

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

In Re: Patriot Coal Corporation, <i>et al.</i>	)	Chapter 11
	)	Case No. 12-51502
Debtors.	)	
	)	

**MOTION TO APPOINT OFFICIAL RETIREE  
COMMITTEE PURSUANT TO 11 U.S.C. § 1114(d)**

Harold R. Racer, on behalf of himself and others similarly situated Non-Union Retirees ("Retirees") of Patriot Coal Corporation, ("Patriot") and its affiliated Debtor entities (collectively the "Debtors")<sup>1</sup>, respectfully requests that the Court authorize and instruct the United States

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<sup>1</sup> Affinity Mining Company; Apogee Coal Company, LLC; Appalachia Mine Services, LLC; Beaver Dam Coal Company, LLC; Big Eagle, LLC; Big Eagle Rail, LLC; Black Stallion Coal Company, LLC; Black Walnut Coal Company; Bluegrass Mine Services, LLC; Brook Trout Coal, LLC; Catenary Coal Company, LLC; Central States Coal Reserves of Kentucky, LLC; Charles Coal Company, LLC; Cleaton Coal Company; Coal Clean LLC; Coal Properties, LLC; Coal Reserve Holding Limited Liability Company No. 2; Colony Bay Coal Company; Cook Mountain Coal Company, LLC; Corydon Resources LLC; Coventry Mining Services, LLC; Coyote Coal Company LLC; Cub Branch Coal Company LLC; Dakota LLC; Day LLC; Dixon Mining Company, LLC; Dodge Hill Holding JV, LLC; Dodge Hill Mining Company, LLC; Dodge Hill of Kentucky, LLC; EACC Camps, Inc.; Eastern Associated Coal, LLC; Eastern Coal Company, LLC; Eastern Royalty, LLC; Emerald Processing, L.L.C.; Gateway Eagle Coal Company, LLC; Grand Eagle Mining, LLC; Heritage Coal Company LLC; Highland Mining Company, LLC; Hillside Mining Company; Hobet Mining, LLC; Indian Hill Company LLC; Infinity Coal Sales, LLC; Interior Holdings, LLC; IO Coal LLC; Jarrell's Branch Coal Company; Jupiter Holdings LLC; Kanawha Eagle Coal, LLC; Kanawha River Ventures I, LLC; Kanawha River Ventures II, LLC; Kanawha River Ventures III, LLC; KE Ventures, LLC; Little Creek LLC; Logan Fork Coal Company; Magnum Coal Company LLC; Magnum Coal Sales LLC; Martinka Coal Company, LLC; Midland Trail Energy LLC; Midwest Coal Resources II, LLC; Mountain View Coal Company, LLC; New Trout Coal Holdings II, LLC; Newtown Energy, Inc.; North Page Coal Corp.; Ohio County Coal Company, LLC; Panther LLC; Patriot Beaver Dam Holdings, LLC; Patriot Coal Company, L.P.; Patriot Coal Corporation; Patriot Coal Sales LLC; Patriot Coal Services LLC; Patriot Leasing Company LLC; Patriot Midwest Holdings, LLC; Patriot Reserve Holdings, LLC; Patriot Trading LLC; PCX Enterprises, Inc.; Pine Ridge Coal Company, LLC; Pond Creek Land Resources, LLC; Pond Fork Processing LLC; Remington Holdings LLC; Remington II LLC; Remington LLC; Rivers Edge Mining, Inc.; Robin Land Company, LLC; Sentry Mining, LLC; Snowberry Land Company; Speed Mining

Trustee for the Eastern District of Missouri to appoint an Official Non-Union Retiree Committee pursuant to 11 U.S.C. §1114(d) (“Section 1114”). In support thereof, the Retirees state as follows:

### Introduction

1. On July 9, 2012, Patriot and substantially all of its wholly owned subsidiaries filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Southern District of New York. On November 27, 2012, an Order was entered that transferred the Patriot Chapter 11 proceedings to the Bankruptcy Court for the Eastern District of Missouri.

2. During these bankruptcy proceedings, Debtors filed a Motion for an Order Authorizing: (i) Debtors to (a) pay prepetition wages, salaries, employee benefits and other compensation, and (b) maintain employee benefits programs and pay related administrative obligations; (ii) employees and retirees to proceed with outstanding workers' compensation claims; and (iii) financial institutions to honor and process related checks and transfers filed. These pleadings acknowledge certain retiree benefit obligations, including but not limited to health care insurance benefits for the Retirees. (See Docket Nos. 9).<sup>2</sup> In those same pleadings,

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LLC; Sterling Smokeless Coal Company, LLC; TC Sales Company, LLC; The Presidents Energy Company LLC; Thunderhill Coal LLC; Trout Coal Holdings, LLC; Union County Coal Co., LLC; Viper LLC; Weatherby Processing LLC; Wildcat Energy LLC; Wildcat, LLC; Will Scarlet Properties LLC; Winchester LLC; Winifrede Dock Limited Liability Company; Yankeetown Dock, LLC.

<sup>2</sup> "The Debtors offer several health and welfare benefit plans (collectively, the “**Health and Welfare Plans**”) for represented and non-represented employees, certain former employees and *certain retirees* (the “**Retirees**”), including coverage for medical, medical premium and expense reimbursement, prescription, dental, vision, life, short-term and long-term disability, accidental death and dismemberment, health flexible spending accounts and dependent care flexible spending accounts, business travel and accident insurance and employee assistance programs (collectively, the “**Health and Welfare Plan Obligations**”). [Docket No. 9, par. 13]

Debtors requested (and this Court subsequently granted),<sup>3</sup> Debtors' permission to continue payment of said retiree benefits during these bankruptcy proceedings.

3. Without previously notifying this Court, on or about December 17, 2012, Debtors sent a mass mailing to (upon information and belief) all non-union retirees informing them that Debtors would be seeking to unilaterally terminate all retiree benefits. (Attached as Exhibit A is an accurate copy of said letter).

4. Inexplicably, Debtors failed to seek the formation of an Official Retiree Committee prior to or contemporaneously with notifying the affected Retirees.

5. Now that Debtors have publically announced their intent to terminate said retiree benefits, a Retiree Committee must be formed as required by Section 1114 without delay. This group of retirees gave their human capital to the Debtors and as part of their employment consideration they were promised lifetime retirement benefits, often in lieu of other direct benefits, such as increased salaries. The retirees at issue now fear loss of their benefits without any understanding as to their rights and protections pursuant to Section 1114 and without any unified voice to speak on their behalf.

#### **Applicability of Section 1114**

6. The rights of retirees in Chapter 11 bankruptcies have been governed by Section 1114 since its enactment as part of the Retiree Benefits Bankruptcy Protection Act of 1988. *See In re Visteon*, 612 F.3d 201, 216 (3<sup>rd</sup> Cir. 2010); *Arclin US Holdings, Inc.*, 416 B.R. 117, 119 (Bankr. Del. 2009). Section 1114 is neither optional nor is it to be imposed at the discretion of the Debtors. Section 1114 provides a framework to ensure that a debtor seeking to modify or eliminate retiree benefits in a bankruptcy follows a process that compels it to provide a verifiable

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<sup>3</sup> Docket No. 253, Order entered on 8/2/12.

basis for the relief it seeks. It also sets forth a framework for negotiation or court action if a consensual resolution cannot be reached.

7. Section 1114(d) defines very broadly the retiree benefits that are entitled special protection. In this respect, Section 1114 defines “retiree benefits” as:

...payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

11 U.S.C. § 1114(a).

8. It is well established that when interpreting a statute, “Courts must determine ‘congressional intent’ and give effect to it.” *In re Patrick Cudahy Inc.*, 88 B.R. 895, 898 (E.D. Wisc. 1988). Section 1114’s legislative history is an “authoritative guide” to the statute’s construction. *In re Garofalo’s Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill 1990).

9. Congress intended Section 1114 to afford retirees “special treatment” in bankruptcy proceedings. *In re Visteon*, 612 F. 3d at 216. The legislative record of Section 1114 further makes it absolutely clear that the protections provided through Section 1114 are qualitatively more essential than those addressed by other sections of the bankruptcy code because retirees’ lives *literally* depend on the benefits protected by Section 1114. This special treatment of non-union retirees arises, in part, because retirees are unlike most other creditors of corporate debtors in a chapter 11 proceeding, such as lenders, lessors, bond holders, vendors and financial institutions. From the perspective of these later creditors, the debtors are but one of many entities with whom they do business. Retirees, in sharp contrast, cannot absorb the loss of their retiree benefits through accounting adjustments, cannot write off the loss of their benefits,

cannot pass along costs to other customers or count on future business with the debtor or successor in interest. Most critically, because retirees are often living on low and fixed incomes, any disruption or reduction of their retiree benefits can have dire and immediate impacts on their lives. Further, as opposed to active employees, retirees are completely at the mercy of the company because “unlike active workers...there is nothing the retirees have that the company needs.”<sup>4</sup>

10. The “statutory scheme and Congress’ expressed intent indicates that [Section 1114] was enacted to achieve the very specific and focused objective of protecting retiree rights from unilateral termination.” *Nelson v. Stewart*, 422 F.3d 463, 474 (7<sup>th</sup> Cir. 2005). Indeed, in one of the earliest Section 1114 cases, it was stated that “[i]t is inescapable that through § 1114, Congress has sought to establish a priority for retirees in bankruptcy cases that assures that they receive a measure of enhanced treatment that is consistent with a bankruptcy court’s role as a court of equity.” *In re Ionosphere Clubs*, 134 B.R. 515, 527 (S.D.N.Y. 1991).

11. Stated another way, Congress’s purpose in enacting Section 1114 was to ensure that the debtors did not seek to effect reorganization “on the backs of the retirees” for the benefit of other parties in interest. *See In re Tower Automotive Inc.*, 2006 U.S. Dist. LEXIS 91958, \*12 (S.D.N.Y. December 15, 2006) (Section 1114 “clearly evidences Congress’s special concern for the rights of retirees.”), *citing to Ionosphere*. This policy was poignantly explained in yet another Section 1114 case where the Court noted that: “retirees are particularly vulnerable when their former employer goes bankrupt, because of their ages, their reduced incomes and their inability to replace the benefits . . . that are being terminated.” *In re Farmland Industries, Inc.*, 294 B.R. 903, 918 (Bankr. W.D. Mo. 2003).

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<sup>4</sup> Sec. 134 Cong. Rec. H3488 (daily ed. May 23, 1988) (statement of Rep. Edwards); Retiree Benefits Security Act of 1987 on S.548 Before Subcomm. on Courts and Admin. Practice of the Senate Comm on the Judiciary, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 103-109 (testimony of G. Kirtland), 188-189 (testimony of J. Heisler).

12. Here, there is no doubt based on the Debtors' *own* prior filings and the letters that Debtors sent out terminating these benefits that they constitute "retiree benefits" as defined by Section 1114(a).

#### **Procedural Protections of Section 1114**

13. Section 1114 "requires a Chapter 11 debtor to continue to pay all retiree benefits unless either the trustee or debtor in possession and an authorized representative of the retirees agree to a proposed modification, or absent such agreement, the trustee or the debtor in possession convinces the court that a proposed modification is necessary to permit the debtor's reorganization and is equitable." *In re Farmland, Ind., Inc.*, 294 B.R. 903, 919 (Bankr.W.D.Mo. 2003); *see also* 11 U.S.C. §1114(e).

14. Section 1114(d) further provides that:

The court, upon a motion by any party in interest, and after notice and a hearing, *shall order the appointment of a committee of retired employees if the debtor seeks to modify or not pay retiree benefits* or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement. The United States Trustee shall appoint any such committee.

11 U.S.C. §1114(d) (emphasis supplied).

15. Indeed, compliance with Section 1114 is *mandatory* for all debtors once they have filed for bankruptcy protection...even in situations where a Debtor might assert a right of unilateral termination. *See In re Visteon*, 612 F.3d 210 (3<sup>rd</sup> Cir. 2010); *In re Farmland Indus., Inc.*, 294 B.R. 903 (Bankr. W.D. Mo. 2003); *Ames Department Stores, Inc. v. Employees' Committee of Ames Department Stores*, 1992 U.S. Dist. LEXIS 18275 (S.D.N.Y. 1992).

16. The payments and treatment of the above noted retiree benefits may not be reduced, modified or terminated unless Debtors fully comply with Section 1114. *See In re General Datacomm Ind., Inc. v. Acara*, 407 F.3d 616, 620 (3d Cir. 2005). In this respect,

Section 1114(e) mandates that the Debtor “shall timely pay and shall not modify any retiree benefits...” unless: (a) after notice and hearing, the court orders modification of retiree benefits pursuant to Subsections (g) or (h) of this Section; or (b) the Debtors and the authorized representatives of the retirees reach another agreement.

17. Once the Retiree Committee is formed, Section 1114 then requires that a debtor:

(A) make a proposal to the...retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and (B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

Section 1114 (f)(1).

18. Here, there has been no consensual modification, nor could there be without the prior appointment of a Section 1114 Retiree Committee. Likewise, Debtors have not demonstrated to the Retirees or the Court that the reduction of retiree benefits is even "necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably and is clearly favored by the balance of the equities." (See Section 1114.)

19. Indeed, a failure by Debtors to meet its burden of proof as to *any* one of Section 1114 requirements is sufficient to prevent any modification of retiree benefits, let alone their termination. See, *In re General Datacomm Ind., Inc. v. Acara*, 407 F.3d 616, 620 (3d Cir. 2005) (“[o]nly after the foregoing requirements have been met, and such good-faith negotiations have occurred, is the court empowered to grant the modification motion, if, among other things, modification is necessary to permit reorganization of the debtor.”); *In re Garafalo’s Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990).

### **The Debtors Must Adhere to Section 1114 Process**

20. After receiving the termination letters and mostly out of luck, a group of representative retirees were able to find counsel familiar with Section 1114 toward the ends of bringing their plight to this Court and to have an Official Retiree Committee created.

21. As reflected in their termination letters, Debtors have clearly indicated their intent to eliminate all retiree benefits for the affected Retirees. (See Ex. A.) This fact alone mandates the formation of a Retiree Committee under the plain language of Section 1114. (See Section 1114(d)).

22. Under the circumstances, Debtors' letter to the affected Retirees has no doubt caused a panic among them. Absent immediate notification to the contrary, affected Retirees could be already seeking to replace their current retiree health insurance based on the Debtors' December 17, 2012 letter.

23. Without a Retiree Committee, there is no central and/or objective source for the Retirees to obtain factual or legal information about the status of their benefits.

### **Proposed Selection Criteria of Retiree Committee**

24. The Retirees respectfully request that the U.S. Trustee be directed to appoint a Retiree Committee as soon as possible. Retiree Counsel, having represented many different Retiree Committees, further respectfully suggests that the Retiree Committee be comprised of five (5) affected retirees. Larger retiree committees are more cumbersome logistically given the age, geographical locations, infirmities, and other similar factors characteristics of Retirees.

25. Other retirees have expressed interest to be party to this action and/or to serve on the Retiree Committee. The undersigned counsel will tender the names of all such Retirees who have expressed an interest in serving on a Retiree Committee directly to the U.S. Trustee upon



the granting of this Motion. To effectuate the formation of a Retiree Committee as expeditiously as possible, and to account for the concerns set forth above, it is respectfully suggested that the U.S. Trustee initiate preliminary contact with the above noted Retirees in advance of this Court's ruling to independently determine the identified Retirees' ability to represent the affected Retirees as soon as practicable.

**Relief Requested**

26. The Retirees respectfully request that the Court grant authorize and instruct the United States Trustee for the Eastern District of Missouri to appoint a Retiree Committee of five (5) Patriot non-union retirees to represent all affected non-union Retirees, spouses, surviving spouses and dependents who currently receive or are entitled to receive retiree benefits from Debtors.

Dated: January 8, 2013

On behalf of Harold R. Racer and all similarly situated retirees

*/s/ Thomas H. Riske*

By: \_\_\_\_\_

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by electronic filing in the CM/ECF system of the United States Bankruptcy Court for the Eastern District of Missouri or via U.S. Mail, postage prepaid or facsimile this 8<sup>th</sup> day of January, 2013, to:

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/s/ Thomas H. Riske



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December 17, 2012

HAROLD R. RACER

Dear HAROLD R. RACER:

Since filing for reorganization under Chapter 11 of the Bankruptcy Code on July 9<sup>th</sup>, Patriot has been making difficult decisions to help ensure the company's future viability.

Every aspect of Patriot's cost structure is being analyzed to decrease our expenditures. As part of this process, Patriot's management team reviewed the range of wages and benefits for both employees and retirees. Based on this analysis, it is clear that Patriot's labor and retiree benefit costs have risen to levels that simply cannot be sustained with the challenges facing the company and the coal industry.

In order to restore itself to viability, Patriot intends to file with the Bankruptcy Court motions seeking approval to discontinue substantially all healthcare benefits and modify life insurance benefits for salaried and non-represented retirees. This includes benefits related to non-union retiree healthcare programs.

It is Patriot's intent to discontinue or modify these programs 60 days after receiving Court approval. If you are receiving this letter, you will be impacted by this planned change. You will be receiving a copy of the motion to discontinue or modify the programs once it is filed with the Court.

Until the Court approves these actions, you will continue to receive benefits under your current program, contingent on payment of monthly premiums through your current payment method. As you are aware, every year Patriot reviews the contribution levels for retiree medical benefits. Based on claims experience for the program in which you are enrolled, your 2013 monthly contribution will be \$158.67.

If you have any questions, please contact the Patriot Restructuring Hotline at 877-600-6531.

Sincerely,

A handwritten signature in black ink, appearing to read "MJL".

Michael J. Luna  
Vice President – Human Resources & Employee Services

