IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	)	Chapter 11
	)	
PATRIOT COAL CORPORATION, *et al.*	)	Case No. 15-32450 (KLP)
	)	
Debtors.	)	(Jointly Administered)
	)	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' MOTION FOR ENTRY OF (I) AN ORDER (A) APPROVING BIDDING PROCEDURES AND BID PROTECTIONS IN CONNECTION WITH THE SALES OF CERTAIN OF THE DEBTORS' ASSETS, (B) APPROVING THE FORM AND MANNER OF NOTICE, (C) SCHEDULING AUCTIONS AND A SALE HEARING, (D) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, AND (E) GRANTING RELATED RELIEF AND (II) AN ORDER (A) APPROVING THE SALE OF ASSETS PURSUANT TO THE BIDDING PROCEDURES, (B) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, AND (D) GRANTING RELATED RELIEF

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The Official Committee of Unsecured Creditors (the "Committee") of Patriot Coal Corporation, *et al.* (collectively, the "Debtors"), by and through its undersigned proposed counsel, hereby files this objection ("Objection") to the *Debtors' Motion for Entry of (I) an Order (A) Approving Bidding Procedures and Bid Protections In Connection With the Sales of Certain of the Debtors' Assets, (B) Approving the Form and Manner of Notice, (C) Scheduling Auctions and a Sale Hearing, (D) Approving Procedures for the Assumption and Assignment of Contracts, and (E) Granting Related Relief and (II) an Order (A) Approving the Sale of Assets Pursuant to the Bidding Procedures, (B) Authorizing the Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief* [Docket No. 200] (the "Motion").[1] In support of the Objection, the Committee submits the Declaration of Leon Szlezinger (the "Szlezinger Declaration") and the Declaration of W. Douglas Blackburn, Jr. (the "Blackburn Declaration"), contemporaneously herewith, and respectfully represents as follows:

PRELIMINARY STATEMENT

1. The auction process and bidding procedures presently before the Court are inadequate as proposed and will impede the Debtors' ability to run a competitive sale process if approved.[2] The truncated timeline proposed by the Debtors (and orchestrated by Blackhawk) forecloses any realistic possibility of a sale of the Debtors' assets to an alternative, higher and better bidder. Moreover, the proposed bidding protections, which are far from customary and contain unreasonably high hurdles for interested parties to become qualified bidders, will

[1] Capitalized terms used herein, but not otherwise defined, shall have the meaning ascribed to such terms in the Motion. Additionally, capitalized terms used in the Preliminary Statement, but not defined therein, shall have the meaning ascribed to such terms below.

[2] This Objection does not address the bidding protections contemplated as part of the Federal Sale. The Motion expressly provides parties the opportunity to object to any such bidding protections five (5) days after the Federal Stalking Horse Bidder, if any, is appointed, and the Committee hereby reserves its rights to do so.

undeniably chill, if not altogether freeze, competitive bidding on the Debtors' assets. Absent leveling the playing field to permit fair and open bidding, a sale of substantially all of the Debtors' assets to Blackhawk without exploration of value maximizing alternatives is a foregone conclusion.

2. The deadlines imposed by the Bidding Procedures are unrealistic and too short to permit the Debtors to sell their assets in a manner that will maximize value, particularly in light of the fact that the Blackhawk Assets were not fully marketed during the first Chapter 11 proceeding and were not broadly marketed before these Chapter 11 cases commenced. The Bidding Procedures permit interested parties no more than 45 days from the approval of the Bidding Procedures[3] to submit competing bids. During that time period, among other things, the following would need to happen: (a) exposure of the Debtors' assets to the market; (b) performance by the prospective bidder(s) of due diligence (which includes not only financial diligence, but also meeting with the Debtors' management and inspections of the Debtors' mining complexes); (c) the formulation of a proposal to address the Debtors' employee obligations; (d) implementation of a strategy to obtain the necessary governmental and regulatory approvals and consents; (e) the arrangement of potentially more than $672 million of financing; (f) funding of a $67.2 million cash deposit; and (g) documentation of a bid that complies with the numerous other requirements of a "Qualified Bid." Forcing interested parties to compress these actions into 45 days will not create additional value for the Debtors' estates but will, instead, dissuade potential bidders from pursuing a transaction.

3. It appears that the unrealistically short time constraints imposed by the Bidding Procedures are driven by Blackhawk's alleged belief that closing a transaction after September 23, 2015, would put the Combined Company at risk with respect to domestic metallurgical coal

[3] This assumes the Court approves the Bidding Procedures as proposed at or shortly after the June 23, 2015 hearing.

contract negotiations for 2016. However, as discussed in more detail in the Blackburn Declaration, such justification is overstated and closing a sale of the Debtors' assets in the weeks after September 25, 2015 would neither have a severe financial impact on Blackhawk or any other third-party purchaser of the Debtors' assets, nor materially impede a purchaser's efforts to enter into coal supply contracts for 2016. Accordingly, the Debtors have not articulated a viable justification for conducting the sale process on such an expedited basis, when the result is to limit the potential pool of acquirers and dissuade meaningful diligence and participation.

4. The stalking horse protections are also onerous and will chill competitive bidding. In particular, the Debtors have requested this Court's approval of: (a) a $19 million cash breakup fee; (b) up to $5 million in expense reimbursements; and (c) a $5 million minimum overbid. Thus, any potential bidder is required to bid $29 million above the Blackhawk Bid to simply be considered a qualifying bidder. This minimum overbid is unreasonable for a transaction of this size, particularly in light of the fact that no cash consideration is coming into the estates.

5. The size of the minimum overbid is even more questionable due to the highly conditional nature of the Blackhawk Bid. The Blackhawk Bid entails substantial execution risk due to numerous "key conditions" to closing that must be satisfied to effectuate the Blackhawk Sale, including, but not limited to: (a) the order confirming the Debtors' plan and approving the Blackhawk Sale must be entered by September 11, 2015, and must "explicitly" provide that there "are no successorship obligations for the [Combined Company]" in connection with the Debtors' collective bargaining agreements (the "CBAs"), the Coal Act, or the 1974 Pension Plan; (b) the Court must approve the Debtors' rejection of the CBAs, or Blackhawk must enter into new CBAs with the UMWA on terms and conditions acceptable to Blackhawk in its sole discretion ((a) and (b) together, the "Employee Obligations"); (c) Blackhawk must be able to refinance or roll over both its own existing indebtedness into the Combined Company, and that of the holders

of the DIP Facility and the Existing L/Cs; and (d) the Combined Company must obtain "at least $50 million of cash from the proceeds" of certain rights offerings where there are no committed backstop parties as of the date hereof. If the key conditions of the Blackhawk Sale cannot be satisfied, Blackhawk can walk away from the transaction—notably, without any risk of losing a deposit as discussed below.

6. This conditionality belies the notion that the Blackhawk Bid could serve the traditional purpose of a stalking horse bid—that is, to serve as a catalyst for other bids and to act as the definitive transaction in the event no other bidders surface. At this moment in time, the Blackhawk Sale is effectively illusory. On the face of the Bidding Procedures and the Term Sheet, there is too much uncertainty about whether the proposed transaction will ever close. Accordingly, it is difficult to justify traditional (let alone extraordinary) bid protections for an atypical stalking horse bid such as the one submitted by Blackhawk.

7. The conditionality of the Blackhawk Bid is further compounded by the lack of a deposit by Blackhawk. While other bidders are required to place up to a $67.2 million deposit with the Debtors, a deposit amount which itself is likely to chill bidding, Blackhawk is not required to make any deposit with the Debtors' estates, nor is there a reverse break-up fee in the event Blackhawk cannot close the transaction. In essence, the Debtors are giving Blackhawk a free option with only upside and no downside risk. In the event the parties are unable to close on the Blackhawk Sale, Blackhawk could walk away from, or significantly renegotiate, the deal for almost any reason without incurring any liability to the Debtors.

8. Finally, the Committee's participation rights are limited. The Bidding Procedures in their current form deprive the Committee of meaningful consultation rights throughout the bidding and sale process, thereby eliminating oversight of the process by a party that is interested

in maximizing value for the estate. As the key fiduciary for all unsecured creditors, the Committee should receive consultation rights in connection with all key decisions.

9. For the reasons articulated herein, the Committee respectfully requests that the Court deny the Motion, or alternatively, approve modified Bidding Procedures that address the Committee's concerns.

BACKGROUND

I. The Chapter 11 Cases

10. On May 12, 2015 (the "Petition Date"), the Debtors filed their voluntary chapter 11 petitions for relief, thereby commencing the above-captioned cases.[4] By order dated May 13, 2015 [Docket No. 48], these chapter 11 cases are being jointly administered. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, neither a trustee nor an examiner has been appointed in these chapter 11 cases.

11. On May 21, 2015, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors in these cases pursuant to section 1102 of the Bankruptcy Code [Docket No. 115].[5]

12. On June 4, 2015, the Court entered the *Final Order (A) Authorizing the Debtors to Obtain Post-Petition Financing, (B) Authorizing Use of Cash Collateral, (C) Granting Liens and Superpriority Claims, (D) Granting Adequate Protection, (E) Modifying the Automatic Stay, (F) Scheduling a Final Hearing, and (G) Granting Related Relief* [Docket No. 230] (the "Final

[4] The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these chapter 11 cases, is set forth in detail in the *Declaration of Ray Dombrowski, Chief Restructuring Officer of Patriot Coal Corporation, et al., in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 22].

[5] The Committee is presently composed of the following seven creditors: (i) U.S. Bank National Association, as Trustee; (ii) United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan"); (iii) Strata Mine Services, LLC; (iv) Crown Parts & Machine, Inc.; (v) United Mine Workers of America (the "UMWA"); (vi) Raleigh Mine & Industrial; and (vii) Enviromine, Inc.

Order"). The Final Order contained numerous modifications that addressed many of the Committee's concerns raised in its objection to the Debtors' post-petition financing arrangement, [Docket No. 183], including modifying the case milestones set forth on Schedule 4.03 of the Debtors' post-petition financing agreement. The Committee worked with the Debtors to modify the original milestones in a manner that would provide the Debtors with earlier access to post-petition funding and additional time to market the Debtors' assets through to the end of September 2015, while still permitting the Debtors to seek confirmation of a chapter 11 plan by the expiration of the post-petition financing facility at the end of November 2015 (the "Modified DIP Milestones").

II. The Sale Motion and Bidding Procedures

13. On June 2, 2015, the Debtors filed the Motion seeking (a) approval of the proposed bidding procedures (the "Bidding Procedures"), and (b) authorization for the sale of substantially all of the Debtors' assets in accordance with the Bidding Procedures and that certain term sheet (the "Term Sheet") between the Debtors and Blackhawk.[6] Additionally, the Motion seeks approval of the Debtors' proposed procedures for assumption and assignment of contracts, and authorization for the Debtors to assume and assign certain contracts.

14. The Motion provides that, pursuant to the Term Sheet, Blackhawk has agreed to act as the stalking horse bidder for the purchase of certain of the Debtors' assets (the "Blackhawk Assets") and assume certain liabilities through the creation of a new company (the "Combined Company") that will be capitalized with a combination of debt, equity, and cash (the "Blackhawk Sale"). The Blackhawk Assets include all of the Debtors' reserves (active and inactive),

[6] Because of the interwoven nature of the Term Sheet and the Bidding Procedures, this Objection addresses provisions of the Term Sheet to the extent implicated by the Bidding Procedures. However, the Committee expressly reserves its right to separately object to the Blackhawk Sale, including the Term Sheet, and eventually the asset purchase agreement, on any grounds, including those raised in this Objection, at any time on or prior to the objection deadline, if any, established with respect to consideration of the Blackhawk Sale.

equipment and other assets located at the following mining complexes and reserve areas—Panther, Rock Lick, Wells, Kanawha Eagle, Midland Trail/Blue Creek, Paint Creek, Logan County (Stanley Fork, Cub Branch and the Fanco preparation plant and load-out), and all related river docks.[7]

15. In addition to seeking approval of the Bidding Procedures as they relate to the Blackhawk Sale, the Motion also seeks approval of similar procedures for the Federal No. 2 longwall mine, a 1,350 TPH preparation plant,[8] and certain related assets (collectively, the "Federal Complex"). Unlike the Blackhawk Sale, the Debtors do not yet have a stalking horse candidate for the sale of the Federal Complex. The Bidding Procedures, however, provide the Debtors with the opportunity to select a stalking horse bidder for the Federal Complex by July 14, 2015 (the "Federal Stalking Horse Bidder"). The Motion further seeks authority for the Debtors to provide the Federal Stalking Horse Bidder bid protections amounting to three-percent of the cash portion of the Federal Stalking Horse Bidder's bid (the "Federal Bid Protections").

16. Pursuant to the Term Sheet, the consideration provided by Blackhawk to acquire the Blackhawk Assets will be (i) a structured assumption of some portion of the Debtors' prepetition secured liabilities through a debt-for-debt exchange and two separate rights offerings through which Blackhawk will raise $50 million to fund the Combined Company's operations post-closing, and (ii) an assumption of certain liabilities related to the Blackhawk Assets (the "Blackhawk Bid"). Through the Blackhawk Bid, the Debtors' secured creditors will be issued approximately $643 million in debt securities, plus "Class B membership interests" representing 30% of the Combined Company's pro forma equity. The Blackhawk Sale will not provide the

[7] In addition to these mining assets, the Blackhawk Assets also include, among other things, all owned office buildings, furniture, equipment, technology, software, leases associated with the Blackhawk Assets, all contracted sale agreements related to the Blackhawk Assets, and any related contracts with respect to service providers, trucking, suppliers, and vendors.

[8] "TPH" refers to "tons per hour."

Debtors with any cash consideration, and the Debtors must pay associated cure costs with cash-on-hand. Further, the Term Sheet is clear that the Combined Company will not be assuming any liabilities or obligations in connection with: (a) the Debtors' prepetition CBAs; (b) any employee benefit plans maintained or sponsored by the Debtors; (c) any retiree medical or other retiree welfare benefits; (d) any contributions to the 1974 Pension Plan, including any withdrawal liabilities under the plan; or (e) cure costs associated with the assumption and assignment of the Debtors' executory contracts and unexpired leases.

17. By the Motion, the Debtors seek approval of the Bidding Procedures on a timeline significantly more accelerated than the Modified DIP Milestones:

Event	Sale Milestone Date	Modified DIP Milestone Date	Proposed Reduction of Applicable Time
Deadline for the Debtors to obtain approval of a disclosure statement.	7/21/2015	10/15/2015	86 Days
Deadline to submit bids for both the Blackhawk Sale and the Federal Sale.	8/7/2015	9/21/2015	45 Days
Auctions for the Blackhawk Assets and the Federal Complex (together, the "Auctions").	8/13/2015	9/28/2015	46 Days
Deadline for the Debtors to confirm a chapter 11 plan to effectuate the Blackhawk Sale.	9/11/2015	11/23/2015	73 Days
Deadline for closing the Blackhawk Sale.	9/25/2015	11/30/2015	66 Days

18. Thus, notwithstanding the extensive negotiations between the Committee, the DIP Lenders and the Debtors to establish the Modified DIP Milestones and provide the Debtors with the ability to conduct a robust marketing process for the benefit of all the Debtors' stakeholders, the Motion seeks to establish a truncated marketing and sale process for the Blackhawk Assets to be consummated pursuant to a chapter 11 plan. Notably, the Bidding Procedures contemplate that potential interested bidders must submit their bids 45 days earlier than contemplated under

the Modified DIP Milestones, and the Debtors must obtain approval of a disclosure statement for their chapter 11 plan 86 days earlier than contemplated under the Modified DIP Milestones.

19. As part of the Bidding Procedures, the Motion also seeks approval of (i) a $19 million breakup fee (the "Breakup Fee") and an expense reimbursement of up to $5 million (the "Expense Reimbursement") in favor of Blackhawk in the event the Blackhawk Sale is not consummated; and (ii) the establishment of a $5 million overbid (the "Minimum Overbid") for the Blackhawk Assets in connection with any potential third-parties' submission of a bid for the Blackhawk Assets (together, the "Blackhawk Bid Protections"). The Motion provides that the Breakup Fee represents approximately 3% of the Blackhawk Bid ($643 million of new debt securities that Blackhawk would issue to the Debtors' secured lenders), and seeks that the Breakup Fee and Expense Reimbursement, if payable, be deemed an actual and necessary cost and expense of preserving the Debtors' estates, within the meaning of sections 503(b) and 507(a)(2) of the Bankruptcy Code.

ARGUMENT

20. The Committee supports a sale of the Debtors' assets, but the process to sell those assets should not eliminate potential offers that could enhance creditor recoveries. It is axiomatic that the paramount goal of any proposed auction process is to maximize the proceeds for the estate. *See Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.)*, 330 F.3d 548, 558-59 (3d Cir. 2003) (*en banc*) ("debtor-in-possession has a duty to maximize the value of the estate"); *Four B Corp. v. Food Barn Stores, Inc.* (*In re Food Barn Stores, Inc.),* 107 F.3d 558, 564-65 (8th Cir. 1997); *In re Embrace Sys. Corp.,* 178 B.R. 112, 123 (W.D. Mich. 1995) ("When a debtor desires to sell an asset, its main responsibility, and the primary concern of the bankruptcy court, is the maximization of value of the asset[s] sold"). Approval of bidding procedures is appropriate only in circumstances in which the procedures and fees contemplated

thereunder are (a) necessary to preserve and benefit the estate, (b) reasonable, (c) in the best interests of these estates, and (d) designed in a fashion to promote, enhance and encourage bidding. *See In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010); *Calpine Corp. v. O'Brien Envtl. Energy* (*In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 535-36 (3d Cir. 1999);[9] *see also In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995); *In re America West Airlines, Inc.*, 166 B.R. 908, 913 (Bankr. D. Ariz. 1994) (denying bid procedures that would "not induce further bidding" and where "the proposed break-up fee unnecessarily chills bidding"); *Official Comm. of Subordinated Bondholders v. Integrated Resources* (*In re Integrated Resources, Inc.)*, 147 B.R. 650, 663 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993); *In re Hupp Indus., Inc.*, 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992).

21. The purpose of procedural bidding orders "is to facilitate an open and fair public sale designed to maximize value for the estate." *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). To accomplish that goal, bankruptcy courts are necessarily given discretion and latitude in conducting a sale. *See id.*; *see also Wintz v. Am. Freightways, et al. (In re Wintz Co*.), 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring the sale of assets, bankruptcy courts have "ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets"). In addition, court-approved bid procedures must provide, among other things, for a fair and efficient resolution of a debtor's bankruptcy, and they must also be fair and reasonable for all parties. *See* Hearing of Transcript at 132:23-133:5, *In re American Safety Razor Company, LLC,* Case No. 10-12351 (MFW) (Bankr. D. Del. Sept. 30, 2010) [Docket No. 318]. ("I don't think, as the debtors suggest, that my consideration of bid

[9] The Fourth Circuit has not expressly adopted a standard by which to assess the propriety of breakup fees. However, courts within the Fourth Circuit have applied the standards applicable under section 503(b)(1) of the Bankruptcy Code. *See In re Tropea*, 352 B.R. 766, 768 (Bankr. N.D. W. Va. 2006) ("Break-up fees are allowed as an administrative expense claim against the estate if they satisfy the standard of section 503(b)(1): the fee must reflect the actual and necessary cost of preserving the estate.").

procedures is based on the business judgment rule. I need not accept the debtors' business judgment with respect to process. The Bankruptcy Code and Rules and the process under the Bankruptcy Code are all matters for the debtor—for the Court's determination as to what is fair and reasonable. In fact, I think that's my only role in this case: to determine what is fair for all the parties.").

22. Here, the proposed Bidding Procedures and the Blackhawk Bid Protections are not fair to all the parties—they are instead designed to deter competitive bids and facilitate Blackhawk's acquisition of the Blackhawk Assets by (a) truncating the time during which potential bidders can conduct diligence and prepare a Qualified Bid, (b) requiring unrealistically high overbids, and (c) failing to quantify the total consideration being provided under the Blackhawk Bid, namely in connection with the value of the Class B membership interest, does not allow potential bidders to fully understand the amount required of a topping bid.

23. For these reasons, all of which are discussed more fully below, the Court should not approve the Bidding Procedures and Blackhawk Bid Protections as proposed.

I. The Timeframe For The Debtors' Proposed Asset Sale Process Is Too Short

24. The Sale Milestones imposed by the Bidding Procedures are unreasonably aggressive and do not provide a means by which to maximize the estates' value. Without a careful and thorough marketing process that allows sufficient time to reach all potential purchasers (both strategic and financial) and allows these parties to complete the requisite due diligence, the Debtors severely limit their chances of obtaining the highest and best offer that the market will produce. A longer timeframe would enable the Debtors' and the Committee's advisors to canvas alternative potential acquirers, as well as to investigate alternative sale structures and arrangements that could increase value for the estate over the currently contemplated proposal. Indeed, as the Committee has already noted, it is analyzing, among other

things, the viability of tax advantageous structures (such as a transaction with a master limited partnership) and sales on a mine-by-mine basis. These efforts cannot come to fruition within the limited timetable imposed by the Bidding Procedures because potential bidders do not have sufficient time to conduct necessary diligence, undertake the necessary financing discussions with their respective lenders, or interact with the Debtors' management to understand the assets and the business.

25. The purported justification for the aggressive timeline is that, "Blackhawk has conditioned its proposed purchase of the Blackhawk Assets on the achievement of certain milestones, including a transaction closing date on or before September 23, 2015." (Puntus Declaration, ¶ 9.)[10] According to the Debtors, "this condition is driven by Blackhawk's need to begin the negotiation of 2016 coal sales contracts by mid-September." *Id.* Other than these conclusory statements, the Debtors have not provided the Court with any other evidence to support truncating the Debtors' marketing process. As a result, if the present sale timeline remains unchanged, the Debtors will be effectively precluding any competitive bidding.

26. In fact, the September deadline being imposed by Blackhawk is not as significant as is being portrayed by the Debtors. As discussed in greater detail in the Blackburn Declaration, closing a sale of the Debtors' assets in the weeks after September 25, 2015 would neither have a severe financial impact on Blackhawk or any other third-party purchaser of the Debtors' assets, nor materially impede a purchaser's efforts to enter into coal supply contracts for 2016. (Blackburn Declaration, ¶ 11.) First, while it is true that historically the season for negotiating domestic metallurgical coal contracts occurs in September and ends typically by Thanksgiving, (a) many potential domestic metallurgical purchasers are already negotiating their coal supply

[10] The "Termination Date" set forth in the Term Sheet is September 25, 2015 (Term Sheet, § 10), but the Puntus Declaration provides that the "transaction closing date" must occur on or before September 23, 2015. (Puntus Declaration, ¶ 9.)

contracts due to the low current price of coal as compared to historical levels, and (b) such timing does not typically apply to foreign metallurgical supply contracts or thermal coal supply contracts. (Blackburn Declaration, ¶ 11.) With respect to the Blackhawk Assets, even though these assets produce a greater proportion of metallurgical coal to thermal coal, thermal coal still represents a substantial portion of the coal tonnage produced by these assets. (Blackburn Declaration, ¶ 14.)[11] **THE FOLLOWING SENTENCE IN THIS PARAGRAPH HAS BEEN REDACTED. Full Version To Be Filed Under Seal Pursuant To Motion To Seal Filed Contemporaneously Herewith** Generally, foreign buyers begin preliminary discussions regarding long-term supply contracts in the fall (*i.e.,* September and October), and do not finalize supply agreements until late December. (Blackburn Declaration, ¶ 16.) Accordingly, any acquirer of the Debtors' mining assets has adequate time beyond mid-September to secure 2016 supply contracts with foreign metallurgical customers, and those revenues appear to be a more significant component of the Debtors' business as compared to domestic metallurgical sales. (Blackburn Declaration, ¶ 16.) Second, the Debtors are one of the few suppliers to industry purchasers of "Hi-Vol A" coal, which demands the highest per tonnage price in the market. (Blackburn Declaration, ¶ 17.) Given the high demand for this particular product, and that the Debtors are one of the few sources for this product, the Debtors (or any successor entity) will not have to rush into the market by mid-September to secure a supply contract for 2016 for Hi-Vol A coal. (Blackburn Declaration, ¶ 17.) Finally, the Debtors have the ability to enter into coal supply contracts during these Chapter 11 cases,[12] and given the quality of the Debtors' coal and

[11] By comparison, thermal coal, which is generally used by utility companies, is purchased by those companies throughout the year and unlike the domestic metallurgical market, the purchase period for supply contracts is not confined to a specific time within the calendar year. (Blackburn Declaration, ¶ 17, n.3.) Utility companies generally send out RFPs (i.e., requests for proposals) to coal suppliers who, in turn, submit their price proposals back to the utility company, and that this back-and-forth occurs regularly throughout the calendar year. (Blackburn Declaration, ¶ 17, n.3.)

[12] The Debtors have already obtained approval from this Court to enter into and perform under such contracts. *See*

their relationships with metallurgical coal customers, the Debtors should be able to go into the marketplace now, lock in supply contracts for 2016 and then assign those contracts to the winning bidder for the Blackhawk Assets. (Blackburn Declaration, ¶ 18.) Accordingly, without further evidence to support the Debtors stated reasoning for pursuing an aggressive timeline, Blackhawk's condition seems to be nothing more than an attempt to force a quick closing without affording other potential bidders a sufficient opportunity to submit a competing bid.

27. Additionally, although the Debtors have committed the estates to an aggressive timeline, to the Committee's knowledge there have been no well-publicized efforts to market the Debtors' assets either through a transaction similar to the Blackhawk Sale or through the separate marketing of each of the Debtors' mining complexes. (Szlezinger Declaration, ¶ 9.) It was not until the evening of June 18, 2015, that the Debtors placed a mine-by-mine analysis in the data room for potential bidders to fully assess the Debtors assets. Because this information was only recently provided, potential bidders' ability to fully assess the value of the Debtors' assets to this point has been severely impaired. The Committee fully appreciates and acknowledges that the Debtors and their advisors worked diligently to produce such information, but the fact that such an analysis was only made available to potential bidders less than 24-hours ago underscores the fact that the Debtors need more time to allow their investment bankers to market their assets in the most-value maximizing manner possible. (Szlezinger Declaration, ¶ 10.) Upon information and belief, the Debtors have not prepared teasers or other materials for distribution to potential bidders including information on a mine-by-mine basis. It is unknown when such materials will be available, or how much of the 45-day marketing period provided under the Bidding Procedures will have slipped away before such materials are provided to potential bidders.

Final Order (I) Authorizing the Debtors to Enter Into and Perform Under Coal Sale Contracts in the Ordinary Course of Business and (II) Granting Related Relief [Docket No. 238].

(Szlezinger Declaration, ¶ 10.) Requiring submission of a Qualified Bid in 45 days is unrealistic. *See, e.g.*, Transcript of Hearing at 20:16-20, *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del. Nov. 3, 2014) [Docket No. 2699] (holding that "the proposed timelines must be stretched . . . to allow for sufficient time for any interested party to develop an alternative transaction").

28. To further complicate matters, a component of the consideration included in the Blackhawk Bid is a distribution of equity securities to the Debtors' existing creditors – *i.e.*, Class B membership interests in the Combined Company (Motion, ¶ 8.). However, neither the Motion, the Term Sheet, nor any other materials provided by the Debtors or Blackhawk establishes the value of the Class B membership interests, making it impossible to truly quantify the proper amount of a potential bidder's topping bid.

II. The Blackhawk Bid Protections are Unreasonable Under the Current Circumstances

A. The Bid Protections Will Deter Competitive Bids

29. The Blackhawk Bid Protections should not be approved in their current form. The Bidding Procedures dictate that to be a Qualified Bid an alternative transaction requires cash or non-cash consideration in an amount equal to the Blackhawk Bid, plus cash sufficient to satisfy the Breakup Fee, the Expense Reimbursement, and the Minimum Overbid. Thus, an interested third-party would need to bid at least $29 million in cash over the Blackhawk Bid for its bid to even be considered a Qualified Bid. The expense to a potential purchaser with these constraints will discourage, and may prevent altogether, competitive bidding. (Szlezinger Declaration, ¶¶ 14-15.) Further, the Term Sheet even contemplates that Blackhawk receives the Breakup Fee and Expense Reimbursement if Blackhawk walks away because the Blackhawk Sale fails to close by September 25, 2015, or Blackhawk terminates the sale because the Debtors

are unable to satisfy a condition to closing. Thus, even if Blackhawk pulls out of the deal, and has no involvement in inducing or facilitating bids, Blackhawk is still entitled to receive the Breakup Fee and Expense Reimbursement.

30. As a general matter, bid protections may be necessary to preserve the value of a debtor's estate, and thus are permissible as administrative expenses under circumstances in which such bid protections are required to induce an initial bid. *See Reliant Energy*, 594 F.3d at 206; *O'Brien*, 181 F.3d at 535. Furthermore, the Court is not required to defer to the judgment of the Debtors when analyzing the propriety of the Breakup Fee or Expense Reimbursement. *See O'Brien*, 181 F.3d at 534-35 ("[T]he standard is not whether a breakup fee is within the business judgment of the debtor[s], but whether the transaction will 'further the diverse interests of the debtor[s], creditors and equity holders, alike'"). Applicants seeking approval of a breakup fee must establish that the buyer's bid serves as a catalyst to higher bids. *Id.* at 537 (finding estate would arguably benefit from a breakup fee if that fee induced research that in turn led to a value that better reflected the estate's "true worth").

31. Given the truncated timeline being imposed on the estates by Blackhawk through the Bidding Procedures, which include an expedited marketing and sales process, the Blackhawk Bid is not acting as a catalyst for competitive bidding. Rather, it is preventing the Debtors from pursuing a process through which the Debtors will have the opportunity to maximize value for the benefit of all stakeholders. (Szlezinger Declaration, ¶¶ 10, 15.) Providing any breakup fee in such circumstances is neither reasonable nor appropriate. *See In re Bidermann Indus., U.S.A., Inc.*, 203 B.R. 547, 551-53 (Bankr. S.D.N.Y. 1997) (rejecting proposed bidding procedures where the "whole bidding arrangement [was] designed not to encourage but stifle bidding"); *In re Integrated Res., Inc.*, 147 B.R. at 659 ("if [breakup fees] stifle bidding they are not enforceable").

32. Additionally, the Debtors have not established that the Breakup Fee or Expense Reimbursement are actually necessary to preserve the value of the estate. Bid protections are only proper if "assurance of a breakup fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *O'Brien*, 181 F.3d at 537. The Debtors cannot demonstrate that such "bid protections" are necessary to preserve the value of the estate, especially considering the fact that the Blackhawk Bid is highly conditional and does not include any cash component or even a cash deposit. In combination, the Breakup Fee and the Expense Reimbursement do nothing more than encumber the Debtors' assets without providing the Debtors with any additional cash. In sum, the Breakup Fee, together with the Expense Reimbursement and the requisite overbid amount, provide Blackhawk with a significant advantage over all other potential bidders by imposing a substantial hurdle for bidders to overcome. For this reason, the Court should not approve the Breakup Fee. *See In re American Appliance*, 272 B.R. 587, 601 (Bankr. D.N.J. 2002) (holding that a breakup fee "cannot be characterized as necessary to preserve the value of the estate" where such fee "would serve to advantage a favored purchaser").

B. Blackhawk Should Not Receive Bid Protections On Account Of A Highly Contingent And Conditional Term Sheet

33. Approval of the Blackhawk Bid Protections is also entirely improper because the consummation of the Blackhawk Sale is highly contingent, which creates uncertainty about whether the Blackhawk Sale could even close. These contingencies include, among others things:

- The entry of a confirmation order by September 11, 2015 that "explicitly" provides there "are no successorship obligations for the [Combined Company]" in connection with the CBAs, the Coal Act or in relation to the 1974 Pension Plan;

- Entry of a court order approving the Debtors' rejection of the CBAs or Blackhawk must enter into new CBAs with the UMWA on terms and conditions acceptable to Blackhawk in its sole discretion;

- Blackhawk must refinance or roll-over its current secured indebtedness, the DIP Facility and Existing L/Cs into the Combined Company's new debt; and

- The Combined Company must obtain "at least $50 million of cash from the proceeds" from certain rights offerings where the Debtors have no committed backstop parties as of the date hereof.

34. At this point in time, it is entirely unclear what the eventual outcome will be with respect to the Employee Obligations or whether the Debtors will be able to transfer the Blackhawk Assets free and clear of the Employee Obligations. *See Chi. Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 50-51 (7th Cir. 1995) (holding successor liability applicable to ERISA claims asserted after the original employer's bankruptcy).[13] Further, it is far from certain that Blackhawk will be able to refinance its current funded indebtedness or the indebtedness under the DIP Facility and Existing L/Cs, or that the holders of such indebtedness are willing to accept new debt securities in the Combined Company. Neither the Debtors nor Blackhawk have provided any evidence to the Court that Blackhawk will be able to satisfy this condition (in fact, Blackhawk recently failed to refinance its own debt). Also, the Blackhawk Sale is conditioned on the Combined Company's ability to obtain "at least $50 million of cash from the proceeds" from certain rights offerings where the Debtors have provided this Court with no evidence supporting that such rights offerings have committed backstop parties. Because the Debtors do not have the ability to control these contingencies, it is entirely unreasonable to provide Blackhawk with such

[13] *See also Int'l Union Local 68 v. RAC Atl. City Holdings, LLC*, No. 11-3932, 2013 U.S. Dist. LEXIS 11413, at *24 (D.N.J. Jan. 29, 2013) ("the actions of an employer can result in a court voiding a transaction when a primary motive of that transaction was to avoid withdrawal liability") (citing *Sherwin-Williams Co. v. N.Y. State Teamsters Conference Pension, Ret. Fund*, 158 F.3d 387 (6th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999) (parent corporation sold subsidiary to underfunded entity and this subsidiary quickly went bankrupt; sale transaction deemed voided by operation of 29 U.S.C. § 1392(c) because principal purpose was to avoid employee liability)).

significant bid protections when it is unclear whether the Blackhawk Sale will ever be able to close under its current terms.

35. To the extent the Court finds bid protections under the circumstances to be warranted, the Committee submits that reasonable levels of the Blackhawk Bid Protections are as follows: a Breakup Fee of $5 million; an Expense Reimbursement of actual and reasonable expenses of no greater than $1 million; and a Minimum Overbid of $2 million.[14] (*See* Szlezinger Declaration, ¶ 15.) In combination with an extended timeline to properly market the Debtors' assets, these reduced bidding protections will not chill bidding and the Debtors will be able to run a value maximizing sale process.

III. Blackhawk Should Be Compelled To Post A Cash Deposit

36. Shockingly, Blackhawk is not required to place a cash deposit with the Debtors, as all other potential bidders are required to do.[15] The absence of a deposit by a stalking horse bidder under these circumstances is baffling. (Szlezinger Declaration, ¶ 17-18) (in every Chapter 11 case from 2010 through to the present involving stalking horse bidders for asset purchases between $250 million and $1.5 billion (where the stalking horse bidder was not a pre-existing creditors of the debtor) such bidders provided the debtors with a cash deposit, which on average, was approximately 5% of the cash purchase price). In essence, the Debtors are giving Blackhawk a free option with upside and no downside risk. Thus, in the event the parties are

[14] To the extent the Debtors argue that approval of the Blackhawk Bid Protections as they are currently proposed is necessary for the Debtors to meet the next milestone under their post-petition financing, the Court should give such argument little weight especially in light of statement made by the Debtors' investment banker at the June 3, 2015 hearing to the effect that "to the extent there is a hiccup, [the Debtors] have a covenant default, [the Debtors] need a little more liquidity, [the Debtors] miss a milestone, what makes me sleep better at night is that we have lenders at the bottom of our capital structure providing us th[e] DIP facility. And they are protecting their interests at the bottom of their capital structure. So I feel better that if we need a little more flexibility, we'll get it from those DIP lenders. And they won't be pushing for a wind-down or a liquidation." June 3rd Tr. at 98:20-99:3.

[15] Under the Bidding Procedures, "[e]ach Bid must be accompanied by a cash Deposit in an amount acceptable to the Debtors, after consultation with the DIP Lenders, which amount shall not exceed ten percent of the Purchase Price of the Bid[.]" (Bid Procedures, at 3.)

unable to close on the Blackhawk Sale, Blackhawk could walk away from the deal for almost any reason without any resulting liability to the Debtors. Thus, the Debtors are seeking this Court's blessing to incur a potential $24 million administrative expense claim to further their pursuit of the Blackhawk Sale through the expensive Chapter 11 plan process when the proposed transaction may be completely illusory. Yet there is no protection for the estates' downside risk if the Blackhawk Sale does not close through no fault of the estates.

37. Accordingly, due to the chilling effect created by the Blackhawk Bid Protections, it is very possible that the Debtors could be in a situation where Blackhawk is the only bidder, the Debtors seek to consummate the Blackhawk Sale through the Chapter 11 plan process while incurring all of the associated administrative costs, and the Blackhawk Sale is not able to close. In such a situation, the Debtors (a) would be administratively insolvent—lacking any level of cash-on-hand;[16] (b) Blackhawk would be able to walk away without any risk; and (c) due to the unreasonable Blackhawk Bid Protections, the Debtors would have no alternative bidders, and be forced to liquidate.

IV. Additional Modifications Are Necessary to Ensure The Bidding Procedures Are Fair and Reasonable

38. Under the proposed Bidding Procedures and the proposed Bidding Procedures Order, the Committee's participation rights are very limited. As drafted, the Bidding Procedures deprive the Committee of meaningful consultation rights throughout the bidding and sale process, thereby eliminating oversight of the process by a party who is interested in maximizing value for the estate. At a minimum, the Committee, as an independent fiduciary for the Debtors'

[16] In discussing the sufficiency of the Debtors' post-petition financing, the Debtors' investment banker, Mr. Puntus, acknowledged that the Debtors' post-petition financing was insufficient to fund a case through confirmation of a chapter 11 plan. *See* June 3rd Tr. at 88:19-21 ("The cash flow forecast that's been prepared by the company at the direction of Mr. Dombrowski shows us coming up a little bit short.").

creditors, should be brought into the fold, on a confidential basis if necessary, as early as possible.

39. It is also critical that the Committee be involved and have the ability to object to the Debtors' actions and/or challenge the Debtors' decisions regarding the proposed sale, if necessary, particularly given the expedited sale process and lack of current marketing efforts. Accordingly, in all areas where the Bidding Procedures and the proposed Bidding Procedures Order provide for the Debtors' exercise of "discretion", "determination", or "business judgment" (including, but not limited to, determination whether a bid is a Qualified Bid and which Qualified Bid is likely to result in the highest or best value to the Debtors), the proposed Bidding Procedures Order and Bidding Procedures must be revised to reflect that the Debtors must consult with the Committee.

40. Further, the Debtors must include the Committee as a party to receive all bids, including financial information, directly from the bidders and permit the Committee to seek expedited relief from the Court in the event that the Committee objects to actions taken by the Debtors in connection with the sale process.

41. In addition, the Committee must be permitted to communicate with potential bidders to ensure that the interests of creditors are being considered and protected. It is necessary for the Committee to also receive copies of the financial information from potential bidders so it will be able to determine whether a bidder has the financial and other capabilities to consummate the proposed sale. Likewise, the Committee's advisors should receive copies of the "Closing Evidence" that a bidder obtains a debt or equity funding commitment or has financial resources readily available to purchase the Debtors' assets.[17]

[17] If necessary, the Committee can agree that sensitive information concerning bidders may be viewed by the Committee's advisors and not the Committee members themselves.

42. There are also several other aspects of the Bidding Procedures that are unreasonable and/or designed to chill bidding that must be revised:

- Bid Deposit. The Bidding Procedures require that any Bid be "accompanied by a cash Deposit . . . which amount shall not exceed ten percent of the Purchase Price of the Bid[.]" (Bidding Procedures, ¶ B.) Given the alleged value of the Blackhawk Bid, a ten percent deposit amounting to $67.2 million [18] is unnecessarily high and may have the effect of discouraging interested parties from submitting a bid. *See* Transcript of Hearing at 85:16-22, *In re The Standard Register Company, Inc., et al.,* Case No. 15-10541 (Bankr. D. Del. Apr. 13, 2015 (BLS)) [Docket No. 311] (court stating, "a deposit of 10 percent, while it's a typical number . . . is high in this context given the amount of the overall transaction. So I do have some concerns that having to post a deposit of up to $30 million dollars and leave it sitting can have a negative effect on somebody's willingness to even go down that path"). Here, a deposit of upwards of $67.2 million dollars is not reasonable.

- Reservation of Rights. The reservation of rights provision of the Bidding Procedures gives the Debtors, with the consent of the DIP Lenders, the ability to modify the Bidding Procedures without Court approval or notice to any other party. (Bidding Procedures, at 14.) As a result of the broad reservation, the Debtors are permitted, without notice to key stakeholders or the Court, to modify the Bidding Procedures and effectively change the rules of the road. The Bidding Procedures should be modified to provide that Debtors must obtain the Committee's consent or further order of the Court before modifications to the Bidding Procedures may be instituted.

- Unencumbered Assets. To the extent the Debtors are seeking to sell any of their unencumbered assets, some form of consideration must be provided to unsecured creditors.

RESERVATION OF RIGHTS

43. The Committee reserves the right to raise further and other objections to the Motion prior to or at the hearing thereon in the event the Committee's objections raised herein are not resolved prior to the hearing.

[18] The $67.2 million deposit amount is 10% of $672 million, which value accounts for the Blackhawk Bid ($643 million), plus $29 million on account of the Blackhawk Bid Protections. Thus, the proposed deposit amount for potential bidders is equal to more than two-thirds of the Debtors' DIP Facility.

CONCLUSION

44. The Committee has been in discussions with the Debtors and is hopeful that the Debtors can agree to modifications that address some or all of the concerns identified above. However, in the event that the Debtors are unwilling to make acceptable modifications, the Committee respectfully requests that the Court condition approval of the Motion on changes being made to the proposed Bidding Procedures Order as set forth herein.

[*Remainder of page intentionally left blank.*]

WHEREFORE, the Committee respectfully requests that the Court: (a) deny the Motion; (b) modify the proposed Bidding Procedures Order as set forth herein; or (c) grant such other and further relief as the Court may deem just and proper.

Dated: Richmond, Virginia
June 19, 2015

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Proposed Counsel for The Official Committee of Unsecured Creditors of Patriot Coal Corporation, et al.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	)	Chapter 11
	)	
PATRIOT COAL CORPORATION, *et al.*	)	Case No. 15-32450 (KLP)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	

DECLARATION OF LEON SZLEZINGER IN SUPPORT OF OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF (I) AN ORDER (A) APPROVING BIDDING PROCEDURES AND BID PROTECTIONS IN CONNECTION WITH THE SALES OF CERTAIN OF THE DEBTORS' ASSETS, (B) APPROVING THE FORM AND MANNER OF NOTICE, (C) SCHEDULING AUCTIONS AND A SALE HEARING, (D) APPROVING PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, AND (E) GRANTING RELATED RELIEF AND (II) AN ORDER (A) APPROVING THE SALE OF ASSETS PURSUANT TO THE BIDDING PROCEDURES, (B) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS, AND (D) GRANTING RELATED RELIEF

I, Leon Szlezinger, declare under penalty of perjury:

1. I am a Managing Director and Joint Global Head of Restructuring & Recapitalization at Jefferies LLC ("Jefferies"), an investment banking and financial advisory firm with principal offices located at 520 Madison Avenue, New York, New York 10022, as well as at other locations worldwide. The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors") has selected Jefferies as its financial advisor and investment banker, and I am authorized to make this declaration on behalf of the Committee in support of the Committee's objection (the "Objection") to the motion [Docket No. 200] (the "Bid Procedures Motion") of Patriot Coal Corporation, *et al.* (collectively, the "Debtors") for entry of (I) An Order (A) Approving Bidding

Procedures And Bid Protections In Connection With The Sales Of Certain Of The Debtors' Assets, (B) Approving The Form And Manner Of Notice, (C) Scheduling Auctions And A Sale Hearing, (D) Approving Procedures For The Assumption And Assignment Of Contracts, And (E) Granting Related Relief And (II) An Order (A) Approving The Sale Of Assets Pursuant To The Bidding Procedures, (B) Authorizing The Sale Of Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests, (C) Authorizing The Assumption And Assignment Of Contracts, And (D) Granting Related Relief. Unless otherwise stated in this declaration, I have personal knowledge of the facts set forth herein.[1]

QUALIFICATIONS

2. Jefferies provides a broad range of corporate advisory services to its clients including, without limitation, services relating to the following: (a) general financial advice; (b) mergers, acquisitions, and divestitures; (c) special committee assignments; (d) capital raising; and (e) corporate restructurings. Jefferies and its senior professionals have extensive experience in the reorganization and restructuring of troubled companies, both out of court and in chapter 11 proceedings. Jefferies has advised debtors, creditor and equity constituencies, and purchasers in numerous reorganizations in the United States and worldwide. Since 2007, Jefferies has been involved in over 100 restructurings representing over $200 billion in restructured liabilities, many of which included M&A elements.

3. At Jefferies, I have advised on numerous complex restructurings, including Caesars Entertainment Operating Company, MPM Silicones (Momentive), AMR (American Airlines), K-V Discovery Solutions, Eastman Kodak, MSR Golf Resort, Innkeepers USA Trust, Spheris, RathGibson and Medical Staffing Network, among others.

[1] Certain disclosures herein relate to matters within the personal knowledge of other professionals at Jefferies and are based on information provided by them.

4. Before joining Jefferies, I was a Senior Managing Director at Mesirow Financial Consulting, specializing in Restructuring Advisory Services. Prior to that, I was a partner at KPMG LLP and PricewaterhouseCoopers LLP specializing in Financial Advisory Services.

BACKGROUND

5. By the Bid Procedures Motion, the Debtors seek entry of an order approving of bidding procedures, bid protections for the proposed staking horse bidder, the form of notices associated with the auction schedule and the sale, as well as the dates and deadlines for the submissions of any Bids, the Auctions (if necessary), and certain related dates and deadlines.

6. The Bid Protections include a Breakup Fee[2] in the amount of $19 million, and expense reimbursement up to $5 million. The Debtors propose to pay the Breakup Fee in the event that either: (a) Blackhawk terminates the Asset Purchase Agreement due to a material, uncured breach by Patriot that would cause the failure of any condition to closing; (b) an Alternate Transaction Trigger occurs; or (c) Blackhawk terminates the Asset Purchase Agreement due to a failure of the closing to occur before September 25, 2015 (other than if closing failed to occur as a result of the failure of Blackhawk's existing secured creditors to agree to exchange their debt obligations for the debt in Post Closing Blackhawk and Blackhawk is unable to raise new money financing elsewhere to satisfy its obligations) and Patriot subsequently consummates a superior transaction on or prior to December 1, 2015. The Debtors ask the Court that the Bid Protections be senior to all administrative expenses other than those afforded to the DIP lenders, the Debtors' prepetition lenders and the Carve Out.

7. The Debtors also ask the Court to impose the following timeline in order to close a sale through a confirmed Chapter 11 plan (as required by the Stalking Horse Bidder) no later than September 25, 2015:

[2] Capitalized terms not otherwise defined herein shall have the meaning set forth in the Bid Procedures Motion.

Proposed Date	Milestone(s)
August 7, 2015	Bid Deadline
August 11, 2015	Notice of Qualified Bids: Bidders shall be notified whether their bids are Qualified Bids
August 13, 2015	Auction
August 18, 2015	Hearing to designate Winning Bidder

ANALYSIS

I. The Proposed Sale Timeline Is Too Brief

8. During the first day hearing, the Debtors disclosed that leading up to the Petition Date, they were in extensive negotiations with a strategic party interested in acquiring most of the Debtors' operating assets. According to the Declaration of Marc D. Puntus, filed contemporaneously with the Motion, since early 2015, Blackhawk is one of two entities with whom the Debtors have engaged in discussions and negotiations. Less than three weeks ago, the Debtors filed the Motion, together with a term sheet from Blackhawk Mining, LLC, seeking to anoint Blackhawk as a stalking horse, provide them with certain bid protections, and obtain approval of a sale (to be confirmed through a Chapter 11 plan) by mid-September, even though (as noted in the chart below) the Debtors now have the flexibility under their DIP financing facility to accomplish the same thing by mid-November.

Event	Sale Milestone Date	Modified DIP Milestone Date	Proposed Reduction of Applicable Time
Deadline for the Debtors to obtain approval of a disclosure statement.	7/21/2015	10/15/2015	**86 Days**
Deadline to submit bids for both the Blackhawk Sale and the Federal Sale.	8/7/2015	9/21/2015	**45 Days**
Auctions for the Blackhawk Assets and the Federal Complex (together, the "Auctions").	8/13/2015	9/28/2015	**46 Days**

Event	Sale Milestone Date	Modified DIP Milestone Date	Proposed Reduction of Applicable Time
Deadline for the Debtors to confirm a chapter 11 plan to effectuate the Blackhawk Sale.	9/11/2015	11/23/2015	**73 Days**
Deadline for closing the Blackhawk Sale.	9/25/2015	11/30/2015	**66 Days**

9. To the best of my knowledge, there has been no material effort to market the Debtors' assets either through a similar transaction to the Blackhawk Sale or through the separate marketing of each of the Debtors' mining complexes. The Debtors own coal reserves—including owned and leased assets in the Central Appalachia basin (in West Virginia and Ohio) and Southern Illinois basin (in Kentucky and Illinois)—and operate eight active mining complexes in West Virginia. As such, any transaction would require substantial diligence by prospective purchasers.

10. It has been my professional experience that it is beneficial to provide parties with as much time as possible to explore and develop going-concern alternatives in order to ensure that value is maximized for all creditor constituencies. Without a careful and thorough marketing process that allows sufficient time to reach all potential purchasers (both strategic and financial) and complete the requisite due diligence, it is my view that the Debtors severely limit their chances of obtaining the highest and best offer that the market will produce. Given the marketing process has not yet begun, a longer marketing timeframe is essential to enable the Debtors' investment banker to solicit potential purchasers, negotiate confidentiality agreements, and provide the (as yet undrafted) teaser and confidential information memorandum. Interested parties that intend to pursue their interest will require a reasonable amount of time to meet with management, conduct diligence including physical inspections and environmental diligence,

make arrangements for obtaining the necessary financing for a bid, and procure the requisite cash deposit (as currently drafted, up to approximately $67 million).

11. Therefore, to enable a value maximizing process to take place, the Sale Milestones should be modified to mirror the dates contained in the Modified DIP Milestones. This will place the Debtors in a more advantageous posture because they will be in a better position to undertake a more robust and competitive sale process, as well as pursue the possibility of alternate plan structures. Ultimately, this additional time will benefit all parties in interest, including both secured and unsecured creditors.

II. The Bid Protections Only Serve To Enrich Blackhawk Not Promote Competitive Bidding

12. Bid protections, such as a breakup fee and expense reimbursement, should be provided to a stalking horse bidder in order to compensate them for remaining committed to a pre-existing asset purchase agreement that it is able to execute and which will potentially foster higher and better bids, thereby maximizing value for the debtor's estate. Under the current circumstances, I do not believe the proposed Bid Protections do that.

13. Potential bidders are being asked to bid against a highly conditional term sheet in which the buyer utilizes a mix of refinanced and/or roll-over debt and newly issued equity in a yet-to-be-formed entity, while also having to post up to a 10% cash deposit, even though the stalking horse bidder has not posted any deposit with the Debtors.

14. Further, because of the highly truncated time period for due diligence and marketing dictated by the Bidding Procedures (as well as other features of the Bidding Procedures that will chill bidding, as discussed herein), the Debtors likely will not be able to attract the full universe of potentially interested parties to submit overbids, thus depriving the Debtors of the value for which they are paying by providing a break-up fee of $19 million.

15. It has been my experience that parties will be more willing to participate in a section 363 auction and sale process when they believe that they have an equal and fair opportunity to bid for the assets. I am concerned that the Bid Protections create an uneven playing field that will serve as a disincentive for outsiders to participate in an auction for the Debtors' assets. As noted above, the Blackhawk Assets were not marketed extensively before the Petition Date and bidders are now being given a six-week timeframe in which to put together a Qualified Bid even though Blackhawk had several months to deliver their highly conditional term sheet to the Debtors. With incomplete information about the Blackhawk Assets, bidders are being placed at a significant disadvantage from the outset, and are then being further disadvantaged because they must top the highly conditional bid by at least $29 million (i.e., $19 million breakup fee plus $5 million expense reimbursement plus $5 million overbid). In my opinion, the Bid Procedures, as currently constructed, signal to the marketplace that the Debtors are not interested in fostering a competitive and open auction process. Accordingly, given the conditionality in the Blackhawk deal, Blackhawk should not be entitled to a breakup fee or reimbursement of its expenses. However, if the Court is inclined to provide Blackhawk with some degree of bid protections, then it should be on the low end of the customary range of 1%-3% of the purchase price. Therefore, I submit that more reasonable levels of the Blackhawk Bid Protections are as follows: (i) a Breakup Fee of $5 million, (ii) an Expense Reimbursement of actual and reasonable expenses of no greater than $1 million, and (iii) a Minimum Overbid of $2 million.

III. Blackhawk Should Be Required To Post A Cash Deposit

16. Nowhere in the Motion do the Debtors indicate that Blackhawk is posting a cash deposit in support of its stalking horse bid, in spite of its conditionality. In contrast, the Bid Procedures require each Qualified Bidder to post a cash Deposit in an amount acceptable to the

Debtors, after consultation with the DIP Lenders, which amount shall not exceed ten percent of the Purchase Price of the Bid.

17. A cash deposit from a Stalking Horse buyer is of critical importance in a sale process to protect the Debtors from the risk that the Stalking Horse decides to abandon the deal, with the Debtors having expended significant time, effort and expenses, putting the ongoing sale process at a disadvantage and suffering potential damage to employee and customer relations.

18. I surveyed Chapter 11 cases from 2010 through the present that involved asset purchases of between $250 million and $1.5 billion, and found 15 cases in which the stalking horse bidder was not a pre-existing creditor of the debtor. *See* **Exhibit A** hereto. In all of these cases, the stalking horse bidders provided the debtor with a cash deposit, which, on average, was approximately 5% of the cash purchase price. Therefore, the data clearly demonstrates that it is customary for a stalking horse bidder to provide the debtor with a deposit. Accordingly, in my view, it is entirely reasonable and appropriate for Blackhawk to place a good faith deposit with the Debtors of at least $25 million in order to demonstrate its firm commitment to this deal and provide the Debtors' estates with a tangible remedy in the event Blackhawk is not able to fulfill its contractual obligations.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: June 19, 2015

/s/ Leon Szlezinger
Leon Szlezinger
Managing Director

Screening Criteria:
Type: *Court-approved Stalking Horse Bids (excludes credit bids)*
Size: *$250 million to $1.5 billion*
Time Period: *01/01/10 - Present*

Case	Note	Date	Stalking Horse	Purchase Price	Deposit $	Deposit % Purchase Price	Court	Case Number
Overseas Shipholding Group Inc.	(1)	02/03/14	Ship Acquisition Co	$ 255.0	$ 25.5	10.0%	Delaware	12-20000
Synagro Technologies Inc.	(2)	04/24/13	EQT Partners AB	460.0	23.0	5.0%	Delaware	13-11041
Hostess Brands	(3)	01/30/13	C. Dean Metropoulos; Apollo Global	410.0	20.5	5.0%	SDNY	12-22052
Hostess Brands	(4)	01/11/13	Flowers Foods	360.0	18.0	5.0%	SDNY	12-22052
First Place Bank	(5)	10/29/12	Talmer Bancorp	250.0	7.5	3.0%	Delaware	12-12961
Vertis Holdings Inc.	(6)	10/10/12	Quad/Graphics	258.5	25.3	9.8%	Delaware	12-12821
Residential Capital LLC	(7)	06/11/12	Berkshire Hathaway	1,450.0	72.0	5.0%	SDNY	12-12020
CDC Software Corp.	(8)	02/01/12	Vista Equity Partners	249.8	25.0	10.0%	NDGA	11-79079
Graceway Pharmaceuticals LLC	(9)	01/11/12	Galderma SA	275.0	27.5	10.0%	Delaware	11-13036
TerreStar Networks Inc.	(10)	06/15/11	Dish Network Corporation	1,375.0	68.8	5.0%	SDNY	10-15446
Blockbuster Inc.	(11)	02/21/11	Cobalt Video Holdco	290.0	20.0	6.9%	SDNY	10-14997
Boston Generating LLC	(12)	08/09/10	Constellation Energy Group Inc.	1,100.0	50.0	4.5%	SDNY	10-14419
Texas Rangers Baseball Club	(13)	05/23/10	Rangers Baseball Express	300.4	1.5	0.5%	NDTX	10-43400
Station Casinos Inc. - Opco assets	(14)	04/19/10	Fertitta Gaming LLC	772.0	38.6	5.0%	Nevada	09-52477
TXCO Resources Inc.	(15)	01/12/10	Newfield Exploration; Anadarko Petroleum	310.0	20.0	6.5%	WDTX	09-51807
Maximum				**$ 1,450.0**	**$ 72.0**	**10.0%**		
Mean				**541.0**	**29.5**	**6.1%**		
Median				**310.0**	**25.0**	**5.0%**		
Minimum				**249.8**	**1.5**	**0.5%**		

Source: The Deal.com, Debtwire, Pacer.gov.

(1) Sale of CEXIM Vessels. Purchase price of $255 million cash payment.

(2) Purchase price of $460 million cash payment (subject to certain adjustments set forth in the purchase agreement).

(3) Sale of cake business operations, in particular Hostess and Dolly Madison brands ("Cake Business"). Purchase price of Cake Business Assets for $410 million in cash subject to certain adjustments as set forth in the Purchase Agreement plus the assumption of certain liabilities related to the debtor's Cake Business Assets.

(4) Sale of assets related to the debtor's Butternut, Home Pride, Merita, Nature's Pride and Wonder branded products ("Bread Business Assets"). Purchase price of $360 million in cash (subject to certain adjustments) plus the assumption of certain liabilities and the settlement of trade litigation between an affiliate of the buyer and debtor.

(5) Purchase price of $45 million in cash and $205 million in equity contribution.

(6) Purchase price equal to the sum of $258.5 million in cash and the amount of Working Capital Adjustment.

(7) Purchase price of $1.45 billion in cash as indicated in Berkshire Loan APA.

(8) Purchase price of $249.8 million in cash for $10.50 per share of CDC Software shares.

(9) Cash purchase price of $275 million plus assumption of Assumed Liabilities.

(10) Purchase price of $1.375 billion in cash payment.

(11) Cash purchase price equal to $265 million or $290 million (includes assumed Studio Liabilities if Studio Condition isn't satisfied fully).

(12) Stalking horse bidder purchase price of $1.1 billion in cash and assumption of Assumed Liabilities.

(13) Purchase price of $300.4 million cash payment and assumption of Assumed Liabilities minus specified fees and expenses paid of $3.6 million.

(14) Aggregate consideration in cash equal to $317 million, $430 million in aggregate principal amount of Opco Term Loans and $25 million of Landco Loans and the assumption of Assumed Liabilities.

(15) Cash purchase price to include the sum of an amount sufficient to repay the debtor's bank lenders in full, pay for all creditors and any cure amount of executory contracts not to exceed $310 million.

Blackburn Declaration

(To Be Filed Under Seal Pursuant To Motion Filed Contemporaneously Herewith)