participant along with the other three.
16 Q. In your declaration, you speak to information requests
17 that were made throughout the course of negotiations. What was
18 your role with respect to those information requests?
19 A. Well, I helped gather some of the information requests
20 that were posited at the bargaining table by the members of the
21 union's bargaining team. I also saw information requests
22 posited by the union's advisors, PWC. I also was on various e-
23 mail chains and the like and phone calls where the gathering
24 and marshaling of the data requested was discussed. And then
25 periodically, we had status reports of the requests and where

1 the effort was in order to gather the information and whether
2 it was complete or not and then reports that it was put into
3 the data room.
4 So, it was a fairly intimate involvement. That process
5 was one that, at least from the bargaining table's stand point,
6 we had a phone call -- we have a phone call after every
7 bargaining session and the information requests made at the
8 session are one of the subjects we talk about and I participate
9 in that.
10 Q. You mentioned some e-mail chains. Were you included in
11 all the e-mail chains regarding information requests?
12 A. I doubt that.
13 Q. But you had a responsibility for compiling those requests?
14 A. No, I was part of the group that participated in the
15 conversations about those requests and to help marshal whatever
16 efforts needed to be made to gather the information. And then
17 to sort of review the sheets in order to prepare for
18 negotiations and be able to respond to the union's bargaining
19 team at the table about where we stood on gathering information
20 as the process went along.
21 Q. And do you perform other work for Patriot in addition to
22 serving as lead negotiator with respect to the 1113, 14
23 proposals?
24 A. I won't say I'm one of the negotiators -- a lead
25 negotiator. I would have to say Ben Hatfield was probably the

1 lead negotiator as CEO. Yes, I performed other legal services
2 for the company in the past.
3 Q. When did your involvement with Patriot related to their
4 1113, 14 proposals begin?
5 A. Probably last summer.
6 Q. Do you know approximately when last summer?
7 A. The last of the proposals themselves? You know, I would
8 say probably August-September-July; that time frame.
9 Q. You said as to the proposals themselves, did you have some
10 discussions with Patriot related to a potential 1113, 14
11 proposal before that time?
12 A. Well, I think as I was first engaged there was discussion
13 about whether or not the company was going to go into
14 bankruptcy. I was -- listened to some of that discussion. I
15 don't think we had formulated any 1113 or 14 proposals at that
16 time.
17 Q. You said when you were first engaged, when was that
18 approximately?
19 A. The middle of last summer. I don't remember exactly when;
20 probably July, perhaps June.
21 Q. Do you recall if you began -- you, with Patriot's
22 advisors, began working on a labor proposal before Patriot
23 filed for bankruptcy on July 9?
24 A. I don't think we did; no.
25 Q. How long did it take Patriot to develop -- it took Patriot

1 four months to develop a labor proposal; is that correct?
2 A. It took, yes, roughly four months.
3 Q. I should say four months after -- approximately four
4 months after filing for bankruptcy.
5 A. Yes.
6 Q. And was the proposal in the works before the filing?
7 A. As I said, I don't recall that it was; no.
8 Q. In your declaration you discuss Patriot's business plans;
9 an original and a revised business plan. Were you involved in
10 developed those business plans?
11 A. I really wasn't involved in the development of those plans
12 per se, although I was aware that they were being developed and
13 in at least some meetings, I was a participant and there was
14 some discussion of them. But I really wouldn't say I was
15 involved in the development of them.
16 Q. I am going to turn to your declaration a bit. If you take
17 a look in the binder in front of you --
18 A. Okay, there are several.
19 MS. GEENEN: May I approach the witness --
20 THE COURT: You may.
21 MS. GEENEN: -- and help sort it out?
22 Q. Mr. Robertson, I am going to direct you to paragraph 26 of
23 your declaration. It's Exhibit 1 in the binder at page 13.
24 A. Right.
25 Q. In that paragraph, you state that "Patriot and its

1 advisors prepared a complex business plan with a goal of
2 determining the level of savings that would be required for
3 Patriot to survive and reorganize as a viable, competitive
4 business."
5 How did the concessions that Patriot sought through its
6 1113, 14 proposals allow it to compete?
7 A. I'm sorry, could you repeat the question?
8 Q. Sure. What I am wondering is the goal of the business
9 plan was to allow Patriot to be a viable and competitive
10 business. I am wondering what was envisioned by your use of
11 the phrase viable, competitive business?
12 A. Well, I think the company was in -- it was and is in
13 financial -- significant financial difficulty and it concluded
14 that it need to find ways to save substantial amounts of money
15 operationally going forward in order to return to a business
16 that was viable and competitive and profitable. And I think
17 the ultimate decision from a combination of the business folks
18 and the financial folks was that somehow or another, Patriot
19 needed to find 150 million dollars in savings. And if it
20 could, it thought that that would be what it would take in
21 order to return to a competitive, viable status.
22 Q. Do you know how the 150 million dollar figure came about?
23 A. I really don't. The financial folks from Blackstone and
24 some of the Patriot business folks could probably tell you
25 that. I was just made aware that that was the figure that they

1 had arrived at.
2 Q. And how did Patriot's team develop the proposal to reach
3 the 150 million dollar figure?
4 A. Well again, between the business folks and the financial
5 advisors, I think the conclusion was that Patriot needed to
6 find 150 million dollars in savings throughout its various
7 operations. One of the ways then that the company turned to to
8 try to find some of that savings was to look towards 1113 and
9 1114 to see if there were ways under the bankruptcy statutes
10 and under those statutes of developing proposals that could
11 realize some of those savings.
12 Q. At paragraph 27, you state that -- it's the last sentence,
13 "Patriot used its non-union wages and benefits programs as a
14 benchmark for reasonableness and fairness." What the basis for
15 determining that the non-union wages and benefits were
16 reasonable and fair?
17 A. Well I think Patriot employed a substantial number of
18 employees at operations which were non-union at benefit levels
19 and wage levels that were sufficient to attract qualified
20 employees and to retain qualified employees over long periods
21 of time. And thus, I think Patriot concluded then that that
22 was a fair benchmark of marketplace wages and benefits which
23 were necessary to attract and retain qualified miners.
24 So that was the benchmark it thought would be appropriate
25 and one that it would enable it again to retain and attract the

1 kind of miners that it needed to have successful operations.
2 Q. So the focus was on the benchmark rather than the -- so
3 the focus was that on -- I'm going to start over.
4 The focus was on ensuring that the benchmark was
5 reasonable and fair or that the concessions Patriot sought from
6 the union workers was reasonable and fair?
7 A. I don't think the process started out worrying about union
8 workers or not. It started out with first deciding what kind
9 of financial savings were necessary across the board from
10 whatever source, then turning to some of those sources
11 including the potential for labor related savings under 1113
12 and 14 and then in terms of deciding what does the company need
13 to remain viable and competitive? It needs qualified miners
14 with experience. And so then it began to look at what does
15 that take and it concluded that it had a viable set of wages
16 and benefits being paid to non-union employees that was
17 attracting the quality of employee that it needed.
18 And thus, it thought at least that level of wages and
19 benefits would be sufficient in the marketplace to attract the
20 kind of people and keep them that it needed to be successful in
21 mining the coal.
22 Q. You started out that answer with "I think." What was your
23 basis for thinking?
24 A. Discussions with various Patriot business people.
25 Q. Patriot delivered its first proposal to the union on

1 November 15th; correct?
2 A. Yes.
3 Q. How many variations of that first proposal were considered
4 prior to the proposal that was ultimately provided to the mine
5 workers?
6 A. I don't know that there are any variations. It was sort
7 of a building block kind of process that took quite some time
8 to arrive at what might be a viable proposal. I don't think
9 there were variations or versions of it. It was, as I say,
10 sort of a building block kind of process.
11 Q. Patriot didn't consider alternative proposals?
12 A. Well, I'm not aware that it considered alternative
13 proposals, A versus B, as opposed to just building A upon B
14 upon C upon D to come out with a totality of a proposal to
15 make.
16 Q. In your declaration, you identify a summary of savings and
17 it's attached to your declaration as Exhibit 11 or 12. It's
18 Joint Exhibit 12 and 13 in the binder. When I speak of the
19 original savings summary, do you know what I am talking about?
20 A. Yes.
21 Q. You understand that the original summary -- savings
22 summary was revised and a second one was subsequently provided?
23 A. I think that's correct; yeah.
24 Q. Do you recall why it was revised?
25 A. I don't except -- I really don't, to be honest with you.

1 Q. The summary of savings shows -- I'm going to look at the
2 second one which is Joint Exhibit 13. The summary of savings
3 quantifies the 1113 -- Patriot's 1113 proposal; correct?
4 A. Yes.
5 Q. It only shows savings for years 2013, '14, '15, and '16;
6 is that correct?
7 A. I think that's correct; yes. Yes, that appears to be;
8 yes.
9 Q. But Patriot will continue to gain -- to reap the full
10 savings from its 1113 proposal if those modifications are
11 implemented through 2017 and 2018; correct?
12 A. If these modifications are implemented and the term of
13 that implementation is 2017 or 2018, then I would presume that
14 these provisions would remain in effect; yes.
15 Q. Did you prepare this chart?
16 A. No.
17 Q. From whom did you obtain it?
18 A. I think I ultimately obtained it from Dale Lucha at
19 Patriot.
20 Q. Do you remember approximately when you obtained it from
21 him?
22 A. Not exactly but it was before our first bargaining session
23 and before our first proposal to the union because it was used
24 to quantify the amount of savings that might be realized from
25 the proposals that we were going to make in mid-November.

1 Q. Patriot's 1113 proposal, the first 1113 proposal, included
2 wage reductions, in some cases up to nearly seven dollars per
3 hour; is that correct?
4 A. I think it did include both some wage reductions, some
5 wage increases and some wages staying the same. I don't
6 remember the exact amount but I recall there were some that
7 might have been in the seven dollar range.
8 Q. It also contemplated reductions in paid time off, vacation
9 and holidays?
10 A. Correct.
11 Q. As far as you're aware, are the wage reductions, as well
12 as the reductions in paid time off, vacation time and holiday
13 time, remain the same throughout -- with respect to just those
14 items remained the same throughout the 1113 process and
15 proposals?
16 A. I think those proposals have remained constant from the
17 company; yes.
18 Q. The initial proposal also contained some modifications to
19 work rules; is that correct?
20 A. Yes.
21 Q. Did all of them have savings associated with them?
22 A. I think all of them had savings associated with them.
23 Some of them were not able to be quantified but I think the
24 company believed that all would result in savings; yes.
25 Q. Can you give me an example of one that was unable to be

1 quantified?
2 A. Well, I think there were some proposals made with respect
3 to job opportunities, for example. There were proposals made
4 with respect to supervisors doing some bargaining unit work.
5 Q. All right. Let's talk about the supervisors doing
6 bargaining unit work.
7 A. Um-hum.
8 Q. At any time during the course of negotiations, have you
9 seen a figure associated with the supervisor's -- a dollar
10 figure associated with supervisors doing bargaining unit work?
11 A. I don't believe the company was able to put a number on
12 that proposal. I do --
13 Q. All right.
14 A. -- I do know the company believed that there would be
15 savings associated with it but I don't recall a number.
16 Q. Were you involved in developing the 1114 proposal?
17 A. Well, to the same extent as the 1113; I participated in
18 conversations and discussions about those proposals. So in
19 that sense, yes, I was.
20 Q. Did you attend all of the bargaining sessions?
21 A. All but one.
22 Q. And that one you missed was this past week?
23 A. I missed the first day -- it was actually unscheduled
24 until like a day or two before and I couldn't change my
25 schedule. So, I missed that Wednesday afternoon, took a red

1 eye and got home to be there on Thursday for Thursday's
2 session.
3 Q. The original 1114 proposal called for moving UMWA retirees
4 into a VEBA; is that correct?
5 A. Yes.
6 Q. We know that Coal Act retirees are not included in the
7 VEBA; correct?
8 A. Correct.
9 Q. Has Patriot been able to provide the union with
10 information as far as the number of employees that will
11 participate in the VEBA?
12 A. I believe so, yes.
13 Q. And do you know what that number is?
14 A. Not off the top of my head; no.
15 Q. During the course of negotiations, didn't an issue arise
16 with respect to --
17 (Telephonic Recording interruption)
18 THE COURT: Sorry about that. We tried to make that
19 go away and AT&T assured us they could not make it go away.
20 So, I apologize for that but we have been here a long time.
21 Q. During the course of negotiations, did the union become
22 concerned as far as who would participate in the VEBA?
23 A. Yes.
24 Q. And what was the union's concern?
25 A. I think they had a concern that there would be -- there

1 could be some retirees whose benefits were being funded by
2 Peabody that could wind up in the VEBA. And I think they were
3 concerned about exactly what would happen to active employees
4 who became retirees and whether they would be in the VEBA.
5 There may have been others but I think those were two I could
6 recall.
7 Q. Did the union make information requests along this -- to
8 determine the number of individuals who would participate in
9 the VEBA?
10 A. I think they did; yes.
11 Q. You said that Patriot had an idea of, as far as how many
12 people would participate in the VEBA. Even to date, does
13 Patriot know whether the Peabody assumed group will be -- will
14 participate in the VEBA or not -- I'm sorry, under the 1114
15 proposals that called for transitioning to a VEBA, did Patriot
16 know whether those Peabody assumed individuals, those 3,100
17 Peabody assumed individuals would participate in the VEBA?
18 A. I'm not sure I understand your question but I think I do.
19 I think the reason Patriot made the motion that it made that
20 was argued this morning was to try to clarify that and try to
21 ensure that those 3,100 people would not be included but
22 Patriot recognized that there was a legal issue involved in it,
23 as did the UMWA.
24 Q. And that legal issue is not yet resolved?
25 A. I think it's pending before the Court, as best I know.

1 Q. But isn't it a possibility that an additional -- while the
2 1114 proposals were pending up until this past Tuesday when the
3 VEBA was an issue or when the VEBA was a part of the 1114
4 proposal, there was no way to determine whether or not the
5 3,100 people would ultimately end up participating in the
6 proposed VEBA?
7 A. Well again, I think the parties recognize there was a
8 legal issue about that and they posited it to the Court and I
9 think the Court has got to decide that.
10 Q. I understand the Court has to decide that. Does Patriot
11 know how the Court's going to decide that?
12 A. I'm sure it doesn't. I know it hopes it does but I am
13 sure it --
14 Q. During the course of --
15 A. -- doesn't.
16 Q. During the course of --
17 MR. MOSKOWITZ: I apologize. I would just ask counsel
18 not to interrupt the witness when the witness is giving an
19 answer. I apologize.
20 Q. During the course of negotiations, did anther issue arise
21 with respect to whether or not Patriot was inadvertently paying
22 for retiree benefits for approximately 500 Peabody retirees for
23 whom it may not have an obligation?
24 A. Yes.
25 Q. Did the union request information related to that?

1 A. Yes, it did.
2 Q. Did Patriot investigate that matter?
3 A. It did.
4 Q. And what did Patriot determine?
5 A. Well, I am not certain everything that it determined
6 because I didn't participate too much in that. I know it
7 advised the union that it had contacted Peabody, maybe written
8 Peabody, advising Peabody that it thought that these people
9 were Peabody's responsibility. I know that communication was
10 had. I don't exactly know how.
11 Q. Do you know if Patriot is still paying for the healthcare
12 benefits for these approximately 500 retirees?
13 A. I do not know that.
14 Q. The original proposal called for a VEBA that would be
15 funded by an initial contribution, as well as profit sharing;
16 is that correct?
17 A. Correct.
18 Q. The second, third -- I'm sorry, the original proposal --
19 the second, third and fourth 1114 proposals also contemplated
20 an initial contribution and profit sharing; correct?
21 A. Yeah, I think they contemplated a quicker schedule of
22 contribution and a greater contribution and there was more
23 definition over time I think on the profit sharing. So each
24 proposal, I think, improved on the prior one but the two
25 funding components were like you said.

1 Q. By -- I'm sorry for interrupting. By greater --
2 A. Well, plus one other of course and that is the union's --
3 the value of the union's claim. So there really were three
4 funding components but the two you mentioned were included;
5 yes.
6 Q. You said there were increased contributions. You meant
7 only with -- you meant with respect to the initial
8 contribution; correct?
9 A. Yes.
10 Q. And the profit sharing -- and with respect to the profit
11 sharing, the aggregate annual caps were increased, as well
12 as -- the annual caps were increased, as well as the aggregate
13 caps?
14 A. I think that's correct; yes.
15 Q. During the course of negotiations, did Patriot -- was
16 Patriot able to identify the first year in which the union
17 would receive -- I'm sorry, the VEBA would receive
18 contributions pursuant to the profit sharing method?
19 A. I think so.
20 Q. And what year was that, if you recall?
21 A. I think it was 2000, it's either '15 or '16; I don't
22 remember exactly which.
23 Q. Was there any means by which the VEBA would have been
24 funded besides the initial contribution until the profit
25 sharing method kicked in?

1 A. Yes.
2 Q. And what was that?
3 A. A claim that the union would have that when monetized
4 could be used to fund the VEBA in addition to the employer's
5 contributions.
6 Q. Wasn't the monetization of the claim a frequent source of
7 information request from the union?
8 A. Well, issues pertaining to it were; yeah.
9 Q. And during the course of negotiations, did Patriot ever
10 provide the union with an estimated value of its claim for the
11 purposes of funding the VEBA?
12 A. It provided it with a lot of information about it but I
13 don't think that anybody was able to specifically quantify the
14 value of the claim, at least through that part of the
15 bargaining process.
16 Q. You said -- I'm sorry, you said through the bargaining
17 process. What -- I don't know what you mean by that.
18 A. Well, the bargaining process is still ongoing.
19 Q. So the claim has not been quantified -- so the entire
20 duration of time in which the 1114 proposal was pending, the
21 claim was not quantified?
22 A. I'm not aware that anybody's put a specific number on it.
23 I know that both parties have had -- that is both the union and
24 the company have had their financial advisors at bargaining
25 sessions and talking with each other and that they have come

1 together on some parameters of values but I don't know that
2 anybody has been able to finalize them in part because this
3 process is still ongoing, the one we're in right now.
4 Q. You also mentioned a monetization process; is that
5 correct?
6 A. That the union would have to monetize its claim and then
7 that money could be used to fund the VEBA; yes.
8 Q. Isn't it true that Patriot's third and fourth proposals
9 provided a detailed mechanism -- that Patriot's third and
10 fourth proposals purported to provide a detailed mechanism by
11 which Patriot and the union would cooperate to monetize the
12 claim?
13 A. Yes.
14 Q. And what is that detailed mechanism?
15 A. Well, I would have to go back and look. It's in -- it's
16 written out, paragraph by paragraph, yes, in the proposal but
17 it suggests a mechanism, a methodology that the parties could
18 use to try to try to put a value on the claim and monetize the
19 claim.
20 Q. I'm going to direct you to Exhibit 2 in the binder. It's
21 Exhibit 1 to your declaration. It's the fourth Section 1114
22 proposal and I'm looking at page 3.
23 A. Okay.
24 Q. If you could please take a look at paragraphs A, B and C.
25 Are these the paragraphs you're referring to when you said that

1 there was a process spelled out?
2 A. Yes, I think so. There may have been others but I do
3 recall those.
4 Q. Do you know if at any point while an 1114 proposal was --
5 while the VEBA proposal was pending, Patriot had considered
6 specific monetization opportunities along the lines of those
7 specified in paragraph B, such as the sale of the entire claim,
8 the sale of part of the claim?
9 MR. MOSKOWITZ: Before the witness answers, Your
10 Honor, let me just object to this line of questioning. I think
11 this line of questioning it's pretty clear, is really the
12 subject of the financial advisor's declaration. Mr. Robertson
13 is certainly the vehicle by which the proposal gets into
14 evidence. But in terms of substantive questions about it, I
15 think it would be far more productive to inquire about these
16 sorts of questions from the financial advisor. He certainly
17 doesn't go into this detail in his declaration which is his
18 direct testimony. So I think it's beyond the scope, as well.
19 THE COURT: All right. Ms. Geenen, do you have some
20 reason to believe that Mr. Robertson is the person to give us
21 this information or is it better served to be asked of the
22 financial people?
23 MS. GEENEN: The union's made a number of requests
24 related to the monetization process of the claim. I was only
25 looking at it in follow-up to his -- in so that he believed the

1 bargaining agreement had specifics. So, I was just inquiring
2 as to the detailed mechanism. But I can certainly focus on the
3 information request rather than what the bargaining agreement
4 says.
5 THE COURT: All right.
6 MR. MOSKOWITZ: Thank you, Your Honor.
7 THE COURT: Then I'll sustain the objection.
8 Q. Would the monetization of a claim be the only source of
9 funding then between the initial contribution and then the
10 profit sharing?
11 A. Under the proposal, I think that's what was contemplated;
12 yes.
13 Q. Do you recall if during the course of negotiations,
14 Patriot discussing -- do you recall if during the course of
15 negotiations there was a discussion as far as how long it would
16 take to monetize the claim?
17 A. Well there was -- yes, there was discussion about the
18 monetization process. I don't think anybody could pinpoint an
19 exact amount of time that it would take.
20 Q. And the amount of the claim had not yet been quantified;
21 correct?
22 A. Again, I don't think anybody could put a definite dollar
23 figure on it.
24 Q. Would it be correct to say that the subject of VEBA
25 funding came up during nearly ever meeting -- nearly ever

1 negotiating meeting?
2 A. Yes.
3 Q. At the time the 1114 -- at the time the debtors made their
4 application to the Court for relief pursuant to Sections 1113
5 and 14, were all of the -- are you aware that there were
6 information requests from the UMWA and its advisors relating to
7 the VEBA funding that remained outstanding?
8 A. I can't recall specifically. There -- the information
9 request process was ongoing throughout. The union and its
10 advisors made dozens and dozens of requests and there was an
11 ongoing process literally daily. So there may have been. I
12 don't know specifically though.
13 Q. Mr. Robertson, I would like to direct you to Joint Exhibit
14 69. It's declaration 68 to your exhibit -- I'm sorry, Exhibit
15 68 to your declaration.
16 A. Okay. This is -- it's a March 8, 2013 e-mail. I mean
17 that's the top doc; is that what you're looking at?
18 Q. I'm sorry, go to the next tab. It's tab 69. It's
19 declaration 68 to your declaration.
20 A. This appears to be a letter.
21 Q. What I am showing you is the letter from Mr. Hatfield --
22 I'm sorry, from UMWA President Roberts to Mr. Hatfield;
23 correct?
24 A. Right.
25 Q. If you would you flip to the last page, please.

1 A. Of the letter or there's a question -- list of four
2 questions.
3 Q. I'm looking at the questions.
4 A. Okay.
5 Q. Do you recall if -- questions 1113, 14 negotiations. In
6 that document, President Roberts raises issues such as the
7 fifteen million dollar initial contribution and the profit
8 sharing contributions. If you take a look at the other items,
9 do you recall if these matters were discussed in negotiations
10 after February 28th?
11 A. Yes, they were.
12 Q. PWC followed up with an information request that -- do you
13 know if -- I'm going to start over.
14 Do you know if those questions were answered for the
15 union?
16 A. I believe they were answered to the best of the company's
17 ability; yes.
18 Q. When you say to the best of the company's ability, what do
19 you mean?
20 A. Well, I mean as was the case with any information request,
21 this was basically an all hands on deck effort by the company
22 to gather the information, put it together and do it as quickly
23 as possible.
24 Q. A --
25 A. Obviously there were lots and lots of these, so all I

1 meant is the company did its level best to answer these as
2 quickly as it could.
3 Q. And I really hate to do this, but then I would direct your
4 attention to Exhibit 282. By I hate to do this, I mean with
5 respect to these binders. It's going to be in a different one.
6 A. Okay. This is an April 10th e-mail.
7 Q. Correct. From Adam Rosen to Mr. Joe Mizotti (ph.), is
8 that what you're seeing?
9 A. Yes.
10 Q. It you would please flip to the next page. Does this look
11 -- it's titled at the top, UMWA/PBC diligence request list.
12 I'm looking at page 1 of 2. Does this look like one of the
13 diligence requests that you've seen throughout the course of
14 compiling these information requests?
15 A. I've seen documents that look like this; yes.
16 Q. Okay. Do you recall the -- if you would look down at
17 number 6.
18 A. Okay. I can't quite tell which is -- I see 6 and then
19 they're like, it's sort of in the middle of several bullet
20 points but okay.
21 Q. Sure. Mine is gray scale in that -- if you look up -- and
22 it starts -- 6 starts with, "Please provide written responses."
23 A. Okay. The actual 6 on my document is not there. It's
24 further down but okay.
25 Q. If you take a look at those requests, please, are those

1 the same requests that were sought by President Roberts in his
2 February 28th letter?
3 A. I don't know that they're verbatim but they look pretty
4 close; yes.
5 Q. And the union reviewed these requests as open, according
6 to this diligence sheet as of April 15, 2013; isn't that right?
7 A. Yes, that's what the union's data request here says. I
8 mean, that's what its request list says.
9 Q. And the specific -- okay, thank you.
10 One of the requests you'll note, it's the fourth bullet
11 point if you're still there, is a request for an estimate of
12 the value of the reorganized entity. Do you know if Patriot
13 provided the union with an estimated value of the reorganized
14 entity?
15 A. Actually, I really don't. I think you would have to -- I
16 would probably defer that to the financial folks and any
17 discussions that they might have had with each other.
18 Q. During the course of negotiation over the 1114 proposal,
19 did Patriot ever specify -- was there ever -- I'm going to
20 start over.
21 At the time Patriot filed its application to reject the
22 bargaining agreements and modify the retiree obligations, it
23 had met over fifteen times -- it had met fifteen times with the
24 union or -- it had met a dozen times with the union; is that
25 right?

1 A. I think twelve or thirteen; yes.
2 Q. And it subsequently met a few additional times?
3 A. Yes.
4 Q. And the union had made eighteen information requests;
5 correct?
6 A. I think it's more than that, to be honest with you. In
7 fact, I think it's substantially more than that but I don't
8 honestly remember the total number.
9 Q. And the debtors had posted, by your account, tens of
10 thousands of documents into -- by Patriot's account, tens of
11 thousands of documents into the data room?
12 A. I think that's correct; yes.
13 Q. Can any of those documents or in any of those discussions,
14 has there been any document that can show with certainty the
15 number of participants who will be -- who would have been in
16 the VEBA as proposed?
17 A. Well, I mean I think Patriot has answered as best it can
18 the information request from the union as to who is eligible
19 and who isn't. There is obviously a pending question in front
20 of the Court as to 3,100 people and until that question is
21 answered, I guess the answer to your question is no, but
22 Patriot has given all the information it has to the union on
23 the identity of the folks, who they are and who they would be.
24 So save a ruling from the Court, then I think the parties know
25 who is included and who isn't.

1 I mean I would add one other thing and I don't mean to
2 make it more complicated but obviously there may be people who
3 are active who retire and so you don't know those, so that
4 could be but --
5 Q. Patriot's fifth 1114 proposal provided for a different
6 funding mechanism for the VEBA; is that correct?
7 A. Yes.
8 Q. It provided for direct equity stake in the reorganized
9 company?
10 A. Yes.
11 Q. Did the union make specific information requests related
12 to this proposal?
13 A. I believe they did; yes.
14 Q. Do you recall in your declaration stating that that
15 information would be provided at the April 25th meeting?
16 A. Certainly I know some of it would be, perhaps all of it;
17 yes.
18 Q. Is the April 25th meeting the meeting that you weren't
19 able to attend?
20 A. I think that was the Thursday meeting, I was able to
21 attend. Isn't that -- well, I know at the Thursday meeting I
22 did attend, there was a presentation by Blackstone that
23 responded to a lot of the information requests by PWC. I can't
24 tell you that it responded to every single bit of it but it
25 responded to a lot of it and, in fact, that was acknowledged

1 back and forth across the table between the union and the
2 company that that presentation did cover a lot of the
3 waterfront. But again, I don't know that it covered it all.
4 Q. On April 23rd, Patriot made its most recent 1113 proposal
5 to the union; is that correct?
6 A. I think that's correct. I think that's the right date.
7 Q. And that was the proposal that was discussed at the
8 negotiation sessions last Wednesday, Thursday and Friday?
9 A. Wednesday and Thursday.
10 Q. And the union wasn't provided the information to evaluate
11 that proposal until Thursday?
12 A. I don't recall whether they got any information before
13 Thursday. I know on Thursday, they got information concerning
14 the funding of the VEBA portion; in other words, the equity
15 stake portion. Of course, the company's outstanding proposal
16 was substantially more voluminous than that and most of that
17 had been on the table for months and months and months. But as
18 to that one part, which is an important part, but as to that
19 one part, most of the information as I recall that was provided
20 to the union was in the presentation by Blackstone on that
21 Thursday.
22 Q. The latest proposal provides that Patriot will not
23 withdraw from the 1974 Plan; is that correct?
24 A. Pending resolution of a couple of questions that has been
25 the subject of argument amongst counsel today; yes.

1 Q. Has there been discussion of potential factors that could
2 influence contribution rates after the current NBCWA increases
3 at the end of 2016?
4 A. There's been some discussion at the bargaining table. We
5 both, for the most part, listened to occasionally conversations
6 and discussions from Mr. Roberts about that. He's the union
7 president. I know you know that. I didn't know if the record
8 needed to know that. I'm sorry.
9 Q. I'm going to take a step back just quickly and I apologize
10 for doing so. With respect to the thirty-five percent stake
11 and the equity contribution, it was a thirty-five percent stake
12 in the reorganized company; is that correct?
13 A. I believe that's correct. I would have to tell you though
14 that any of the details as to how all that works, I would defer
15 to the financial and business folks. It's not really -- I
16 didn't really play much of a role in that.
17 Q. So if I would ask you thirty-five percent of the stake in
18 what or of what, you would say to defer to the financial
19 people?
20 A. I mean I think it is the reorganized company; yes. But
21 beyond that, if you want me to put more definition and meaning,
22 I am probably not the right person to ask. That's all I'm
23 saying.
24 Q. I will only take it one step further. Do you know what
25 the reorganized company is?

1 A. Well, it's the company that will merge out of bankruptcy,
2 I would presume.
3 Q. And during the course of negotiations, wasn't there
4 additionally an issue related to the business plan that was
5 provided to the UMWA's advisors?
6 A. The business plan -- an issue about the business plan?
7 Q. I'm sorry, the business model.
8 A. Well, I think what you're asking me about was the
9 functional business model.
10 Q. That's correct.
11 A. Yes.
12 Q. Patriot provided a functional model of the business plan;
13 isn't that correct?
14 A. Yes, it provided the business model that it had.
15 Q. Okay. Was -- are you aware of discussions in which PWC
16 advisors stated that they believed the model was limited?
17 A. I heard them make comments like that at the bargaining
18 table on occasion when they participated; yeah.
19 Q. In order for the advisors to truly understand the model as
20 Patriot used it, did you have to arrange a site visit for the
21 advisors to travel to St. Louis?
22 A. I believe that visit was arranged; yes.
23 Q. So the PWC advisors traveled to St. Louis to Patriot to
24 look at the model as Patriot uses it; is that correct?
25 A. Correct. In other words, Patriot made available to them

1 the functional business model which Patriot was using. It gave
2 them everything they had.
3 Q. And just to be clear, you're not aware of whether or not
4 the union has been provided with an estimated value of Patriot
5 for purpose of valuing the equity stake?
6 A. Well, I -- I don't know. Again, I would defer to the
7 financial folks on that because I know PWC and Blackstone have
8 talked frequently, even last -- late last week. I am not aware
9 that anybody has put a definitive figure on the value of the
10 company or the value of the claim. If they have between them,
11 and they may have, I am just not aware of it.
12 Q. Thank you, Mr. Robertson, I have no further questions.
13 A. Thanks.
14 THE COURT: Mr. Moskowitz, do you have some brief
15 redirect?
16 MR. MOSKOWITZ: Yes, Your Honor, and I will be brief,
17 at least relative to the opening statements.
18 THE WITNESS: Uh-oh, that could take a while.
19 MR. MOSKOWITZ: Don't you worry.
20 REDIRECT EXAMINATION
21 BY MR. MOSKOWITZ:
22 Q. Mr. Robertson, good afternoon.
23 A. Afternoon.
24 Q. Mr. Robertson, you were just asked a series of questions
25 by Ms. Geenen about how long it took Patriot to provide the

1 UMWA with proposals in connection with 1113 and 1114; do you
2 recall giving that testimony?
3 A. Yes.
4 Q. And you testified that it took approximately four months;
5 do you recall saying that?
6 A. Correct.
7 Q. Mr. Robertson, do you know why it took four months for
8 Patriot to provide the proposals to the union?
9 A. I think I do. The company worked about as hard as I think
10 you could work to do it. The problem was that both the coal
11 market and the demand for coal was in a downward spiral and
12 there was a lot of fluctuation during that time frame. And
13 thus, it's a sort of target as to what would work and what
14 wouldn't work was moving.
15 And in terms of trying to adjust to that moving target and
16 that downward spiral, both the business plan the company was
17 working on in terms of emergence from bankruptcy, as well as
18 trying to figure out what proposals would work or wouldn't work
19 and what was necessary, were all in a state of flux because of
20 those market factors.
21 Q. Mr. Robertson, you'll forgive me if I skip around to
22 various topics addressed by Ms. Geenen. Mr. Robertson, do you
23 recall being asked a series of questions about the information
24 sharing process that the debtors and the union engaged in?
25 A. Yes.

1 Q. And do you recall Ms. Geenen at least suggesting that
2 there was something incomplete or delayed about Patriot's
3 provision of information to the union?
4 A. Yes.
5 Q. Do you think that that is a reasonable criticism based on
6 your involvement in the process as set forth in your
7 declaration?
8 A. No, I mean honestly, I've been doing this for a long time.
9 I've been doing labor negotiations, not necessarily in 1113
10 context but I've been doing labor negotiations for a long time.
11 And like I said before and I think I said in my deposition, one
12 of the marching orders for us was when the request was made, we
13 had -- and the best phrase I know for it is an all hands on
14 deck effort.
15 After every bargaining session, we collected the data they
16 asked for and we assigned people to go work on it. After every
17 PWC request that was spread about, assignments were made to go
18 work on it and there were status reports and constantly sort of
19 trying to get that data collected and marshaled and put into
20 the data room as soon as we could. You know, there's a lot of
21 information request, a lot of information had to be dug up;
22 some from third-parties. But I will tell you, the effort to
23 get it done and to get it done as promptly as possible, I think
24 was absolutely, you know, as robust as it could be. It really
25 was.

1 Q. Mr. Robertson, do you recall Ms. Geenen asking you about
2 the paid time off element of Patriot's 1113 proposal and
3 suggesting to you that that remained constant in each of
4 Patriot's successive proposals?
5 A. Yes.
6 Q. Do you know whether there were other elements of Patriot's
7 1113 proposal that moved over time?
8 A. Yes.
9 Q. Can you --
10 A. You mean the proposal -- the proposal was -- it evolved
11 over time and there were efforts to try to react to concerns
12 that the union had and try to improve and react to those
13 concerns.
14 Q. Mr. Robertson, do you recall Ms. Geenen asking you a
15 question about the length of time, the term of Patriot's 1113
16 proposal?
17 A. Yes.
18 Q. Do you know whether the union's latest proposal includes a
19 term?
20 A. Yeah, I haven't had a chance to study it. I skimmed it
21 over a little bit last night. I think it has a 2018 expiration
22 date.
23 Q. And do you know whether that's the same or different than
24 the date of ending that Patriot's proposals reflect?
25 A. I think it's the same.

1 Q. Mr. Robertson, do you recall Ms. Geenen asking you some
2 questions about what we'll just call 500 retirees who the union
3 believes Peabody should be paying for?
4 A. Yes.
5 Q. And do you know if Peabody has agreed with the union's
6 suggestion that it should pay for the 500 -- for those 500
7 retirees, approximately?
8 A. I don't think that it has but I'm not dead certain of
9 that.
10 Q. Mr. Robertson, you were asked I think a series of
11 questions about information requests related to participants in
12 the VEBA; do you recall that?
13 A. Yes.
14 Q. Sitting here today, in light of what's in your
15 declaration, are you aware of any such request related to that
16 topic that remains outstanding --
17 A. No.
18 Q. -- from Patriot's perspective?
19 A. No.
20 Q. And a similar question, with respect to the claim, you
21 were asked a series of questions about information that was
22 sought with respect to the monetization of the union's claim;
23 do you recall those questions?
24 A. Yes.
25 Q. Do you know of any information about the claim that

1 Patriot has refused to turn over to the union over the course
2 of the last six months?
3 A. No, I think Patriot has responded with every bit of
4 information relating to that that it could. I think it's -- I
5 don't know of any information request outstanding on it.
6 Q. Now I think you testified that -- I'm trying to use your
7 words -- that Patriot could not quantify with a definite dollar
8 figure, the value of the claim that would be monetized or the
9 monetization value of the claim. Do you recall that testimony?
10 A. Yeah.
11 Q. Do you know though whether Patriot's advisors ever
12 expressed to the union's advisors that the claims should have a
13 substantial value, even if it could not be quantified with a
14 definite dollar figure?
15 A. Oh, I know that. That was said at the bargaining table
16 with the advisors there and I know Mr. Hatfield has said it to
17 Mr. Roberts at the bargaining table.
18 Q. Mr. Robertson, I would like you to turn to Exhibit 69
19 which is a letter that Ms. Geenen showed you during your cross-
20 examination.
21 A. Yes, I have it.
22 Q. I want to make sure I have it. Mr. Robertson, do you know
23 if Mr. Hatfield responded to the letter from Mr. Robertson --
24 I'm sorry, you're Mr. Robertson -- Mr. Roberts?
25 A. Yeah, I believe he did; yes.

1 Q. Can I ask you to turn to Exhibit 62, please -- Exhibit 72,
2 please?
3 A. Yes, this is a March 13th letter from Mr. Hatfield to Mr.
4 Roberts and it begins with, "This letter is written in response
5 to your letter dated February 28, 2013," which is the one we
6 were just looking at.
7 Q. And just briefly, based on this letter and on your
8 knowledge of the discussions at the time, do you know if Mr.
9 Hatfield agreed with all of the allegations set forth in Mr.
10 Roberts' letter?
11 A. He did not agree; no.
12 Q. I would like you now to turn to Exhibit 282 which Ms.
13 Geenen asked you about.
14 A. Okay.
15 Q. I will take a moment to get it myself. Thank you.
16 Mr. Robertson, whose status report is this?
17 A. I think it's PWC's status report.
18 Q. And do you know whether Patriot agreed with every single
19 one of the entries on this status report?
20 A. I don't think that they did. Specifically, I don't think
21 they did on number 6.
22 Q. And that's one of the elements that Ms. Geenen asked you
23 about; is that right?
24 A. Right.
25 Q. Do you know if Patriot -- can you tell me what the date

1 is of this PWC status report? And I would direct your
2 attention to the page before.
3 A. Yeah, the e-mail is dated April 10, 2013. So I would
4 assume, but don't actually know that the status report is of
5 the same date.
6 Q. And assuming that it is of the same date, that's about
7 nineteen --
8 A. Well, I would take that back. It says attached please
9 find current status update, so I would assume this is PWC's
10 report as of April 10; yeah.
11 Q. And that's about nineteen days ago; is that right?
12 A. Yes.
13 Q. Do you know if there have been discussions between PWC and
14 Blackstone in the last nineteen days concerning some of the
15 questions raised in this status report?
16 A. I'm aware that there have been both at the bargaining
17 table and over the phone and in their offices, although I
18 wasn't privy to any of the specifics.
19 Q. Mr. Robertson, let me turn your attention to paragraph 37
20 of your declaration.
21 A. What is it --
22 Q. This actually would be your reply declaration.
23 A. I'm sorry, do you know what number that is?
24 Q. I'll have to get right back to you on that. I believe
25 it's 73.

1 A. Okay.
2 Q. Can I ask you to take a moment just to review that just
3 briefly or at least skim that, so that you understand the
4 context for the questions I'm about to ask you.
5 A. This is paragraph 37?
6 Q. Correct and the bullet points that succeed it.
7 A. Okay.
8 (Pause)
9 A. Okay.
10 Q. Do you know whether -- and do you know whether this is, in
11 fact, the eighteenth request -- I would say set of requests
12 that PWC tendered to the debtors in the course of negotiations?
13 A. Yeah, I think that's right. On my -- when the question
14 was asked to me earlier, I know that the total volume of
15 information requests, one by one, had been a lot more than
16 eighteen as a set. I think this is correct.
17 Q. And looking at these particular questions, do you see that
18 they relate to the -- at least in part to the equity stake
19 that's set forth in Patriot's most recent 1113 -- 1114
20 proposal?
21 A. Yes.
22 Q. And are these the questions that were then addressed and
23 discussed that you mentioned in your testimony before at the
24 Blackstone, PWC, Patriot, UMWA meetings that occurred in
25 Triangle, Virginia, which you attended last Thursday?

1 A. Yes, I am not sure I can tell you that each and every one
2 of these bullet points was included but I can see in looking at
3 the subject matters of them, that a lot of them were; yes.
4 Q. And that meeting occurred how many days after PWC issued
5 this list of -- one, two, three, four, five, six, seven, eight,
6 nine, ten -- eleven requests?
7 A. Seven.
8 Q. Thank you.
9 MR. MOSKOWITZ: Subject to any recross, I have nothing
10 further.
11 THE COURT: All right. Thank you. Ms. Geenen, did
12 you have anything else briefly for this witness?
13 RECROSS-EXAMINATION
14 BY MS. GEENEN:
15 Q. Mr. Robertson, Mr. Moskowitz just asked you a little bit
16 about the union's latest counter proposal. And there was a
17 discussion that the proposal went through 2018; is that
18 correct?
19 A. Yes.
20 Q. Isn't it true that the proposal contains a wage re-opener
21 provision at the end of 2016?
22 A. I think it does; yes.
23 Q. That's all I have for you.
24 THE COURT: All right. Mr. Moskowitz, anything else?
25 MR. MOSKOWITZ: Nothing further. Thank you, Your

1 Honor.
2 THE COURT: All right. Mr. Robertson, you may step
3 down. Thank you.
4 All right. It's about five after 6:00. Maybe we
5 ought to wrap up for the day. I had some high aspirations
6 about staying here a little longer but it's been a long day.
7 All right. Before we recess for the evening, Mr.
8 Moskowitz is -- Ms. Magnus, I can't read your handwriting, I
9 know that's Lucha or --
10 MS. MAGNUS: Huffard.
11 THE COURT: -- oh, are Huffard. Are they going to be
12 your first witness tomorrow morning, one of those two?
13 MR. MOSKOWITZ: Yes, and I think we would propose to
14 take up Mr. Huffard first and then actually if we did that, we
15 would probably move Mr. Lucia till later. If we had to track
16 it out right now, I think that our -- I think we're going to do
17 Mr. Huffard first, then Mr. Terry, then Mr. Schwartz, then Mr.
18 Lucha and it will be pretty impressive if we were able to
19 accomplish that all tomorrow. Maybe that should be our goal.
20 And then Mr. Hatfield -- I'm always setting high goals -- then
21 Mr. Hatfield would go on Wednesday -- on Wednesday morning and
22 then we would pass the podium to the union sometime in the
23 middle of the day on Wednesday.
24 THE COURT: Okay. Do you want to talk about that now?
25 And Mr. Moskowitz, it's my understanding Mr. Huffard's going to

1 discus some confidential information.
2 MR. MOSKOWITZ: Yes, Your Honor. Here is what we have
3 agreed upon among the parties and we would present that to the
4 Court for approval. Given that the testimony of both Mr.
5 Huffard and Mr. Mandarino (ph.), particularly more than any
6 other witnesses would tread on information that has been placed
7 under seal, sensitive, confidential information, it is our
8 proposal that for those two witnesses alone and no one else,
9 that that information go in under seal and thus, the courtroom
10 would be cleared, other than parties who have signed a
11 confidentiality agreement with the debtors and there are
12 plenty of those.
13 So we would propose to limit the participation in the
14 courtroom of those witnesses only to those parties. We could
15 have tried to do that for other witnesses but we figured that
16 it would just be impractical, and so we're doing our best with
17 the questioning to tread on public information but I think this
18 is a reasonable compromise between the union and the company.
19 And I know that the union is in agreement with that.
20 MR. PERILLO: The only portion of that that I am
21 uncertain about, Your Honor, is I made an observation to the
22 debtors that in our confidentiality agreement we had a carve-
23 out for confidential information that we could reveal to our
24 members. And the debtors were going to tell me whether they
25 thought it was critical to clear the members from the

1 courtroom, too or not and I don't think they ever replied to me
2 on that but in fairness, we've been a little busy.
3 THE COURT: Just a little.
4 MR. PERILLO: And so, I guess I would ask the debtors
5 to tell me that now, seeming like it's a pertinent time.
6 MR. MOSKOWITZ: I'll be happy to and you're quite
7 right, Mr. Perillo. The provision of the confidentiality
8 agreement that Mr. Perillo was talking about is a provision
9 that allows the union to keep its members apprised of the
10 details of the negotiations and that's something that's a
11 reasonable request in that context because, of course, its
12 members want to know exactly what's going on behind closed
13 doors, because they have obviously a tremendous interest in the
14 outcome of that.
15 That's very, very different than the need for a debtor
16 to keep wholesale hours and hours of testimony where
17 confidential information is going to be discussed under seal.
18 And so, we would respectfully suggest that for purposes of the
19 testimony of Mr. Mandarino and Mr. Huffard that the courtroom
20 be cleared of the members, as well. There are frankly many
21 members attending these proceedings which is of course their
22 right and we honor that. But just for these two witnesses, we
23 think it would be best to safeguard confidential information if
24 they were not in the courtroom because otherwise if you have
25 dozens and dozens and dozens of parties privy to confidential

1 information, it becomes very difficult to safeguard.
2 THE COURT: Correct, it's not confidential anymore.
3 Mr. Perillo, does that answer your question?
4 MR. PERILLO: Your Honor, I'll accept the Court's
5 ruling on that if you choose to exclude the members from the
6 testimony of those two witnesses. I prefer that we move on and
7 complete the trial than dwell on it.
8 THE COURT: All right. That would be my ruling then
9 that we'll clear the courtroom of everybody except for parties
10 that have signed the confidentiality agreement. And likewise,
11 I'll clear the phone line, as well. I have spoken with the
12 clerk's office staff. They will cut the feed off downstairs.
13 They will likewise cut the feed off to the attorney conference
14 rooms and cut the feed off to, there is a listening room on the
15 fourth floor in the clerk's office, as well, just in an
16 abundance of caution.
17 And then at some point we'll figure out what we're
18 going to do about the transcript. It will be recorded and
19 transcribed. And as you know, you all request a copy of the
20 transcript but we'll figure that out when that becomes an
21 issue.
22 MR. MOSKOWITZ: Thank you, Your Honor.
23 THE COURT: All right. Then one other question, do we
24 want to start at 9 o'clock tomorrow?
25 MR. MOSKOWITZ: We'd be happy to and think that that's

1 actually advisable.

2 THE COURT: Mr. Perillo?

3 MR. PERILLO: We're ready with four witnesses; I think

4 9:00 is a fine time.

5 THE COURT: All right. I'll commit to -- I'm here.

6 I'll commit to be ready to go at 9 o'clock.

7 MR. HO: Your Honor, there is one other issue.

8 THE COURT: To the podium, please.

9 MR. HO: -- which is that if you look at Exhibit

10 binder, it's the Huffard declaration, the reply Huffard

11 declaration are both redacted, which makes cross-examination

12 impossible and that was never agreed to by the union. And

13 also, Exhibit 275 which is the five-year plan was never put

14 into the binder. We will request that the unredacted versions

15 of those declarations, as well as Exhibit 275 be put into the

16 binder and to permit cross-examination.

17 THE COURT: Mr. Moskowitz?

18 MR. MOSKOWITZ: The answer is, of course, that was a

19 mistake and so it's being correct.

20 THE COURT: All right. All right. Then we'll have --

21 MR. HO: so by tomorrow morning, we're going to have

22 unredacted versions; yes.

23 MR. MOSKOWITZ: How about in five minutes?

24 MR. HO: Okay.

25 MR. MOSKOWITZ: Or an hour.

1 THE COURT: All right. You all have -- because we
2 have copies of them as well. All right. Then is there
3 anything else then before we adjourn?
4 MR. MOSKOWITZ: Nothing from the debtors, Your Honor.
5 Thank you.
6 THE COURT: All right. Mr. Perillo, anything else for
7 the union?
8 MR. PERILLO: Nothing here, Your Honor.
9 THE COURT: All right. Any of the other parties,
10 rather than me do the round robin and we could be here another
11 twenty minutes? All right.
12 Then hearing nothing else, we'll be in recess until
13 tomorrow morning at 9:00 a.m. Thank you.
14 (Whereupon these proceedings were concluded at 6:11 PM)
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4 I, Esther Accardi, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

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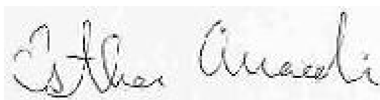

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UNITED STATES BANKRUPTCY COURT
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Fourth Floor
St. Louis, MO 63102

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12–51502 –A659

CHAPTER 11

Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction

To: All Persons of Record at Hearing

A transcript of the proceeding held on April 29, 2013 was filed on May 2, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: May 9, 2013. Personal data identifiers include: **social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice:May 23, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no Statement of Transcript Redactions is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: June 3, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: July 31, 2013, unless extended by court order. However, during this 90–day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244–4801.

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 5/2/13

Copies Mailed To:
Brian C. Walsh, Bryan Cave LLP, 211 N Broadway Suite 3600, St. Louis, MO. 63102
Rev. 12/10