

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

In re: )  
) Chapter 11  
PATRIOT COAL CORPORATION, *et al.*, ) Case No. 12-51502-659  
) (Jointly Administered)  
)  
Debtors. ) Objection Deadline:  
) July 16, 2013  
)  
)  
) July 23, 2013 at 10:00 a.m.  
)  
) Hearing Location  
) Courtroom 7 North

**UNITED STATES TRUSTEE’S OBJECTION TO THE MOTION OF THE DEBTORS  
FOR AN ORDER AUTHORIZING AND APPROVING THE PAYMENT OF FEES AND  
REIMBURSEMENT OF EXPENSES OF POTENTIAL RIGHTS OFFERING  
BACKSTOP PARTIES**

Comes Now the United States Trustee for the Eastern District of Missouri (the "U.S. Trustee")<sup>1</sup>, by attorney Leonora Long, and objects to the Motion of the Debtors for an Order Authoring and Approving the Payment of Fees and Reimbursement of Expenses of Potential Rights Offering Backstop Parties and avers as follows:

1. This Court has jurisdiction to hear this Objection.
2. Pursuant to 28 U.S.C. § 586, the United States Trustee is charged with overseeing the administration of cases filed in this judicial district. This duty is part of the United States Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-296 (3d Cir. 1994) (noting that the U.S. Trustee has “public interest standing” under 11 U.S.C. Section 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498,500 (6<sup>th</sup> Cir. 1990) (describing the United States Trustee as a “watchdog”).

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<sup>1</sup> “The United States Trustee for Region 13, Nancy J. Gargula, has voluntarily recused herself from further participation in this matter out of an abundance of caution. Prior to the transfer of the case to the Eastern District of Missouri, the debtors retained Ernst & Young to perform services relating to the debtors’ bankruptcy case. The United States Trustee’s spouse is employed by Ernst & Young on matters unrelated to the debtors and unrelated to any work being conducted for the debtors. The matter is proceeding under the direction of Paul Randolph, Assistant United States Trustee for the Region 13 St. Louis Office of U.S. Trustee.”

3. In furtherance of the United States Trustee case supervisory responsibilities, as well as pursuant to 11 U.S.C. § 307, the United States Trustee has standing to raise and be heard on this Objection.

4. The Debtors filed these jointly administered cases in the Southern District of New York on July 9, 2012. On December 19, 2012, the cases were transferred to the Bankruptcy Court for the Eastern District of Missouri. No plan of reorganization has been filed in the case and all debtors remain as debtors in possession of their property.

5. In June 2013, the Debtors filed a Joint Motion for An Order Authorizing and Approving the Payment of Fees and Reimbursement of Expenses of Potential Rights Offering Backstop Parties (hereinafter referred to as “the Motion”) under 11 U.S.C. §363(b)(1). This section of the Bankruptcy Code allows a Chapter 11 debtor in possession of its property to “use, sell, or lease, other than in the ordinary course of business, property of the estate” after a notice and hearing. 11 U.S.C. §363(b) (1).

6. In the Motion, Debtors request authority to pay the legal fees and expenses of Knighthead Capital Management, LLC (“Knighthead”) and Aurelius Capital Management, LP (“Aurelius”), which are negotiating a potential investment in the debtors under a plan of reorganization. Knighthead and Aurelius are creditors of the debtors and have averred to this Court that they hold a significant portion of the debtors’ 8.25% Senior Notes due in 2018.

7. The Motion seeks to pay the unlimited legal fees of these potential sources of emergence funding before those potential sources commit to anything.

8. The Motion, if granted, would require the debtors to pay the unlimited legal fees of Knighthead and Aurelius though they are able to abandon negotiations at any time.

9. Although the debtors provide a string of cases and docket numbers for cases to support the conclusion in the Motion that it is common practice to pay the fees of backstop parties, it does not seem reasonable to do so before they actually backstop a deal or transaction. Indeed, all the cases appear to be ones where the deals were consummated.

10. The Third Circuit case of *In re O’Brien Environmental Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999) provides an analysis of circumstances within which fees and expenses relating to a significant deal in a case are appropriate. The Court concluded there was no justification for treating the request for a break-up fees differently from any other request for administrative expenses. The “allowability of the ...fees...depends upon the requesting party’s ability to show that the fees were actually necessary to preserve the value of the estate”. *In re O’Brien*, at 535. In the matter now before this Court, the record is clear that Knighthead and Aurelius are significant creditors in these cases. It is not clear that in addition to the strong financial

incentives of their role as a creditors, additional fees must be paid to motivate them to negotiate this matter.

11. Debtors are at a challenging time, financially. Adding the burden of paying unlimited legal fees for creditors without establishing the reasonableness and necessity for such fees or requiring a commitment to the deal is improper. This Court should draw from the analysis made by the Chief Judge James J. Barta of this Court in analyzing break-up fees in bankruptcy. As Judge Barta wrote in *In re President Casinos, Inc.*, 314 B.R. 786 (Bankr. E.D. MO 2004): “While not disregarding the importance of debtor’s business judgment, the applicable law in this Circuit requires that the determination of whether break-up fees or expenses are allowable as administrative expense in a bankruptcy case will be made in reference to general administrative expense jurisprudence”. *President Casino, Inc. at 789 (citing Tama Beef Packing, Inc. (AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C.) 290 B.R.90, 96 (8<sup>th</sup> Cir.B.A.P. 2003.)*)

12. General administrative expense jurisprudence requires more careful attention be given to this request to pay an extraordinary expense. The U.S. Trustee asserts that no fees or expenses should be allowed to be paid unless a deal is made between the parties. If this Court allows the fees be paid after a deal is set, then a cap on the amount of fees or a budget of the amount of fees to be allowed each month would provide a solid financial basis for these debtors to anticipate the expense. Without these limits, the debtors are subject to the unchecked, unlimited amounts billed by counsel over which the debtor has no control.

13. In addition to a cap or a budget, the Court should not consider approval of the payment of fees and expenses until after a plan of reorganization is approved by the Court and after this Court determines the fees and expenses of Knighthead and Aurelius’ counsel are in fact reasonable and actual and necessary costs of preserving this estate.

14. Prudence also requires a process for the disclosure, review and Court approval of these expenses. Such a review process is an important aspect of protecting the estate from unnecessary, unreasonable charges.

WHEREFORE, based upon the foregoing, the United States Trustee requests this Court deny the Motion without prejudice until such time as an agreement is reached requiring Knighthead and Aurelius to commit to a deal with the debtors. Even after a deal is agreed to, the Motion should only be allowed of fees and expenses are capped or subject to a budget and the process provides for disclosure of the amounts and a review process and Court approval.

ST. LOUIS OFFICE OF U.S. TRUSTEE, REGION 13  
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### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically mailed by the U. S. Bankruptcy Court, Eastern District of Missouri to those names listed below and / or by first class mail postage prepaid this 15<sup>th</sup> day of July, 2013, to the following:

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