THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **ARCH COAL, INC., *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 16-40120-705** **(Jointly Administered)** **Requested Hearing Date and Time:** July 6, 2016, 1:00 p.m. (Prevailing Central Time) **Hearing Location:** Courtroom 7 South

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER PURSUANT TO SECTIONS 105(A) AND 105(D) OF THE BANKRUPTCY CODE AND LOCAL RULE 9019(A) DIRECTING THE APPOINTMENT OF A MEDIATOR

The Official Committee of Unsecured Creditors (the "**Committee**") of Arch Coal, Inc. and its subsidiaries and affiliates (collectively, the "**Debtors**"), by and through its undersigned counsel, hereby files this motion (the "**Motion**") seeking entry of an order directing the appointment of a mediator to mediate plan issues among the Committee, the Debtors, and the ad hoc group of first lien lenders (the "**Lender Group**"), pursuant to sections 105(a) and 105(d) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "**Bankruptcy Code**"), and Rule 9019(A) of the Local Bankruptcy Rules for the Bankruptcy Court of the Eastern District of Missouri (the "**Local Rules**"). In support of this Motion, the Committee respectfully states as follows:

[1] A complete list of the Debtors and their tax identification numbers is available on the website maintained by the Debtors' claims and noticing agent, https://cases.primeclerk.com/archcoal.

PRELIMINARY STATEMENT

1. These chapter 11 cases are at an important crossroads. Over the past 8 weeks, the Committee, the Debtors, and the Lender Group have been engaged in substantial, and often contentious, negotiations over the terms of a chapter 11 plan that would resolve all major case issues, provide unsecured creditors with meaningful distributions, and avoid the cost and delay associated with litigation. While those negotiations initially bore fruit, the parties' successes were short-lived. After reaching an agreement in principal on the terms of a global settlement at the end of May, the parties were ultimately unable to agree on the final, documented terms of the agreement in the weeks that followed.

2. As a result of the breakdown in negotiations – and the Lender Group's unwillingness to further extend the Committee's challenge period under the Final DIP Order – the Committee was forced to file motions seeking authority to pursue estate claims against the first lien lenders and certain of the Debtors' directors and officers, and the Debtors filed a new Plan and Disclosure Statement shortly thereafter.

3. The Committee strongly opposes the new Plan. The new Plan and Disclosure Statement contain a never-before-seen settlement of the estates' claims for inadequate or no consideration, and provide materially different (and insufficient) treatment for unsecured creditors. Absent a resolution of the issues surrounding plan confirmation and the prosecution of estate claims, these cases could easily devolve into lengthy and expensive litigation.

4. Importantly, however, all of the parties appear to agree that consensus *should* be reached, and that such consensus is in the best interests of all creditors and the estates. In fact, the Committee remains hopeful that even before this Motion is heard by the Court, the parties may resolve their issues. However, assuming the parties are unable to resolve their differences, the Committee submits that the appointment of a mediator is the best means of achieving a

settlement. The oversight of a mediator and the structure of a formal mediation will force each of the parties and their principals to the table to address Plan issues, including most importantly the treatment of unsecured creditors under the Plan.[2] Accordingly, the Committee requests that the Court appoint a mediator and direct the parties to mediation on an expedited schedule.

5. The benefits of a successful mediation clearly outweigh any potential drawbacks. It is incontrovertible that the litigation that will ensue absent consensus – whether over the Committee's standing motions and underlying claims, or over the terms of the Debtors' Plan and Disclosure Statement – has the potential to delay confirmation and resolution of these cases indefinitely. But a brief delay now to allow for mediation could yield enormous dividends and avoid the long delay that would certainly result from a litigation Armageddon. The choice is simple: maintain the Debtors' proposed schedule and proceed headlong into costly and protracted litigation, or instead give the parties one last chance to consummate a global resolution they came so close to reaching only a few weeks ago.

JURISDICTION

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

8. The bases for the relief requested herein are sections 105(a) and 105(d) of the Bankruptcy Code.

[2] Despite the Committee's repeated requests for an in-person meeting of the principals, to date, no such meeting has taken place. The Debtors are, however, in the process of organizing the first in-person meeting of principals from the Committee, the Lender Group, and the Debtors, which is tentatively scheduled for next Tuesday, June 28, 2016.

BACKGROUND

A. The History of the Treatment of Unsecured Claims in the Cases

9. The treatment of general unsecured claims in these chapter 11 cases has gone through many iterations. At the outset of these cases, the Debtors filed a restructuring support agreement they executed with certain first lien secured creditors (the "**RSA**") [Dkt. No. 156, Ex. A]. Under that agreement and its accompanying term sheet (the "**RSA Term Sheet**"), unsecured creditors were to receive one of two types of treatment: (i) class members that agreed to the plan releases would receive a pro rata share of 4% of the new common stock and warrants for 8% of the new equity; and (ii) class members that opted out of the plan releases would receive a pro rata share of the value of unencumbered assets, following the satisfaction of adequate protection and priority claims. *See* RSA Term Sheet at 3-5. If the general unsecured class voted in favor, the restructuring support agreement also provided for a waiver of first lien deficiency claims for distribution purposes.

10. The RSA provided that the Debtors and secured creditors reserved the "right" to revoke this promised distribution of stock and warrants for unsecured creditors in the event that holders of at least $1.6 billion in unsecured claims did not agree to support the plan by a specified date. RSA Term Sheet at 3, n.5.

11. After analyzing the value of unencumbered assets and potential estate claims and causes of action that could be asserted (as discussed in more detail below), the Committee informed the Debtors and the Lenders that the proposed distributions under the RSA and RSA Term Sheet were insufficient. As a result, the parties began engaging in negotiations to determine whether they could come to an agreement on the treatment of unsecured creditors under the Plan.

12. In the midst of these negotiations – and in order to comply with the Lender Group-imposed milestones in the RSA – the Debtors filed a plan and disclosure statement on May 5 that revoked the original distribution of stock and warrants to unsecured creditors, leaving unsecured creditors with an unspecified recovery from unidentified unencumbered assets. The disclosure statement itself also indicated that it was "clear that [the original] proposed distribution would not currently meet with wide acceptance among holders of General Unsecured Claims," and that "the Debtors remain focused on reaching consensus on a plan of reorganization among their creditors." May 5 Disclosure Statement, at ii.

B. The Committee's Investigation of Unencumbered Value

13. In accordance with its fiduciary duties to unsecured creditors, and immediately upon its appointment, the Committee commenced a comprehensive investigation into what value may be available to unsecured creditors, including unencumbered assets and litigation claims. As a result of that investigation, the Committee identified three categories of claims whose value would inure to the benefit of unsecured creditors.[3] Those categories of claims can be grouped as follows:

- Claims Relating to Failed Exchange: There are substantial claims that can be asserted against a subset of first lien secured creditors who acted to block out-of-court restructuring efforts the Debtors sought to effect through a series of exchange transactions commenced in July 2015. As the Company itself warned at the time, these acts exposed the lenders to significant liability if the Company was ultimately forced into bankruptcy – which it was just a few months later.

- Unperfected/Unencumbered Assets: Despite the Debtors' stipulations in the Final DIP Order relating to the first lien lenders' liens on the Debtors' assets, the Committee determined that (i) the first lien lenders and collateral agent failed to properly obtain or perfect liens on certain estate property of substantial value, and (ii) significant alleged "collateral" is expressly *excluded* from the collateral securing the first lien credit facility.

[3] Because the Debtors waived, released, and/or refused to bring these claims from the outset of the Chapter 11 Cases, the Committee determined that it was the appropriate party to pursue such claims on behalf of the estates.

- Claims against Executive Officers: After the filing of the Debtors' schedules in March 2016, the Committee learned of sizeable and previously undisclosed bonus payments made to eight of the Debtors' executive officers on the last business day before the Debtors filed these chapter 11 cases. Those eve-of-bankruptcy payments alone totaled nearly $9 million in the aggregate, and further investigation revealed additional oversized bonus payments made to nine executives and insiders within the years prior to the Petition Date, each of which may be avoided as either preferential or fraudulent transfers.

14. The magnitude and importance of each of these claims are set forth in detail in the Committee's standing motions and accompanying complaints. And because each of these claims could dramatically enhance the value of the Debtors' estates and the assets available for distribution to unsecured creditors, such claims have been and continue to be the subject of much negotiation among the parties.

C. Plan Negotiations to Date

15. As the Committee's investigations were ongoing, Plan negotiations began in earnest in late April/early May 2016. To facilitate those negotiations, the Committee's challenge period under the Final DIP Order was extended to May 27, 2016.

16. On the afternoon of May 27, 2016, after weeks of negotiations, the Committee, the Lender Group, and the Debtors reached an agreement in principle on the terms of a chapter 11 plan they could each support. Such a settlement had the benefits of resolving the following Plan issues, among others:

- The Committee's litigation against certain of the first lien lenders arising out of the failed prepetition exchange offers;
- The Committee's litigation against the lenders and the prepetition collateral agents regarding the extent and validity of the lenders' liens on certain of the Debtors' assets;
- The value of the Debtors' unencumbered assets – including most significantly the value of the Debtors' interests in the Knight Hawk joint venture;

- The Committee's litigation against the Debtors' executive officers seeking to avoid hefty bonus payments made to those officers as preferential and fraudulent transfers;

- The form of consideration to be distributed to holders of unsecured claims under the Plan;

- Certain intercreditor disputes among unsecured creditors as to how any such consideration should be allocated among unsecured creditors;

- Issues relating to the scope and extent of Debtor and third-party releases under the Plan;

- The amount of the first lien lenders' deficiency claim; and

- Arguments raised by the lenders that they have somehow suffered a diminution in the value of their collateral.

17. This agreement in principle was a significant accomplishment, but remained subject to resolution of certain outstanding issues, and documentation of a term sheet. In the three weeks that followed, the Committee continued to engage in negotiations with the Debtors and the Lender Group regarding the detailed terms of the agreement.

18. Unfortunately, notwithstanding the parties' agreement on the basic economic terms of a settlement and the tireless efforts of the Committee and its professionals in the weeks that followed, the Committee was forced to file its standing motions. Almost immediately after the Committee filed its standing motions, the Debtors filed a Plan and related Disclosure Statement that provided new – and materially worse – treatment for unsecured creditors, along with numerous other unique and unusual Plan provisions. Among them are:

- A new purported "global settlement" of estate claims and causes of action – which settlement was negotiated solely among the defendants in those same actions without the consent of the plaintiff, and was made for "consideration" consisting of a waiver of unproven adequate protection claims in respect of an alleged diminution in value of the prepetition collateral from the Petition Date through June 22, 2016, and "potentially, through the Effective Date";

- The grouping of unsecured creditors into two groups: (i) holders of claims against Prairie Holdings, and (ii) holders of claims against all other Debtors, with those other Debtors substantively consolidated;

- New treatment for each group of unsecured creditors, with (i) holders of unsecured claims against all Debtors other than Prairie Holdings receiving their ratable share of $33.4 million in cash less the lenders' litigation fees and expenses in excess of $250,000 and a fair allocation of all DIP Facility Claims, Administrative Expense Claims and Priority Claims, and (ii) holders of claims against Prairie Holdings receiving a ratable share of the Debtors' equity interests in the Knight Hawk joint venture – but only if the Court finds prior to the Effective Date that Knight Hawk is unencumbered; and

- Treatment for unsecured creditors that is riddled with inappropriate "death-traps" including, among other things, the elimination of the lenders' waiver of certain of their adequate protection claims if (i) the Committee obtains standing to pursue its litigation claims, (ii) the class of general unsecured creditors votes to reject the Plan, or (iii) the Committee objects to confirmation of the Plan.

19. Given that the current terms of the Plan not only render it patently unconfirmable but attempt to undermine the Committee's ability to act as a fiduciary for unsecured creditors in connection with Plan confirmation, the Committee intends to object to the Disclosure Statement on these and other grounds.

20. Thus, absent a consensual resolution of these issues, these cases are now set on a litigation trajectory for the foreseeable future.[4]

RELIEF REQUESTED

21. By this Motion, the Committee seeks entry of an order (i) appointing a sitting bankruptcy judge from the Eastern District of Missouri or the Western District of Missouri as mediator, (ii) directing the Debtors, the Lender Group, and the Committee and its members, to mediate issues related to the formulation of the Debtors' chapter 11 plan of reorganization,

[4] As of the filing of this Motion, hearings on the Disclosure Statement and the Committee's standing motions have not yet been scheduled. The Debtors are requesting that the Disclosure Statement be heard on July 6, while the Committee has requested it be heard later in July and at the same time as the Committee's standing motions, in light of the fact that the Debtors' Disclosure Statement was substantially revised from that previously filed and is closely intertwined with the Committee's standing motions.

which mediation would commence immediately and continue for an initial period of thirty (30) days, and (iii) deferring all pending Plan-related motions and hearings until the conclusion of the mediation.

ARGUMENT

22. Both the Bankruptcy Rules and the Local Rules explicitly contemplate court-ordered mediation under appropriate circumstances. *See* Local Rule 9019(A) (referencing court-ordered mediation); Bankruptcy Rule 7016 (providing that court "may consider . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule"); *see also In re Atlantic Pipe Corp*., 304 F.3d 135, 140 (1st Cir. 2002) ("There are four potential sources of judicial authority for ordering mandatory non-binding mediation of pending cases, namely, (a) the court's local rules, (b) an applicable statute, (c) the Federal Rules of Civil Procedure, and (d) the court's inherent powers."). Moreover, section 105(a) of the Bankruptcy Code provides that the court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105(d) of the Bankruptcy Code further provides that "[t]he court, on its own motion or on the request of a party in interest (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . . ." 11 U.S.C. § 105(d).

23. Pursuant to Local Rule 9019(A) and section 105 of the Bankruptcy Code, the Committee requests the appointment of a mediator to mediate issues surrounding the Plan, Disclosure Statement and standing motions, in the hopes of achieving a global resolution of all

case issues. In accordance with the Local Rules, the Committee requests that the key parties be given seven days following entry of a mediation order to agree on the choice of a mediator and, failing such agreement, that the Court forthwith order the appointment of a sitting bankruptcy judge from either the Eastern District of Missouri or the Western District of Missouri as mediator.

24. Given the importance of the resolution of the open Plan issues to the Debtors' ability to propose a confirmable, consensual plan, submission of these issues to mediation is clearly the most appropriate way to proceed. The Committee believes that the appointment of a sitting bankruptcy judge to mediate these issues in the chapter 11 cases will significantly enhance the possibility of a consensual reorganization – thereby saving the estates considerable time and expense. Indeed, the mere appointment of a mediator could be helpful in incentivizing parties to reach a deal based on their current negotiations even before the mediation occurs. Although significant progress has been made among the Debtors, the Committee, and the Lender Group, final agreement on the terms of such a settlement has not yet been achieved. Absent resolution, the parties will be forced to litigate each of the Plan issues, a process that will undoubtedly involve substantial time and resources from all parties involved.

25. The use of a mediator to achieve consensus in complex bankruptcy cases such as this one is not novel. Courts in this district and elsewhere have granted similar relief and held that a bankruptcy court may order parties before it to non-binding mediation. *See In re U.S. Fidelis, Inc.*, No. 10-41902-705, Dkt. No. 922 (Bankr. E.D. Mo. Oct. 26, 2011) (ordering mediation on motion of certain interested parties); *In re Chemtura Corp.*, No. 09-11233 (REG), Dkt. No. 4950 (Bankr. S.D.N.Y. Jan. 25, 2011); *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 85 (Bankr. S.D.N.Y. 2010), *rev'd on other grounds*, *In re A.T. Reynolds & Sons, Inc.*, 452 B.R.

374 (S.D.N.Y. 2011) ("While it goes without saying that a court may not order parties to settle, this Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis."); *see also Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. 1987) (imposing sanctions on an insurance company that failed to attend a nonconsensual, non-binding mediation ordered by the district court).

26. Accordingly, the Committee requests that the Court appoint a mediator (either one agreed to by the parties or a sitting bankruptcy judge, as discussed above) and direct the Debtors, the Lender Group, and the Committee and its members to engage in non-binding mediation regarding the Plan issues. The Committee would propose that such mediation proceed for an initial period of thirty (30) days from the entry of the Order, with any costs of such mediation borne by the estates. To ensure that no party is prejudiced – and to maintain the respective parties' negotiating positions thereby increasing the likelihood of a successful mediation – the Committee requests that the Court abate all pending Plan-related motions and hearings in this case until the conclusion of the mediation.

NOTICE

27. Consistent with the Court's Order Establishing Certain Notice, Case Management and Administrative Procedures [Dkt. No. 155], the Committee will serve notice of this Motion on (a) the Core Parties and (b) any Non-ECF Parties. All parties who have requested electronic notice of filings in these cases through the Court's ECF system will automatically receive notice of this Motion through the ECF system no later than the day after its filing with the Court. In light of the relief requested, the Committee submits that no further notice is necessary. A copy of a proposed order granting the relief requested by this motion will be made available on the case website: https://cases.primeclerk.com/archcoal.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court grant the Motion and (1) order the Committee, the Debtors, and the Lender Group to mediation in St. Louis, Missouri within the next thirty days and (2) abate all pending motions in this case until the conclusion of the mediation.

Dated: June 23, 2016

Respectfully submitted,
SPENCER FANE LLP

/s/ Ryan C. Hardy

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of June, 2016, a true and correct copy of the foregoing was served *via* the Court's ECF system, with notice of case activity generated. Additionally, service was made on those parties appearing on the attached list by e-mail if an e-mail is given, or otherwise by depositing a copy of the foregoing in the U.S. Mail, first-class postage pre-paid, to the postal address listed.

/s/ Ryan C. Hardy

Exhibit A

Core/2002 Service List
Served as set forth below

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