UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI

- -x

In the Matter of:

PATRIOT COAL CORPORATION, et al.,	Case No.
Debtors.	12-51502

- -x

PATRIOT COAL CORPORATION,	
Plaintiffs,	
- against -	Adv. Proc. No.
PEABODY HOLDING COMPANY, LLC,	13-04067
Defendants.	

- -x

United States Bankruptcy Court

111 South 10th Street, 4th Floor

St. Louis, Missouri

April 29, 2013

8:40 AM

B E F O R E:

HON. KATHY A. SURRATT-STATES

U.S. BANKRUPTCY JUDGE

Motion for Summary Judgment by Plaintiffs (6)

Motion to Dismiss Adversary Proceeding by Defendants (11)

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P R O C E E D I N G S

THE CLERK: Please rise. Your Honor, we are back on the record.

THE COURT: All right, thank you. Be seated please.

All right. So these are the matters that are set in the Patriot case this morning, the motion for summary judgment and the motion to reject collective bargaining agreements and modify the retirement benefits.

Before we get started with the matters on the docket let me get appearances in the courtroom first, please.

Mr. Moskowitz, I bet they want you to go first.

MR. KAMINETZKY: Good morning, Your Honor, Benjamin Kaminetzky of Davis Polk for the debtors. I'm here with my colleagues Elliott Moskowitz, Jonathan Martin; Marshall Huebner is also in the courtroom, as well as some others from Davis Polk. We also have local counsel from Bryan Cave, Lloyd Palans. Thank you.

THE COURT: Thank you.

MR. WILLARD: Good morning, Your Honor. May it please the Court, Greg Willard and Angie Schisler on behalf of the official unsecured creditors' committee, the members of which are Wilmington Trust Company as indenture trustee, US Bank National Association as indenture trustee, the United Mine Workers of America, the United Mine Workers of America 1974 Pension Plan, and American Electric Power.

Also in the courtroom with us today, Your Honor, is Mr. Tom Mayer, and I'd like to introduce for his first appearance, our co-counsel, Mr. Stephen Blank.

THE COURT: All right.

MR. WILLARD: Thanks, Judge.

THE COURT: Thank you.

MR. TURNER: Good morning, Your Honor.

THE COURT: Good morning.

MR. TURNER: Marshall Turner on behalf of Citibank as agent for the first out DIP lenders. Also in the courtroom is Joe Smolinsky, lead counsel from Weil, Gotshal & Manges.

MR. SMOLINSKY: Good morning, Your Honor.

THE COURT: Good morning.

MS. TOLEDO: Good morning, Your Honor. Laura Toledo of Lathrop & Gage on behalf of Bank of America as a second out DIP agent. With me in the court is Ana Alfonso of Willkie Farr & Gallagher, lead counsel. And appearing by telephone is Margot Schonholtz, also of Willkie Farr.

THE COURT: All right, good morning.

MR. PERILLO: Good morning, Your Honor. Fred Perillo on behalf of the United Mine Workers of America. I have with me in the courtroom today Mr. Yingtao Ho, my partner. Joining us later will be my colleague Sara Geenen. And also with me in the courtroom today is the general counsel of the United Mine Workers of America, Mr. Grant Crandall.

THE COURT: Good morning.

MR. PERILLO: Thank you.

THE COURT: Thank you.

MR. COUSINS: Good morning. Always an honor to appear before Your Honor. Steven Cousins of Armstrong Teasdale representing Peabody Energy Corporation. I'm here today joined by our co-counsel Jones Day, and from Jones Day we've got Mr. Jack Newman who will be handling the adversary proceeding, together with Mr. Robert Hamilton, and also Mr. Carl Black and Mr. Brad Ayers. Thank you, Your Honor.

THE COURT: Thank you.

MS. LONG: Good morning, Your Honor. Leonora Long on behalf of the United States Trustee.

THE COURT: Good morning.

MR. GOODCHILD: Good morning, Your Honor. John Goodchild, the law firm of Morgan Lewis & Bockius. I'm here on behalf of the UMWA health and retirement funds. I have a number of colleagues and co-counsel with me down in the overflow room, along with a number of beneficiaries of the funds. And with Your Honor's permission we'll simply move locations when Your Honor moves to the 1113/1114 proceeding.

THE COURT: All right, that will be fine.

MR. GOODCHILD: Very well. Thank you, Your Honor.

THE COURT: Thank you and good morning.

MR. SCHNABEL: Good morning, Your Honor. Eric Lopez

Schnabel of Dorsey & Whitney on behalf of U.S. Bank as trustee to the convertible notes.

THE COURT: Good morning.

MR. SCHNABEL: Thank you, Judge. Good morning.

THE COURT: Thank you.

MR. MARSICO: Good morning, Judge. Leonard Marsico, McGuireWoods. With me is Bonnie Clair on behalf of Ohio Valley Coal Company and Ohio Valley Transloading Company.

THE COURT: Good morning.

MS. CLAIR: Good morning, Judge.

MR. SILVERSTEIN: Good morning, Your Honor. Paul Silverstein and Jonathan Levine, Andrews Kurth, for Wilmington Trust Company, indenture trustee for the senior notes. Thank you.

THE COURT: Good morning.

MR. ROBBINS: Good morning, Your Honor. I'm Larry Robbins from Robbins, Russell, for the noteholders, Aurelius and Knighthead. I'm joined by my partner Alan Strasser. Good morning.

THE COURT: Good morning.

MR. EARLY: Good morning, Your Honor. Blaine Early from Stites & Harbinson on behalf of five of the surety companies; Argonaut Insurance, Indemnity National, Travelers Casualty and Surety Company, U.S. Specialty and Westchester Fire. And on the phone is my partner, Brian Meldrum.

THE COURT: All right, good morning.

MR. EARLY: Thank you, Your Honor.

MR. DOYLE: Good morning, Your Honor. Dan Doyle, Lathrop & Gage for Caterpillar Financial Services Corporation and Caterpillar Global Mining Entities.

THE COURT: Good morning. All right, let me get roll on the phone. We have Ms. McGreal on behalf of the debtors.

MS. MCGREAL: Good morning, Your Honor.

THE COURT: Good morning. We have Anu Yerramelli on behalf of the creditors' committee. Ms. Yerramelli.

MR. WILLARD: Your Honor, she may have that on mute; Ms. Yerramelli is a colleague of mine and she did previously indicate her presence, Your Honor.

THE COURT: All right, thank you. Ms. Schonholtz on behalf of Bank of America.

MS. SCHONHOLTZ: Good morning, Your Honor.

THE COURT: Good morning. And Theresa Anderson on behalf of the Pension Benefits Guaranty Corporation. Ms. Anderson?

THE CLERK: She indicated she was running late this morning.

THE COURT: All right. And Brian Meldrum on behalf of Argonaut Insurance and the other sureties.

MR. MELDRUM: Yes, Your Honor. Good morning.

THE COURT: Good morning.

THE COURT: All right.

All right. I will make my brief administrative comments. I will remind the participants on the phone to place their phones on mute except when speaking.

I would, again, like to acknowledge that I have received to date over 875 letters that I have read and placed on the record as correspondence. As those letters continue to arrive I will continue to read them and place them on the record. I thank all of those who have taken the time to address the Court and to share their thoughts.

Again, I'll remind everybody about appearances in the courtroom, all parties that have entered their appearance in the case are welcome to appear in person in court or request to appear by telephone in all court hearings. Again, when you are provided with the call-in information as noted on the e-mail, you are not to share that information with anyone else, and if it comes to my attention that the call-in information is being shared with other parties that have not been approved and authorized to appear by telephone, all appearances by telephone will be discontinued.

As was mentioned earlier, there is the overflow courtroom is open on 5 South; therefore, the lawyers need to make sure you're at the podium, not only so we get an accurate recording, but also so that you can be seen on the video feed that is in 5 South. And also, in addition to the court, the

attorney conference rooms on either side of my courtroom, also the attorney conference rooms on the other side of the hallway for 7 South are also open and available if needed. All right.

All right. Let's talk about what our agenda for today will be. As we discussed last week at the pre-trial before the hearing on the Section 1113 and 1114 motion, I will call adversary 13-4067, Patriot Coal Corporation v. Peabody Holding Company, first.

I imagine that after that matter I will then hear the opening statements of all the parties, except the debtors, the UMWA and the funds. After we've had all of the other parties opening statements, we'll take a lunch break and then we will return to hear the opening statements of the debtors, the UMWA and the funds, and then I imagine that we will have cross and redirect of at least one of the debtors' witnesses before breaking for the day.

Pursuant to my previous order that was entered on April the 5th, 2013 ten minutes will be allotted for the opening statements of the parties, other than the debtors, the UMWA and the funds, and we will keep that time in the courtroom. Thereafter, I will leave it to the debtors, the UMWA and the funds to manage their times for your presentations knowing what our schedule is and that we will wrap this all up by Friday.

All right. Therefore, I will call in the adversary

proceeding the debtors' motion for summary judgment and Peabody's motion to dismiss simultaneously. I have reviewed the motion for summary judgment, the memorandum of law in support, as well as the statement of undisputed facts, Peabody's motion to dismiss the adversary, the declaration of Matthew Cochran, and Peabody's statement of undisputed factors.

The debtors seek a declaratory judgment that liability for certain health benefits, for approximately 3,100 retirees lies with Peabody and not with the debtors, and thus those retirees should be excluded from the 1114 motion before the Court. Resolution of this issue is based on the Court's interpretation of the assumption agreement, particularly Sections 1 and 2 and the acknowledgement and assent.

Peabody argues in its motion to dismiss that this Court lacks subject matter jurisdiction because the complaint does not constitute and actual controversy and that the issues raised are not ripe.

In light of my review of the pleadings, I will first call upon the debtors to make their arguments, both in support of the motion for summary judgment and in opposition to the motion to dismiss. I won't time either side's arguments, but let's try not to go over about thirty to forty minutes each, including rebuttal.

MR. MARTIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. MARTIN: For the record, Jonathan Martin from Davis Polk & Wardwell for the plaintiff-debtors.

It's clear, Your Honor, that you have absorbed the papers, so I will try to get at this from a different perspective today, because there are a million different ways to look at this and conclude that what Peabody is doing is wrong: legally wrong, and just plain wrong.

This motion is about Peabody's attempt to break its promise to provide retiree healthcare benefits to 3,100 of its retirees and their dependents. This is Peabody's attempt to free-ride on Patriot's bankruptcy to escape obligations that it owes to its retirees.

Now, as the Court is well aware, we are about to start a week here where Patriot will demonstrate that it is unable to pay for the retiree healthcare benefits of its own retirees. There should be no mistake, Your Honor, Patriot is here reluctantly and by absolute necessity without anywhere else to turn. Peabody is here by choice.

Patriot's objective is to save this company and preserve 4,000 jobs. Peabody's motive is pure unadulterated greed. Patriot is here after complying with the requirements of Section 1114 of the Bankruptcy Code.

After months of good-faith negotiations with the union, after sharing reams of data showing this company's dire financial condition, and after coming to this Court to prove

that Patriot needs the savings it is requesting in order to survive and save thousands of jobs. Peabody is here to take a flier on the flimsiest of contractual arguments. They want to take away these peoples' retiree healthcare benefits, not because they need to, but because they want to, and because they have half-baked theories for why they can.

This motion tells us everything we need to know about who Peabody is as a corporate citizen. This motion concerns thousands of people who worked their entire lives for Peabody. All of them retired before December 31, 2006, before Patriot was even born, before it was a twinkle in Peabody's eye. All of those people are currently receiving their healthcare benefits pursuant to Article 20 of the CBA; that's the provision that governs retiree healthcare. And there is no dispute -- no room for debate, I'll put it that way, that these benefits are Peabody's liability.

In 2007 in connection with the spinoff, Peabody promised the union and it promised Patriot it would assume the liability for the retiree benefits to these 3,100 people. Peabody has been paying those benefits and it could continue to pay those benefits; it can afford it.

Most importantly, Your Honor, Patriot can survive without modifying these people's retiree healthcare benefits, but only if Peabody, the largest and richest private sector coal company in the world, is made to stand behind its word.

And that's why we're here, we need the Court's assistance to make Peabody stand behind its word to provide the retiree healthcare to these 3,100 people.

Patriot Section 1113 and 1114 proposals, if approved by the Court, will not change the CBA as it applies to these 3,100 people. Patriot doesn't want to and it doesn't need to touch these people's healthcare benefits. The benefits are Peabody's liability, not Heritage's liability, not Patriot's liability. And for these 3,100 people, Patriot wants to keep the status quo. There is no earthly reason why these people should lose their healthcare benefits.

The only reason these 3,100 people would have to be included in the request for relief that Patriot is going to be making as part of this trial is if Peabody refuses to stand behind its obligations, because if those benefits come back to Patriot, Patriot cannot afford them. And that's why this issue is a gating issue for this trial that's about to start. It will decide the scope of the relief that Patriot is required to seek from this Court.

To be honest, Your Honor, we were surprised that we even had to bring this action. It's, frankly, very surprising that Peabody could even take the position that its obligations to its retirees could be excused because of Patriot's bankruptcy. But they've refused to give us comfort that they will stand behind their obligations, so we were forced to bring

this action, and forced to bring this motion for summary judgment on the plain and unambiguous contract.

And now we've seen their arguments for why the liabilities assumption agreement supposedly allows them to take healthcare benefits away from these 3,100 Peabody retirees. They make two arguments.

The first, they claim the first time ever that these benefits are Heritage's liabilities, not theirs.

Second, conceding that argument, they say even if they are our liabilities those benefits for the 3,100 Peabody retirees should be modified in the same way that the benefits for Patriot's retirees get modified as a result of this Section 1114 trial that's about to commence.

Your Honor, those arguments are a disgrace. They are so obviously wrong on the law, and so manifestly deplorable that you have to wonder why Peabody is even making them.

First on the law, we'll see, Your Honor, that these arguments are legally indefensible; they defy the plain language of the contract. But second, Your Honor, as a matter of common decency, these arguments are shocking. The arguments are unthinkably wrong as a matter of law and as a matter of fairness, and the arguments never should have been made in the first place.

So we'll talk about why. And I'll preface this by saying that the legal reasons why Peabody's position fails are

straightforward and, frankly, ho-hum. This is Contracts 101 stuff. So you don't have to be as offended as we are to grant summary judgment here, you just have to read the plain English words on the face of the contract.

So I'll begin with Peabody's first argument, which is that the 31 -- the benefits for these 3,100 Peabody retirees are Heritage's liability. Now, they say they just fund Heritage's liability for these benefits and nothing more. Your Honor, that argument is a nonstarter on the face of the contract. You can't get past the title of the contract without concluding that that argument is wrong.

Before looking at it, just a brief minute on the relevant history here. As the Court knows, in October of 2007 Patriot was spun off from Peabody. One of the subsidiaries that was spun off was Heritage Coal Company; it was at that time Peabody Coal Company. So I'll refer to it today as Heritage, but in the contracts that we look at it's referred to as PCC.

Now, in that spinoff Peabody saddled Patriot with a lot of liabilities. And as the Court knows the debtors and the creditors' committee are investigating whether Peabody provided sufficient assets to support those liabilities. Now, that is a question for another day, but there is one thing that is absolutely clear: even Peabody stopped short of imposing the liabilities for these 3,100 retirees on Patriot because if they

had it would have raised serious questions about Patriot's solvency at its birth. So as part of the spinoff Peabody agreed to assume the liabilities for the 3,100 Peabody retirees. Peabody agreed to assume those liabilities, to pay for them, to account for them on its own books. These liabilities have always been on Peabody's balance sheet.

In addition, Your Honor, and this is a critical point we'll explore today, even as Peabody assumed the liabilities for the 3,100 Peabody retirees, Peabody did not want to be a party to the CBA or any future CBA that covered these retirees.

And as we'll see, Peabody went to the union and got the union's assent to an arrangement where Peabody would be directly liable for the healthcare benefits provided to these retirees, but that they would not have to be a party to the CBA and would not have to administer the health plan that provides the benefits to these retirees. That was the deal.

But now Peabody comes in here and says exactly the opposite. They say that the 3,100 Peabody retirees are Heritage's obligation, our liability. It's the first time anybody has uttered those words. They say they just agreed to fund the liability. The words "to fund" must appear I don't know how many times in their brief. The argument fails as a matter of basic contract law. If they had agreed only to fund or pay for Heritage's liabilities, it would have been an indemnification agreement. That's what an indemnification

agreement is: you agree to pay for somebody else's liabilities as they arise. Your Honor, that's not what this is. And I have copies of the contracts if it would assist the Court to hand up.

THE COURT: I believe I have copies from the --

MR. MARTIN: I'd like to begin, Your Honor, with the liabilities assumption agreement, and we'll turn next to the acknowledgement and assent.

THE COURT: All right. I have it here.

MR. MARTIN: Okay. Thank you, Your Honor.

THE COURT: Uh-huh.

MR. MARTIN: Your Honor, this contract is not titled a liabilities indemnification agreement; it's a liabilities assumption agreement, and that makes a big difference under contract law. When you assume contractual liabilities, you're not a backstop, you're not a guarantor, you're not a surety, you're not a funding source. You are the primary obligor; you are first in line and directly liable to the person who is owed those contractual obligations.

The title of the contract, Your Honor, is just the start. Every part of this contract makes clear that Peabody assumed direct liability for the benefits provided to these retirees. You just have to look at the fifth whereas clause in the recitals, Your Honor. The second one from the bottom is Peabody "has agreed to assume the liabilities of PCC for

provision of healthcare pursuant to Article 20 of the NBCWA, or any successor of PCC labor contract to certain retirees and their eligible dependents to the extent expressly set forth in this agreement."

The sixth whereas clause, Your Honor, makes clear that Patriot and Heritage will be their agent in delivering those benefits. It says, "Contemporaneously herewith, Peabody and Patriot have entered an administrative service agreement pursuant to which Patriot will take certain actions necessary and appropriate for the administration of any NBCWA individual employer plans" -- those are the health plans, "and delivery of benefits constituting NBCWA individual employer plan liabilities." That last term is the defined term that describes the liabilities assumed by Peabody.

Section 2, Your Honor, of this contract, on the next page, which is titled "PHC Assumption of Liabilities" says Peabody "assumes and agrees to pay a discharge when due in accordance herewith the NBCWA individual employer plan liabilities." Could not be more clear.

Let's look at the definition of the liabilities that they've assumed, in Section 1(b), which is just above, Your Honor. Those liabilities are defined as: "Amounts PCC, that's Heritage, pays for benefits to those retirees of PCC identified on attachment A hereto, and such retiree's eligible dependants under the terms of the NBCWA individual employer plan." We

administer the plan, they're liable for it.

I'd like to look just quickly, Your Honor, at the acknowledgement and assent because it tells exactly the same story. Peabody hates this document, because it makes crystal clear that its characterization of the liabilities assumption agreement is unsupported.

In August of 2007 Peabody went to the union to explain its plan for the spinoff and its plan for the liabilities assumption agreement. And Peabody had one principal objective here: to get the union to assent to an arrangement where Peabody would be directly liable for the retiree healthcare benefits provided to these 3,100 people, but would not have to be a party to the CBA, or any future CBA, or administer the health plan under the CBA. And the union agreed.

In Section A(2), Your Honor, of the acknowledgement and assent, it states, "At the completion of the spinoff of Patriot, Peabody will enter into an agreement, the NBCWA liability assumption agreement with Heritage and/or Patriot pursuant to which Peabody will agree to be primarily obligated to pay for benefits of retirees of Heritage and such retirees' eligible dependants under the terms of an employee welfare plan maintained by Heritage, pursuant to Article 20 of the PCC labor contract or any Heritage successor labor agreement." We'll come back to that, too, Your Honor.

But what's clear from the face of this is that Peabody

was promising the union that it would be directly liable for the healthcare benefits provided to the 3,100 Peabody retires; Heritage would be its agent. Heritage has the health plan and delivers the benefits; these are their liabilities.

And Peabody got what it went to get from the union in exchange for that promise. In paragraph B on the next page, Your Honor, B(2), the union agrees that the entry of the NBCWA liability assumption agreement will not make Peabody a party to any collective bargaining agreement with the UMWA or create a labor law relationship between Peabody and the UMWA.

And the preamble to that section makes clear why the union agreed to that. It was, "In recognition of the benefits to UMWA retirees and their eligible dependents from an agreement between Peabody and PCC through which Peabody would undertake the assumption of liabilities as described above," which we just read in Section A(2).

In the face of this, Your Honor, Peabody has the nerve to come in here and say that these are not their liabilities. Now, I'll concede, Your Honor, that the irony will not be lost on you that Jonathan Martin is up here saying that two contracts entered into contemporaneously as part of the same transaction should be construed together. But this happens to be the correct application of that rule, unlike some other cases we've seen recently.

This contract, Your Honor, the liabilities assumption

agreement, is unambiguous. This is not a reimbursement agreement, it is not an indemnification agreement; it is a liabilities assumption agreement. These are Peabody's liabilities.

Which brings us to their second argument, Your Honor. They say that even if they are directly and primarily liable for the retiree healthcare benefits provided to the 3,100 Peabody retirees, that this contract requires that those benefits be modified in the same way that the benefits are modified for Patriot's retirees pursuant to the Section 1114 trial that's about to commence. That argument is outrageous. It quite literally makes no sense. And it's -- the reason it doesn't make any sense is that it's sheer opportunism. It doesn't even come close to being right as an interpretation of the contract.

And let me be clear about something, perfectly clear: Patriot's proposals contemplate maintaining the status quo for these 3,100 Peabody retirees. We don't want to change anything for these people.

Now, Peabody argues in its papers that our Section 1113 proposal calls for the elimination of Article 20 altogether, which they say would also include the benefits provided to the 3,100 Peabody retirees. Not so. Our proposals are crystal clear. And if they're not, go out in the hallway and we'll make them crystal clear. But they are crystal clear

on their face. The 3,100 Peabody retirees are not included in our request for relief unless Peabody is not made to stand behind their obligations, and that's exactly what they're trying to do here.

They say that the second sentence of Section 1(d) of the liabilities assumption agreement, which we'll take a look at in a second, automatically marks down their liabilities to whatever changes Patriot obtains pursuant to the Section 1114 trial, whether through an order or a consensual resolution. Their argument is contrary to both the purpose and the plain text of that sentence of Section 1(d).

Some important context here, Your Honor. We've discussed that Patriot didn't want to be a party to this -- I'm sorry, Peabody didn't want to be a party to the CBA. They wanted Heritage to be the party to the CBA. Not having to be a party to the CBA was a benefit for them, one they actively sought from the union. But it also comes at a cost, and that is loss of control. They would forever have to rely on Heritage to negotiate with the union over what their liabilities would be. That is an example of what a first year law student learns is agency costs. Agency costs come when a principal, here Peabody, is relying on an agent, here Heritage, to act on its behalf. When you send your agent off to enter into a contract for you and you're the one stuck with the liabilities of that contract you never know what the agent

might do. They may not have your interests completely at heart.

That was the purpose of the second sentence of 1(d). Peabody wanted to make sure that Heritage, when negotiating Peabody's liabilities under the CBA, would always get Peabody the best deal available. There's nothing objectionable about that. As I said, any first year law student would learn that that's the kind of provision you put in a contract when you send your agent out to negotiate your liabilities.

But what that means, Your Honor, is that that second sentence has no application here whatsoever. We are not negotiating with the union over Peabody's liabilities. We've expressly excluded those liabilities from our request for relief. Those liabilities will next be negotiated with the union when the NBCWA comes up for renegotiation no earlier than 2016. So the very purpose of that section -- of that sentence of Section 1(d) isn't even implicated here, and the text makes it crystal clear.

If Your Honor looked to that second sentence of Section 1(d) it's the one that begins "changes to benefit levels." It's says, "Changes to benefit levels, cost containment programs, plan design, or other such modifications contained in PCC's future UMWA labor agreements are applicable to the retirees and eligible dependants subject to this agreement shall be included for the purposes of the definition

of NBCWA individual employer plan liabilities." Then it goes on to say -- and the proviso says: we want the best deal that Eastern Associated gets, too. But the predicate of this sentence is that Heritage is out negotiating a labor agreement that will be applicable to the retirees and eligible dependents subject to this agreement.

Now, I'll discuss in a second why we're not even negotiating a labor agreement. But you don't even have to reach that issue, because the plain text of the provision says the labor agreement, whatever that is, has to be applicable to their retirees. Our 1114 motion and the relief we're seeking excludes those retirees. We want to keep the status quo under the CBA for those retirees.

And just a brief minute, Your Honor, on the second reason why this text doesn't apply to this situation. Any result -- any result of the Section 1114 trial that's about to commence, whether it's an order from the Court, a negotiated resolution, an order incorporated into a confirmed plan, whatever it is, it is not a labor agreement as that term is used in this contract.

How do we know that? Take a look at the fourth recital of the liabilities assumption agreement. It states that, "The parties desire that PCC continue to provide the retiree healthcare required by Article 20 of the NBCWA, or any successor PCC labor contract." The animating purpose of this

contract was to continue providing retiree healthcare benefits pursuant to the CBA, or any future CBA that gets renegotiated in the ordinary course with the union. Nobody contemplated that the benefits would be subject to markdown in the event that one party enters bankruptcy and has to alter Article 20 in order to survive. The parties' desire -- their desire was that PCC continue to provide the retiree healthcare required by Article 20. And that parenthetical, "or any successor of PCC labor contract," makes unmistakably clear what the parties intended when they said that. They were referring to any of the periodically renegotiated versions of the CBA that incorporates Article 20, that are negotiated in the ordinary course with the union.

The acknowledgement and assent makes that clear as well, Your Honor. In Section A(1) it defines the PCC labor contract. And it defines it as one that incorporates by reference Article 20 of the NBCWA. Section A(2) says that Peabody will be primarily obligated for benefits provided -- and this is the fourth line down -- "under the terms of an employee welfare plan maintained by Heritage pursuant to Article 20 of the PCC labor contract, or any Heritage successor labor agreement."

I won't go through every reference here, Your Honor, but if you look through both contracts, every time that term is used it is clear as day that the parties were referring to a

periodically renegotiated version of Article 20 in the ordinary course.

There's no evidence, none, that the parties intended for a successor labor agreement to include a court order, or an agreement for a plan of reorganization that modifies Article 20 under conditions of duress in order to avoid a liquidation. Any argument to the otherwise is, frankly, absurd.

And if Peabody had wanted a Patriot bankruptcy to reduce their obligations as well, they could have tried to get that into the contract. Two reasons -- two obvious reasons why they didn't.

First, Peabody didn't want a whisper of a hint of a suggestion that Patriot might ever go bankrupt because that would have raised serious doubt about Patriot's solvency and viability at its birth. And second, even if Peabody had tried to get the benefit of a Patriot bankruptcy and a markdown that would result to their liabilities, the union would have said no way. The very purpose of the arrangement that Peabody, itself, pitched to the union was that Peabody would be directly liable for these healthcare benefits.

And Section B(2)(c) of the acknowledgement and assent provides that the union and its members can sue them directly for the benefits they agreed to assume in the liabilities assumption agreement.

The union would have said no way at the suggestion

that if Patriot goes bankrupt then our obligations could get marked down however Patriot's obligations get marked down. They'd say no, the very purpose of entering into this agreement is that you're a better credit risk than Patriot is. And the benefits provided to these retirees will be safe from a Patriot bankruptcy. It makes no sense.

The next labor contract that can modify the benefits for the 3,100 Peabody retirees will come no earlier than 2016. And to be clear, Your Honor is not being asked to decide what will happen when that contract is renegotiated. Just being asked to confirm that under the plain language of the liabilities assumption agreement, whatever results from the Section 1114 trial cannot be a basis for them to escape their obligations.

Your Honor, just quickly on their jurisdictional arguments. They make them in a halfhearted way, so I won't spend much time on them. The notion that this proceeding is noncore is nonsense. This action directly affects the administration of the estate because it is a necessary gating issue to the Section 1114 trial that's about to commence. And the core dispute here, by their own devices, is over whose liability these are. Determining whether these liabilities are Patriot's liabilities could not go more directly to the heart of what this bankruptcy proceeding is about or be more squarely within this Court's jurisdiction.

And just quickly, on the motion to dismiss, Your Honor, this is a delay tactic. They know they lose on the merits so they want to defer a decision for as long as possible. They have two arguments. They say this is not right because we got to wait and see what happens because there are two contingencies that might make this motion completely unnecessary.

The first one, they say, is the Court might deny relief altogether. The second, they say there might be an outcome of the 1114 process that looks like a labor agreement in their view, and so we should wait to see what the outcome is and then decide. Neither one makes any sense, Your Honor.

The first one is the very reason why we're here today arguing this motion contemporaneously with the trial that's about to commence. You can take the motion under advisement. Listen to the testimony at the hearing this week. And you can decide whether the motion is still ripe, at the same time you're deciding whether to grant relief under 1114 or if there's a negotiated resolution.

On the second argument they have, they say that something short of the next collectively bargained contract in 2016 could qualify as a labor agreement. So they say let's wait and see whether there's a consensual agreement or an order and a confirmed plan or something else that they might argue is a labor agreement. That's precisely the dispute. We say that

whatever you can dream up that might be the result of this 1114 trial, if it's something short of the next collectively bargained contract entered into with the union in the ordinary course, it is not a labor agreement for purposes of this contract. That dispute is an actual controversy, it is a live dispute, it is a ripe dispute.

So, Your Honor, the debtors respectfully request that the Court deny Peabody's motion to dismiss and grant the plaintiff's motion for summary judgment.

Thank you, Your Honor.

THE COURT: All right. Thank you. And now I'll call up Peabody Holding Company to make a complete recitation in support of the motion to dismiss and in opposition to the debtors' motion for summary judgment.

MR. NEWMAN: Thank you, Your Honor. Jack Newman of Jones Day on behalf of Peabody.

And initially, just as an administrative matter, Your Honor, I would like to hand up to the Court three pieces of paper that I would characterize as argument aids. They're excerpts from provisions of the liabilities assumption agreement. I've provided copies to counsel for the debtors.

MR. MARTIN: No objection.

THE COURT: All right. You may hand up those.

MR. NEWMAN: These are not exhibits, Your Honor. They're just aids in understanding and I have a copy for the

law clerk, a copy for you and some extras if there's anybody else that needs.

THE COURT: That's great. Thank you.

MR. NEWMAN: Let me begin, Your Honor, by saying something that I hadn't planned to say and didn't think I would have to say but that I cannot help but observe that the comments of counsel for the debtors attacking Peabody on an ad hominem basis using terms like greed, unthinkable, nerve, challenging their corporate citizenship and assorted other calumnies suggests that they were talking to someone else or some other group and not to this Court, not to a court of law. We stand behind our obligations, Peabody does, and it expects the Court to stand behind -- help it stand behind those obligations. I'm here to address the Court not some different constituency.

By way of backdrop, Your Honor, last Tuesday, we were here and there were some comments made by Mr. Perillo and then followed up by Mr. Huebner that provide, I suggest, an important backdrop to this argument.

First, Mr. Perillo said -- and it's in the transcript; I'm paraphrasing but pretty close -- that for certainty, there needs to be a labor deal and know the terms of the labor deal; 1113, 1114 will not provide certainty, he said. There needs to be a labor deal.

And Mr. Huebner said, following up, that you can't

have a financeable company without the multibillion dollar issues between the debtors and the union resolved. We agree with those propositions.

So that at its very farthest reaches proceeding here before the Court today is manifestly only interim and temporary. Very interim and very temporary because at best for the debtor/plaintiffs, there is nothing left of their argument, and I mean at best, Your Honor, or of any conceivable order of this Court once there is a new collective bargaining agreement, that is, a deal with the union. And so what is being discussed here today is only whether something that might or might not happen between now and when there is a deal between the company and the union that would make it financeable for exit from bankruptcy whether in that interim period there is or is not an effect on Peabody's obligations. And so that's an important, I'd say critical backdrop, Your Honor, to the whole discussion we are having today.

I'd like to move first to the motion to dismiss because that is a threshold issue. Patriot has offered an interpretation of the IEP liability assumption agreement. Peabody says that interpretation is wrong so there is a disagreement. A disagreement over how that -- how and when that contract applies. But at its broadest on the relief -- on the contentions made by Patriot and the contentions by Peabody, that disagreement is of no consequence and there's no need for

an adjudication if -- or I should say unless there is some sort of relief, an emergence from the 1113, 1114 process and there is never a union bargaining agreement to go forward, only in those circumstances that this disagreement here today makes any difference at all. And that's without debating whether whatever the relief, if there is relief under 1113 and 1114 is, whatever that relief is does or does not constitute a new labor agreement. That's -- without even debating that yet, that's the issue in the summary judgment, Your Honor.

But the issue on the motion to dismiss is whether, as I said, there's any consequence to the disagreement over the interpretation. In the absence of relief, we say no and there's no consequence unless there's never a union bargaining agreement, it leaves no consequence in the longer run. And on that basis, there simply is no cognizable controversy under the constitution or the declaratory judgment act and no authority for this Court to proceed.

While there's a lot of technical debate in the papers, Your Honor, the proposition is pretty simple and I just stated it for purposes of just fundamental jurisdictional concepts.

Now, I don't think there can be any dispute about those concepts or about their application here. It's only in certain future circumstances that the disagreement is of even any consequence.

There is also the issue of ripeness, Your Honor. And

it seems like -- including in the presentation made by the debtors -- on behalf of the debtors this morning, that it's not even clear, at least not to us, what relief they really do seek. Maybe, if we went out in the hall there would be something different but that's really the point of the ripeness argument which is the second aspect of our motion to dismiss. There would be many ways in which, if the Court were to grant some sort of relief under 1113 or 1114 that there could become a cognizable dispute in the sense that it might matter whether the debtors are right or we're right. Only on an interim basis but it still might matter. The Court could grant 1113 relief as sought in its entirety or it might not grant 1113 relief but grant relief under 1114; it might grant both. There would be questions of the scope and the extent. A question of whether there is a consensual resolution but according to the debtors not or maybe yes equivalent of or a collective bargaining agreement. So there's substantial number of future facts. This is not, in this respect, an issue of taking discovery to find out past facts. These are facts that haven't developed yet. So Your Honor would be really swimming in a sea of hypotheticals in trying to make a decision here.

Now, Patriot says well, we'd like to know in advance of our battle with others, primarily, but not exclusively, the mineworkers, in case we win that bet. We'd like to know in advance how Your Honor thinks about this. But, Your Honor, the

mere saying that makes clear, I suggest, that what's being sought here is an advisory opinion, which is not permitted, and an advisory opinion under circumstances where Your Honor would have to guess and hypothesize at how things might happen and then rule -- well, on that hypothesis the following -- on this other hypothesis the following, or on this other hypothesis the following. And the mere desire to have some kind of an indication of what Your Honor thinks about an issue doesn't make that issue ripe.

We also know that it's not necessary in order to frame a request for relief because, in fact, the debtors have framed their request for relief on an alternative contingent basis recognizing that they could conceivably get some sort of relief under 1113 and 1114 without having the Court rule on this issue and then take steps accordingly even if the Court ruled adversely to them. So it's not needed to frame or to get relief.

And in any event, Your Honor, at least so far as we have been able to determine, and I think this is pretty clear, the suggestion is that the relief, if it's granted, would not go into effect until July 1. I suggest to you that that's purely theoretical, as well, because the relief being sought with a VEBA and all the provisions that would have to be determined to go into a VEBA and have it up and running by July 1 is exceptionally optimistic. I doubt that it's even

possible.

But in event, once this Court rules on 1113, 1114 and knows whether there is any relief or what the nature of that relief is, whether there has been a consensual set of provisions submitted to the Court, whether there is an agreement with the union, all of those things would be known at least in the context of 1113 and 1114 by early June with time to come back here and say, Your Honor, this is the state of play, say the debtors, we say we win for certain reasons and Peabody then says, no, we now know the state of play and you don't win. So at that point, there can be a discussion about yes or no on the meaning of the contract -- again, only on an interim basis, if there is by then no collective bargaining agreement, only interim on the very best day for the debtors.

And I suggest to you, Your Honor, that oftentimes the law and practicality don't seem to intersect, but here they do because practicality says why should the Court, I'll say it again, swim in a sea of hypotheticals in order to make some sort of ruling, a bunch of different possibilities? From a practical standpoint, it seems pretty silly when it's not necessary. And under the law, the law says it's not permissible. That there's no controversy that is cognizable, and in any event, whatever there is is not ripe because there are too many other things that have to develop before it's clear what the Court is really dealing with.

So I suggest to, Your Honor, that the motion to dismiss should be granted or at the very least, the whole situation held until the Court knows what it's dealing with and can ask the parties to argue specifically what the positions are with respect to unknown circumstance. We don't know that circumstance now.

Your Honor, I move onto the issue of summary judgment, and here, what Peabody wants is to rest and rest successfully on its contractual rights. We say three things, essentially, in response to the motion for summary judgment, Your Honor.

First of all, the same argument that we make with respect to the motion to dismiss: it's all premature.

Secondly, the terms of the agreement do not allow the interpretation that is being advanced by Patriot.

And third, that to the extent there's any lack of clarity, to the extent that someone wants to debate the drafting of the document, and how it was drafted, to the extent there's some concept of intent that is separate from the document itself, from the terms of the document itself, from what the language of the document says to the extent any of that is at all in play here -- and I suggest that the debtors have tried to put it in play so the Court will think about it but try not to put it in play enough to make clear that in that event it requires discovery, it requires fact finding. So what we're here to do is talk about the terms of the agreement

itself. But as I say again, to the extent there is an issue of intent, what the union would have said or done under certain circumstances, what Patriot would have said or done under certain circumstances, the drafting of the agreement, that requires factual examination and a factual presentation that's not been made here. And we don't suggest on our part that that is necessary. What we say is we look at the terms of the agreement and that will decide if we're -- of this agreement, not some other agreement, not some other pieces of paper, not what people say, not intent that's imputed or asserted for people, but rather the document itself.

So we then turn to the document, Your Honor, and the question is what are the obligations of Peabody under the assumption agreement and from where do those obligations flow? What defines those obligations? May I ask you to look at, Your Honor, at the -- what I call the argument aids that I passed up. And what you have there on page 1 is excerpts from certain portions of the agreement from the definitions. Not from the introductory clauses. These are the definitions; these define what the obligations are.

Page 2 is another paragraph. It's a long sentence, actually. And then, page 3 is a formatted version of page 2. In other words, everything follows one after the other but it is formatted in a way that's designed to make it a little more readable, a little more understandable. That's what the Court

has in front of it. And I'd like to just march down the definitions here, Your Honor.

Number one, that "Peabody Holding assumes and agrees to pay" -- yes, "and discharge when due in accordance herewith" meaning in accordance with the agreement that we're talking about here. Not in accordance with something else; in accordance with this agreement, "the NBCWA, Individual Employer Plan Liabilities." So that's what Peabody has agreed to do.

Well, what are the NBCWA Individual Employer Plan Liabilities because that's what Peabody agreed to pay and discharge? That is amounts that Heritage pays for benefits to the retirees of Heritage, identified on Attachment A, under the terms of the NBCWA Individual Employer Plan. So what defines the obligation of Peabody, is the amounts that Heritage pays. And so if Heritage is not obligated to pay anything, neither is Peabody. To the extent Heritage is obligated to pay, Peabody assumes those and agrees to fund them, pay them, whatever word you want to use, and that's our obligation. We have stuck to it, we continue to stick to it, we will continue to stick to it so long as there are amounts Heritage pays the retirees under the terms of an individual employer plan.

Then we go onto the third item because what is an individual employer plan? It means, "A plan for the provision of healthcare benefits to Heritage retirees, maintained by Heritage pursuant to Article 20 of the NBCWA."

And then you have to look at a definition of what's NBCWA and that's the fourth bullet. "NBCWA shall mean the National Bituminous Coal Wage Agreement of 2007 as amended, supplemented or replaced."

So as we go forward in time, if there is a new agreement, a new labor agreement, calls for payment by Heritage to its retirees, then Peabody is responsible for those payments. That is, the retirees that are the subject of the agreement to begin with. Peabody is responsible to make those payments and it will.

We go on and it says, "Subject to the proviso of the definition of NBCWA, Individual Employer Plan Liabilities." Where is that proviso? Well, that proviso is in the sentence, the paragraph on the next page, 1(d) second sentence where it says, "provided that" and then for any successor Heritage labor contract it references the provisions relating to Eastern. And as counsel for the debtors pointed out, with all due respect, Jonathan, it might be the only thing he said that I thought was accurate here, when you're doing something like this and you've put it in the hands of Patriot to negotiate, you want to make sure that you have an independent yardstick. And for new agreements, the independent yardstick is how the retirees of Eastern are treated. It's as simple as that.

And so if there were to be a new agreement in which Heritage has liabilities for retirees and Peabody is

responsible for those liabilities, maintained according to a plan under a collective bargaining agreement, you look at what the provisions are with respect to a sister subsidiary and it's those numbers that govern Peabody's obligation for the Heritage retirees.

Now, that's the way, Your Honor, a contract works. It's the way it was -- you can derive that from the design itself. So what's the meaning? The meaning is that to the extent Heritage maintains a plan pursuant to a collective bargaining agreement under which it must pay retiree healthcare benefits, then Peabody must fund it, must step in and pay the amounts that otherwise would be paid by Heritage.

It is true that one doesn't have to wait until Heritage fails to pay; that's not it. In fact, the Union has a right to come after Peabody if Peabody doesn't pay what it owes. So it's not a matter of step-by-step. Peabody says and the contract says if Heritage has these obligations as defined, then we must pay them. And originally, they were obligations that were set out in 20 of the 2007 NBCWA. There's a new labor agreement now, the 2011 NBCWA. Obligations of Peabody are measured there by Eastern. They will continue to be measured by Eastern to the extent there is a labor agreement that calls for payments by Heritage to retirees; it's as simple as that.

Now, the argument over primary liability, Your Honor, that is not a method of analysis. What does it mean? It means

only that we step in and pay the liabilities, but it does not say that there are liabilities independent of what Heritage must pay. The contract says our liabilities, our obligation to pay are what Heritage must pay. And one can imagine why that's the case because to the extent the argument is correct as to the reason why this was done in the first place, it's only if Heritage has obligations that calls for Peabody to step in. If it doesn't have those obligations, there's no occasion for Peabody to step in and the contract doesn't call for it to step in.

There is no, in this contract, you cannot find and there is not a freestanding obligation on the part of Peabody independent of and unconnected to what Heritage pays, what Heritage is obligated to pay. And that's why what happens in the future is important, and we don't know what's going to happen in the future. But the dispute if there were a cognizable one, Your Honor, or perhaps when there does become a cognizable dispute if certain things happen would be what is the effect of 1113, 1114 relief given the contract terms because our obligations are governed by the contract. They're not governed by anything else. What happens then gets interpreted within the terms of the contract and then our obligations either are or are not depending upon how what happens fits within the contract.

If the relief is granted as requested, at least as it

looks to us it's requested, under 1113 such that the existing labor agreement is terminated, the foundation for Peabody liability then disappears, Your Honor, because our liability as set out in the very provisions that we went through here earlier, our liability is based upon liabilities that Heritage has, obligations that Heritage has in an individual employer plan maintained pursuant to a collective bargaining agreement. And if the 113 relief is given then and that the collective bargaining agreement is terminated, which is what's being sought, then there is no such collective bargaining agreement or a plan that could have been maintained pursuant to a collective bargaining agreement.

And so a springboard for Peabody's liability is gone and the most favored nation clause doesn't even come into play. But if there's no determination or on some other basis there remains some sort of a Heritage liability, then the question becomes is whatever the result is that the Court -- that emerges from the 1113, 1114 process. And I use those terms advisably, Your Honor, because it could be in the form of a court order, it could be in the form of a consensual resolution; that is, an agreement.

The question becomes is whatever that result is a successor or a replacement labor contract because, as you recall, the provisions of the assumption agreement that we went through talk in terms of and if there is a successor or a

replacement labor agreement, here's what happens.

And again, it's interim at best because we know as a practical matter that for a company to emerge from bankruptcy there will need to be a new collective bargaining agreement or at least one that is imminent. And we're all in agreement that a new collective bargaining agreement -- that there's no debate that the new collective bargaining agreement then would be the thing that would be looked at within the -- a thing that would be looked at within the terms of the contract. So we're talking here only about an interim situation.

But even then, Your Honor, and this is debated in the papers so let's not -- need to go into great detail but if there's, for example, relief under 1114(g) alone that would constitute, according to the authorities, a modification of the existing labor agreement and DO & W Coal speaks to that issue saying it's a modification. Well, in our view within the context of the agreement that is an amended labor agreement.

Ultimately, in any event, Your Honor, 1113 or 1114, whatever relief is granted in order for there to be an emergence from bankruptcy would have to be incorporated into a confirmed plan which has been called a contract. If there is a consensual resolution, that would require labor's consent, obviously, the union's consent, and would be a labor agreement. Look at the Dana case in that regard.

Finally, Your Honor, we -- again, I've made this point

several times but it's in part because it is so important, so central to Your Honor's understanding of what really is at issue here, one would expect a new collective bargaining agreement before confirmation, in any event.

And so whatever the Court does here on the various different hypotheses it would have to consider in order to decide the issue, if it decides it has jurisdiction to decide the issue, could be a declaration that would stretch only for a very limited period and needs to be so defined and so limited to the temporary circumstances that would precede a collective bargaining agreement.

The debtor makes a few points -- again, these have been debated in the papers, Your Honor -- suggesting, well, it's only a certain kind of an agreement that would be applicable here. But you should -- I invite your attention again to something that we looked at before which was the fourth bullet on the first page of the argument aid that I passed up that defines NBCWA, means National Bituminous Coal Wage Agreement of 2007, as may be amended, supplemented or replaced from time to time subject to the Eastern proviso. And what that makes clear, Your Honor, is that this isn't a name game. This isn't a game where, well, there can be an agreement with the union but we're going to call it something else. We're not going to call it the NB -- we're not going to call it the National Bituminous Coal Wage Agreement of 2007 or 2011 or

something else; we're going to give it a different name, and therefore, it doesn't apply within the terms of this agreement. That's not so.

This particular provision says as it may be amended, supplemented or replaced. And if there's something that replaces it that's called something else, that's a replacement within the terms of this agreement.

The issue of bankruptcy or not, Your Honor, as triggering anything. Well, under the terms of the agreement, there is nothing in the agreement that says if there are changes for a certain reason, those changes don't count. Or if there are -- the only thing that counts are changes that arise in a certain circumstance. The agreement doesn't talk about the reasons why changes occur. The agreement doesn't talk about why there might or might not be a union contract and individual employment provisions, individual employment plans pursuant to a contract. It doesn't say anything about the reasons yes or no. All it says is if these things occur, then these are the consequences. So bankruptcy, financial trouble, financial distress, nothing one way or the other is said about the reasons for why there might or might not be a contract or why the contract might have certain terms. There's just no basis at all for thinking that Peabody was intending to make payments when Heritage was escaping under any circumstances. And the very same thing that could occur in this court could

also occur completely outside of bankruptcy. A different deal because everybody recognized that Patriot needed a different deal.

So, Your Honor, there -- and in that event, whether it was because of financial distress or other pressures, whatever it was, the contract says if there is a new, a supplemental, an amended, a replacement agreement, then we look at that agreement to see about Heritage's obligations and Peabody's obligations -- if there are obligations of Heritage, Peabody has to pay those obligations but what those obligations actually are are measured by the deal with Eastern, the Eastern proviso, the independent measuring stick, a check, to make sure that Peabody, that doesn't have control over what Patriot does, has this independent check on the Eastern side.

There's a reference to other documents. In particular, the acknowledgement and assent, a document that was created more than two months, almost three, well, two-and-a-half before the actual agreement that is being litigated here. It's a completely separate document between different parties, not contemporaneous, and even on its own terms, creates no obligation.

No one would suggest, Your Honor, I'm sure that if the spinoff had not occurred and they're -- or if there had not been an assumption agreement that somehow or other there would be obligations of Peabody to pay the Heritage liabilities

arising just out of the acknowledgment on the assent agreement, that doesn't say that. What that agreement does say, and there's no dispute about that, is that the obligation is defined by -- or shouldn't be a dispute, I should say -- the obligation is defined by the NBCWA. And the provisions of the acknowledgement and assent, yes, give the union and retirees a right to sue if the payments pursuant the anticipated assumption agreement are not made in accordance with the terms, we understand that; but it doesn't create any obligation on the part of Peabody -- and you look at the language, it doesn't -- to pay anything.

And if you, in fact, look at the language there and some of which was quoted but not all of which by counsel for debtors, it says that "in addition to will not make Peabody Holding a party to any collective bargaining agreement or create any right of action by the UMWA, members or retirees against PHC for benefits under any provision of the Heritage labor contract or any other labor agreement including but not limited to Article 20 of the 2007 NBCWA except that they could file an action if Peabody doesn't carry out its obligations under the Liabilities Assumption Agreement."

So the obligations that Peabody has are defined by the liabilities assumption agreement and that only. And I don't know how anyone, conceivably, Your Honor, could argue otherwise. That's the document that creates the obligations.

And Your Honor, very much it creates the obligations by stacking definitions on top of the point number one which is set out on the argument aid, "PHC assumes and agrees to pay in accordance herewith the NBCWA Individual Employer Plan Liabilities," then you go through the definitions step by step. You understand what Peabody's obligations are; they're derivative of Heritage obligation. Heritage has no obligation and Peabody has no obligation. And if Heritage has an obligation in successor labor agreements and Peabody has an obligation but it's defined by the provisions at Eastern which is the Eastern proviso.

Your Honor, unless you have questions, I'm finished with my oral presentation.

THE COURT: I don't have any questions at this time.

MR. NEWMAN: Thank you.

THE COURT: Thank you.

MR. PERILLO: Your Honor, may I address the Court?

THE COURT: Briefly, Mr. Perillo.

MR. PERILLO: Thank you, Your Honor, I want to address three small issues that I don't think have been addressed by the other parties.

First, Your Honor, the term "collective bargaining agreement" has been thrown around somewhat loosely this morning. A collective bargaining agreement has a particular definition in the law. It's an agreement reached between an

employer of employees as defined in the National Labor Relations Act -- that does not include retirees, by the way -- and the certified or recognized representative of an appropriate bargaining unit of those employees.

I mention this because there are suggestions in some of the papers that a confirmed plan of reorganization might be a collective bargaining agreement or that a court order might be a collective bargaining agreement. Those things could not possibly be. Only a voluntary agreement between a union and a company that employs the employees represented by that union can have the definition of collective bargaining agreement.

I would amplify this by referring to the actual statute, 1114, Your Honor. If we look at Section (g)(3) and look at the first proviso, (g)(3) is the section that says "a Court can enter an order providing for a modification in the payment of retiree benefits." Please note, it's not a modification of the benefits themselves. It's a modification of the payment of the benefits. It can do so under certain standards, and now, I'm quoting, "except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): Provided, however, That at any time after an order is entered providing for modification in the payment of

retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3)."

There's a further proviso which says that the union can make multiple such requests to the court and that -- without limitation, that there is no limit in the numbers.

So what this means is that once the Court -- if the Court grants an order modifying the payments of the benefits because there is no consensual agreement to do so, the union could daily return to the Court and ask for an increase in those benefits based on a change in circumstances; a rise in the price of coal or anything. I submit to you that that doesn't look like what a contract is. That's more like court management of a decree which is what in reality it is but it's not a contractual agreement. It's not the product of voluntary assent between parties. Because when Congress modified the duties of employers by forcing employers to negotiate with a certified union representative, it did not go so far to say that an employer could be compelled to an agreement; neither can a union be compelled to an agreement. So when the Court is entering an order under 1113 or 1114, it's not creating a new

contract. It's entering a court order that allows the debtor to breach its obligations in certain ways.

I say this because the Peabody argument, at various times, suggests an order of the court under 1113 or 1114 constitutes a contract. They cite DO & W Coal for this proposition. I merely want to caution the Court that DO & W Coal was entered into under 1113(e), the emergency preliminary relief section of 1113. That's akin to a preliminary injunction. And the contract expired before the Court could rule on the final application. The Court, in that case, said that the new status quo was set by the Court's last order and that parties would have to continue to comply with a court order until the Court had changed it. That is different from saying that the Court had created a new contract between the parties. I don't believe that is what happened in that case.

Lastly, Your Honor, I want to say first that I -- I should have said first that the declaratory judgment should be granted. This has been called a gating issue; I'm not quite familiar with the term "gating" but it's what I think, as a young man, I would have called a threshold issue for two reasons.

First, if we have no agreement and the Court does make a ruling under 1114, you're going to have to determine the 1114 factors with respect to a group of retirees, and until this issue, the declaratory judgment is resolved, we don't know

who's in the group nor do we know how large the liability is.

Patriot suggested that the liability could grow from -- Patriot thinks it's 1.4 billion, could grow to 2 billion with the Peabody assumed group. We think the liability is 1.8 billion. It might grow to two-and-a-half billion but those are not immaterial numbers. And how can the Court weigh, then, the adequacy of the consideration, the necessity, the fairness, without knowing who's in the group? So that's one proposition.

The other proposition is that regardless of the outcome of the hearing, the union and the company will never be able to reach an agreement without knowing what they're agreeing about, whether that group includes the Peabody people or not. And so it is critical that we know the answer to that question before we begin to do the analysis, before the Court can do the analysis and before the parties can work further on making what I loosely call the labor deal when I spoke last week.

Thank you, Your Honor, for providing me a brief amount of time.

THE COURT: All right. Thank you, Mr. Perillo. Mr. Martin?

MR. MARTIN: Just briefly, Your Honor.

I want to make it again crystal clear that Patriot's proposal here is to keep the status quo for the 3,100 Peabody

retirees. We don't want to touch the CBA as it applies to those people or modify the retiree health benefits. That fact is dispositive here. Mr. Newman said Peabody will live up to its obligations under the contract.

Well, the contract says they have to pay whatever benefits get delivered to these retirees pursuant to Heritage's health plan under the CBA. That will not change under Patriot's Section 1114 proposal. But before we can get there, we need the comfort that our interpretation of the contract is correct and that Peabody does have to stand by its word.

Now, their argument is, well, you're about to get modifications to the retiree health benefits provided to the Eastern Coal retirees and we should get the benefit of that. That is not the way the contract works. They agree that that second sentence, the (1)(b) which is the entirety of what they rely on, was intended to keep Heritage aligned with Peabody when it was negotiating Peabody's liability. That is not what we're doing in this trial. We, again, we are not going to touch their liabilities. So the very purpose of that sentence isn't implicated here.

And the text makes it clear as well because for that sentence to apply, you have to have a labor agreement -- I'll get to that in a second -- but you don't even -- as I said, you don't have to reach that issue whether the result here will be a labor agreement or not because that second sentence of (1)(d)

says that their liabilities change only when the labor agreement is applicable to the retirees and eligible dependents subject to this agreement. Summary judgment can be granted right there before reaching the issue as to whether the result here is a labor agreement. We want a declaratory judgment that that's the way the contract works. That they have to continue paying for the retiree health benefits provided to these 3,100 people and they have to do it until there is a labor agreement that is applicable to those 3,100 Peabody retirees.

Now, they say, well, we don't know whether there might be a labor agreement that comes out of this. There might be a consensual resolution. Well, that's precisely our point. We need clarity that whatever results from this Section 1114 motion will not implicate this contract if Your Honor reaches the labor agreement question.

I want to emphasize that the only reason we are negotiating with the union about this Section 1114 relief, is that they stepped in to represent these retirees. If they had not, we would be negotiating with the committee. Peabody can't argue that if we had negotiated a resolution of the 1114 trial with a committee of retirees that that would be a labor agreement as it's used in the contract. And that's because nobody contemplated that a bankruptcy would affect -- a bankruptcy by Heritage or Patriot would affect their liabilities. It would not serve the purpose of that provision.

It would just give them a windfall. They can afford to continue paying these benefits. They should be required to until they next negotiate those benefits again with the union in the ordinary course.

And as predicted, Your Honor, they were very dismissive of the acknowledgement and asset because it is dispositive here. What they never said, because they can't, is that the Court can't consider that contract in understanding the meaning of the liabilities assumption agreement. It is a related contracted. They say so in their papers. It was describing to the union what the purpose of the liabilities assumption agreement would be. That is precisely the kind of contract that can be used to understand the meaning of the liabilities assumption agreement without violating the parol evidence rule.

That's all I have, Your Honor. Thank you very much.

THE COURT: All right. Thank you.

Mr. Newman, briefly.

MR. NEWMAN: Your Honor, the proposal before the Court in the 1113 and 1114 proceeding is to terminate the labor agreement. The proposal is not to terminate a portion of the labor agreement; it's to terminate the labor agreement. We don't think it's permissible or would be permissible to pick and choose in the termination but rather it either is terminated or not. But in any event, if there's some different

proposal before the Court that we don't know about then, of course, we haven't had an opportunity to address that. That simply goes to the issue of this is a floating situation anyway; not ripe and not a proper subject for this Court's adjudication.

I've responded to, I believe, to all other arguments subject to any questions that the Court might have.

THE COURT: All right. Thank you.

MR. MARTIN: Your Honor, just quickly. I don't know how I can make it any more clear. Our proposal does not propose to touch the Peabody retirees. I can read it -- I can read it to the Court but the Court has it and I am representing to the Court that we do not want to change the CBA as it applies to the 3,100 Peabody retirees.

THE COURT: Thank you. All right. I'll take the matter again as submitted based on the pleadings and the arguments heard here today.

(End of requested portion)

C E R T I F I C A T I O N

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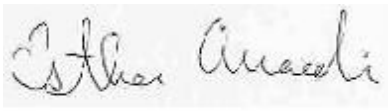

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Form transap

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: Patriot Coal Corporation
Debtor

Case No.: 12−51502 − A659

Adv. Proc. No. 13−04067 − A659

Patriot Coal Corporation
Heritage Coal Company LLC
Plaintiff
v.
Peabody Holding Company, LLC
Peabody Energy Corporation
Defendant

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 June 24, 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: July 1, 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: July 15, 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: July 25, 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: September 23, 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:

Dated: 6/24/13

/s/Dana C. McWay
Clerk of Court

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