

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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)	
In re:)	Chapter 11
)	
LONGVIEW POWER, LLC, <u>et al.</u> , ¹)	Case No. 13-12211 (BLS)
)	
Debtors.)	Jointly Administered
)	
)	Hearing Date: Dec. 18, 2013, at 1:00 p.m. (ET)
)	Objection Deadline: Dec. 11, 2013, at 4:00 p.m. (ET)

**DEBTORS’ MOTION FOR ENTRY OF AN ORDER
(A) AUTHORIZING AND APPROVING THE DEBTORS’ KEY
EMPLOYEE INCENTIVE PLAN AND (B) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) file this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**: (a) authorizing and approving the Debtors’ Key Employee Incentive Plan (as defined herein) for the four key senior executives of the Longview Debtors (the “KEIP Participants”), providing a target award opportunity of approximately \$1.1 million in the aggregate with a maximum award opportunity of approximately \$1.6 million in the aggregate; and (b) granting related relief. In support of the Motion, the Debtors submit the declaration of Douglas J. Friske (the “Friske Declaration”), attached hereto as **Exhibit B**. In further support of this Motion, the Debtors respectfully state as follows:²

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: (a) Longview Power, LLC (1860); and Longview Intermediate Holdings C, LLC (1008) (collectively, the “Longview Debtors”); and (b) Mepco Holdings, LLC (6654); Mepco Intermediate Holdings A, LLC (0502); Mepco Intermediate Holdings, LLC (4248); Mepco, LLC (3172); Coresco, LLC (6397); Dana Mining Company of Pennsylvania, LLC (8721); Dana Mining Company, LLC (4499); Mepco Conveyor, LLC (0477); Shannopin Materials LLC (1616); Border Energy, LLC (2798); and Alternate Energy, LLC (2428) (the foregoing excluding the Longview Debtors, collectively, the “Mepco Debtors”). The Longview Debtors’ principal offices are located at 966 Crafts Run Road, Madsville, West Virginia 26541. The Mepco Debtors’ principal offices are located at 308 Dents Run Road, Morgantown, West Virginia 26501.

² Capitalized terms used but not defined herein shall have the meanings set forth in the *Debtors’ Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 443] (the “Plan”).

Jurisdiction

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 363(b) and 503(c) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Preliminary Statement³

4. The Debtors commenced these chapter 11 cases to restructure their balance sheet, facilitate their efforts to repair the Longview Power Facility, and exit chapter 11 as a stronger, de-leveraged business enterprise. Since the Petition Date, the Debtors have used the breathing room provided by the chapter 11 process to negotiate with their secured lenders to reach a global agreement on an exit from chapter 11 as a reorganized entity. These efforts have been a success, and the Debtors entered into an agreement to obtain postpetition financing in the form of the Court-approved DIP Facility from certain Longview Lenders, which will be used to fund their ongoing operations, to repair the Longview Power Facility, and to pave the way for the Debtors’ eventual emergence from chapter 11. In addition, the Debtors have agreed to terms on the form

³ Capitalized terms used but not otherwise defined in this preliminary statement shall have the meanings ascribed to such terms in this Motion or the Plan.

of a plan of reorganization supported by the Backstoppers, and, on November 13, 2013, filed their proposed Plan and Disclosure Statement.

5. The Debtors are therefore keenly focused on driving business performance and achieving a swift emergence from chapter 11 in order to limit the administrative costs of these chapter 11 cases. To this end, the Debtors and their stakeholders require outperformance from the Debtors' key executives—i.e., the KEIP Participants—to achieve their restructuring goals. To provide appropriate incentives to achieve this performance, the Debtors reached an agreement with the Backstoppers on the Key Employee Incentive Plan to motivate the Debtors' senior management team to outperform during this critical time period. Through the Key Employee Incentive Plan, and as described more fully below, the Debtors propose to implement an incentive plan for the KEIP Participants, which plan will provide a maximum bonus payment pool of approximately \$1.6 million in the aggregate and a target award opportunity of approximately \$1.1 million in the aggregate for the four KEIP Participants. The Debtors and the Backstoppers believe that implementation of the Key Employee Incentive Plan is crucial to motivate the KEIP Participants and drive value at this critical stage in these chapter 11 cases, and the Backstoppers support the relief requested herein.

6. The Key Employee Incentive Plan is designed to account for the Longview Power Facility's operational issues and to reflect the Debtors' and Backstoppers' desire for an expeditious chapter 11 process, which will limit the administrative costs of these chapter 11 cases and will result in the Debtors' timely reorganization. Simply put, the Debtors do not believe targets tied to the Longview Power Facility's performance can accurately gauge (or incentivize) management outperformance given the Longview Power Facility's many operational difficulties. The Longview Power Facility's operational issues (that contributed to the Debtors'

need to file these chapter 11 cases in the first instance) make it prohibitively difficult to measure business performance simply by recourse to the Longview Power Facility's performance. Indeed, all parties, including the Backstoppers, recognize that the Longview Power Facility requires a global repair solution, and that such repairs will not commence until well after the Debtors anticipate emerging from chapter 11. To this end, the Debtors and the Backstoppers have agreed on milestones tied to achieving what the Debtors and the Backstoppers have agreed is the urgent task at hand: emerging from these chapter 11 cases as quickly and efficiently as possible.

7. The Key Employee Incentive Plan therefore requires the KEIP Participants to expeditiously guide the Debtors through the chapter 11 process and to consummate the Plan on a swift timeline given the complexities of the Debtors' capital structure and the conditions precedent to consummation of the Plan. The Key Employee Incentive Plan provides for award opportunities that are only available if the Debtors obtain target or maximum performance. The Key Employee Incentive Plan establishes payments for achieving seven separate goals that are driven by the Debtors' chapter 11 timeline and the Backstoppers' desire to limit the costs of these chapter 11 cases. The Debtors and their advisors believe the Key Employee Incentive Plan properly incentivizes the KEIP Participants to outperform and will drive value for the benefit of all economic stakeholders.

Relief Requested

8. By this Motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A**: (a) authorizing and approving the Debtors' Key Employee Incentive Plan for the KEIP Participants; and (b) granting related relief.

Background

9. On August 30, 2013 (the “Petition Date”), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b). No party has requested the appointment of a trustee or examiner in these chapter 11 cases, and no committees have been appointed or designated.

10. The Debtors and certain of their non-Debtor affiliates operate an integrated power generation company, which includes electric power generation, coal mining and processing, and waste disposal operations. The Debtors operate through two primary business units: (a) Longview, whose primary asset is the Longview Power Facility, which is a 700 net megawatt supercritical coal-fired power generation facility located in Madsville, West Virginia; and (b) Mepco, a vertically integrated coal miner and processor with facilities located in southwestern Pennsylvania and northern West Virginia. As of the Petition Date, the Debtors have funded debt totaling approximately \$1 billion.

The Key Employee Incentive Plan

I. The KEIP Participants

11. The KEIP Participants and their award opportunities can be summarized as follows:

Participant	Salary	Target as Percentage of Salary	Target Award Value	Max as Percentage of Salary	Max Award Value
Chief Executive Officer	\$454,300	100%	\$454,300	150%	\$681,450

Participant	Salary	Target as Percentage of Salary	Target Award Value	Max as Percentage of Salary	Max Award Value
Chief Financial Officer	\$275,000	70%	\$192,500	105%	\$288,750
Senior Vice President & General Manager	\$294,580	70%	\$206,206	105%	\$309,309
Vice President of Marketing & Origination	\$282,322	70%	\$197,625	105%	\$296,438
Total Key Employee Incentive Plan Award Values			\$1,050,631	N/A	\$1,575,947

12. The KEIP Participants, each of whom the Debtors have assumed is an “insider” (as such term is defined in section 101(31) of the Bankruptcy Code) for purposes of this Motion, are the Longview Debtors’ senior management team. These senior executives are instrumental to the operation of the Longview Power Facility and the Debtors’ ability to negotiate with the holders of approximately 60 percent of the debt outstanding under the Debtors’ senior secured credit facility (the “Backstoppers”) and other parties in interest to obtain consensus on the Debtors’ eventual emergence from chapter 11. Importantly, Longview Intermediate Holdings C, LLC, one of the Longview Debtors, owns 92.2 percent of the beneficial interest in Mepco Holdings, LLC, which is the Mepco Debtors’ holding company. The Longview Debtors’ management team is therefore vital for formulating both the Longview Debtors’ and the Mepco Debtors’ exit from chapter 11.

13. Moreover, the KEIP Participants, including the Longview Debtors’ Chief Executive Officer, are instrumental in the Debtors’ efforts with regard to the arbitration between and among the Longview Debtors, Siemens Energy, Inc. (“Siemens”), Foster Wheeler North America Corporation (“Foster Wheeler”), and Kvaerner North American Construction Inc.

(“Kvaerner,” and collectively, the “Contractors”), in the arbitration captioned Kvaerner North American Construction Inc. v. Longview Power, LLC, et al., No. 50 158 T 00411 (the “Arbitration”). If a negotiated resolution is unattainable, the KEIP Participants will be heavily involved in litigating issues surrounding the estimation of the Contractors’ claims pursuant to section 502(c) of the Bankruptcy Code. Indeed, resolution of the issues raised in the Arbitration, either through settlement or litigation, is critical to the Debtors’ ability to consummate the Plan and exit chapter 11 as well as a requirement under the Debtors’ Court-approved DIP Credit Agreement. And, the Debtors currently expect that each of the KEIP Participants will continue to play an important role in the Debtors’ ongoing operations. Accordingly, motivating the KEIP Participants to resolve issues of critical importance to these chapter 11 cases is crucial to the Debtors’ expeditious emergence from chapter 11 as a stronger company.

II. The Structure of the Key Employee Incentive Plan

14. The “Key Employee Incentive Plan” can be summarized as follows:

Performance Target	Date	Available Award
File Plan and Disclosure Statement	On or before November 13, 2013	20% of Target Award
File a motion either to: (a) estimate the Disputed Mechanics’ Lien Claims (the “ <u>Estimation Motion</u> ”); or (b) settle each of the Disputed Mechanics’ Lien Claims (the “ <u>9019 Motion</u> ”)	Before December 11, 2013	20% of Target Award
Obtain entry of the Disclosure Statement Order	Before December 31, 2013	20% of Target Award
Commence the hearing on either the Estimation Motion or the 9019 Motion	Before February 8, 2014	20% of Target Award
Commence Confirmation Hearing	Before February 12, 2014	20% of Target Award

Performance Target	Date	Available Award
Obtain entry of the Confirmation Order	Before February 19, 2014	25% of Maximum Award
Achieve Plan Effective Date	Before March 7, 2014	25% of Maximum Award

15. The KEIP Participants will be entitled to a cash payment if the Debtors meet the performance targets set forth in the Key Employee Incentive Plan. If the KEIP Participants fail to meet any of these timeline dates, however, the KEIP Participants will not receive an award for such performance target.⁴ The Debtors and their advisors believe that the award opportunities available under the Key Employee Incentive Plan are consistent with market compensation practices for similarly situated employers and are reasonable under the circumstances of these chapter 11 cases.

III. Development of the Key Employee Incentive Plan Structure

16. Prior to the Petition Date, and in the ordinary course of their business, the Longview Debtors maintained both a long-term and an annual incentive program for the KEIP Participants. The Debtors did not obtain approval for these plans as part of the “first day” relief requested in these chapter 11 cases with respect to the KEIP Participants. As a result, and as set forth more fully in the Friske Declaration, the proposed KEIP Participants are currently lacking a material portion of their prepetition compensation opportunities and are also materially undercompensated when compared to similarly situated executives.

⁴ All dates are, however, subject to the Court’s availability where the Court is necessary for the KEIP Participants to meet the performance goals. Thus, if the Court was unable to hold the Confirmation Hearing prior to February 12, 2014, the performance target date would be subject to holding the Confirmation Hearing on the first date that the Court is available for such hearing.

17. Since the commencement of these chapter 11 cases, the Debtors, their advisors, and the Backstoppers have actively engaged in discussions over all aspects of the Debtors' restructuring, including the terms of an incentive plan that will motivate the KEIP Participants and maximize value for all of the Debtors' stakeholders. In connection with the hard fought negotiations on the terms of the DIP Facility and the proposed Plan, the Debtors and the Backstoppers agreed to the terms of the Key Employee Incentive Plan that would motivate the KEIP Participants to strive to keep the chapter 11 process on track to allow the Debtors to expeditiously and cost-efficiently exit chapter 11. This structure reflects the realities of the Debtors' chapter 11 cases, including litigation with the Contractors that has formed a significant aspect of these chapter 11 cases to date. In addition, the Key Employee Incentive Plan reflects the chapter 11 timeline agreed to by the Debtors and the Backstoppers in connection with both the DIP Facility and the proposed Plan, and the Key Employee Incentive Plan was agreed to two weeks before the date of any performance targets.⁵ Importantly, the Backstoppers support the relief requested herein.

18. Moreover, the Key Employee Incentive Plan reflects the realities associated with the Longview Power Facility's operational issues. As the Court is aware, the Longview Power Facility has been plagued by unscheduled forced outages, extended planned outages, generation derating, and material repair obligations since it was substantially completed in December 2011. In fact, the Longview Power Facility has operated at a capacity factor of 68 percent since the Debtors took possession versus the designed levels of approximately 90 percent. And, given that the Longview Power Facility's numerous unscheduled forced outages and extended planned outages are beyond the KEIP Participants' control, formulating an incentive plan based on the

⁵ Indeed, meeting the first performance metric required herculean efforts by the KEIP Participants, and included the negotiation of a key settlement described in the Plan.

Longview Power Facility's operational performance has proven impossible. Simply put, no matter how motivated the KEIP Participants are to drive outperformance in the Debtors' operations, they cannot control a Longview Power Facility that does not work properly and may be regularly out of service through no fault of the KEIP Participants. Accordingly, the Debtors and their advisors believe that the Key Employee Incentive Plan is reasonably tailored to drive outperformance, is in the best interest of their stakeholders, and is justified under the facts and circumstances of these chapter 11 cases.

IV. Independent Review of the Key Employee Incentive Plan's Award Opportunities

19. As set forth in the Friske Declaration, prior to the Petition Date, the Debtors engaged Towers Watson to advise them on compensation-related matters, including the overall cost of a reasonable incentive program for the KEIP Participants. To this end, Towers Watson undertook an analysis of incentive programs for similarly situated companies operating in chapter 11, including with respect to the timing of payments, total maximum plan costs, participation, and the individual award opportunities (expressed as an absolute dollar value and as a percent of salary) that might be available as well as benchmarked compensation levels for the KEIP Participants with and without the proposed Key Employee Incentive Plan. Based on this analysis, the Debtors and Towers Watson believe the proposed Key Employee Incentive Plan provides a reasonable award opportunity to KEIP Participants versus comparable programs and under the facts and circumstances of these chapter 11 cases.

Basis for Relief

I. Implementing the Key Employee Incentive Plan Is an Exercise of the Debtors' Sound Business Judgment

20. The Debtors' implementation of the Key Employee Incentive Plan is a sound exercise of their business judgment and should be approved. Section 363(b)(1) of the

Bankruptcy Code provides, in relevant part, that debtors “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Under section 363(b), courts require only that the debtor “show that a sound business purpose justifies such actions.” In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999) (internal citations omitted); see also In re Elpida Memory, Inc., No. 12-10947 (CSS), 2012 WL 6090194, at *5 (Bankr. D. Del. Nov. 20, 2012) (noting that it is “well-settled” that a debtor may use its assets outside the ordinary course where such use “represents the sound exercise of business judgment”); In re Phoenix Steel Corp., 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (stating that judicial approval under section 363 of the Bankruptcy Code requires a showing that the proposed action is fair and equitable, in good faith, and supported by a good business reason). Moreover, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); see also In re Tower Air, Inc., 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”).

21. Implementing the Key Employee Incentive Plan is a proper exercise of the Debtors’ business judgment and is in the best interests of the Debtors, their estates, and all of their stakeholders. The KEIP Participants are in positions that are most integral to the Debtors’ restructuring process, including with respect to right-sizing the Debtors’ balance sheet, implementing operational repairs to the Longview Power Facility, and continuing to overcome hurdles leading to the achievement of a successful exit from chapter 11 protection. The

KEIP Participants therefore have the most significant ability to improve performance and to drive value for these chapter 11 estates.

22. Moreover, it is clear that the Debtors' restructuring initiatives have placed additional demands on the KEIP Participants, making the provision of appropriate, market-based compensation and incentives essential to the success of the Debtors' restructuring efforts. In addition to their ordinary-course activities needed to drive the Debtors' financial and operational performance, the KEIP Participants must work diligently to manage the Debtors' reorganization process. These KEIP Participants and their skills, expertise, and motivation are essential to the Debtors' ability to achieve a successful reorganization in these chapter 11 cases and will position the Debtors for future success.

23. Further, the Key Employee Incentive Plan aligns the interests of the KEIP Participants and all stakeholders in these chapter 11 cases. The Debtors have structured the Key Employee Incentive Plan carefully to balance the Debtors' need to incentivize the KEIP Participants with the need to drive the Debtors' expeditious reorganization, resolve all issues related to the Arbitration (including, if necessary, through litigation regarding the estimation of the Disputed Mechanics' Lien Claims), and strengthen their operations. The Key Employee Incentive Plan sets difficult targets on each of these fronts in exchange for incentive awards because the achievement of each of these goals will benefit all parties in interest. In fact, the Key Employee Incentive Plan is entirely performance-based and requires outperformance during the Debtors' restructuring process.

24. The KEIP Participants' award opportunities depend on their ability to attain difficult-to-reach goals related to resolving open issues in these chapter 11 cases and expediting the Debtors' exit from chapter 11. The KEIP Participants can obtain incentive awards if, and

only if, the KEIP Participants are successful at meeting the proposed timeline to resolve the significant issues in these chapter 11 cases. These issues are complex, and include reaching a resolution over the claims raised in the Arbitration through settlement or litigation and acquiring Dunkard Creek's assets, among other significant issues. By linking the KEIP Participants' increased compensation opportunities to a swift emergence from chapter 11, the Key Employee Incentive Plan successfully and fairly aligns the interests of the Debtors, their employees, and their stakeholders. Thus, the Key Employee Incentive Plan is designed to achieve "desired performance." See In re Dana Corp., 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006).

25. Not only is the Key Employee Incentive Plan calculated to achieve desired performance and drive value, but the incentive payments are reasonable. As set forth more fully in the Friske Declaration, the Debtors and Towers Watson analyzed award opportunities using benchmarks from other court-approved incentive plans and also from general and energy-specific executive compensation data sources. Towers Watson determined the award opportunities and total costs of the Key Employee Incentive Plan are reasonable and within market practice. Towers Watson believes that the absence of an incentive opportunity for the KEIP Participants significantly undermines the current competitiveness of the Debtors' compensation programs, which could impact the Debtors' ability to motivate current management to achieve desired business objectives and the ambitious timeline in these chapter 11 cases.

26. Courts in this and other jurisdictions have recognized that programs such as the Key Employee Incentive Plan can be an efficient means of maximizing value for a debtor's estate and, accordingly, have approved similar incentive programs. See, e.g., In re IPC Int'l Corp., No. 13-12050 (MFW) (Bankr. D. Del. Sept. 3, 2013) (approving debtors' key employee

incentive plan); In re Synagro Techs., Inc., No. 13-11041 (BLS) (Bankr. D. Del. May 13, 2013) (same); In re Prommis Holdings, No. 13-10551 (BLS) (Bankr. D. Del. Apr. 16, 2013) (same); In re DDMG Estate (f/k/a Digital Domain Media Grp., Inc.), No. 12-12568 (BLS) (Bankr. D. Del. Oct. 22, 2012) (same); In re Local Insight Media Holdings, Inc., No. 10-13677 (KG) (Bankr. D. Del. Mar. 29, 2011) (same); see also Dana Corp., 358 B.R. at 584 (approving management incentive plan).

27. Accordingly, the Debtors submit that implementing the Key Employee Incentive Plan is a valid exercise of the Debtors' business judgment and the approval of the Key Employee Incentive Plan is in the best interests of the Debtors, their estates, and all parties in interest in these chapter 11 cases.

II. The Key Employee Incentive Plan Satisfies the Requirements of Section 503(c) of the Bankruptcy Code

28. At least certain of the KEIP Participants are "insiders" within the meaning of section 101(31) of the Bankruptcy Code and, therefore, the Key Employee Incentive Plan implicates section 503(c) of the Bankruptcy Code. Section 503(c) of the Bankruptcy Code contains three subsections: (a) section 503(c)(1) of the Bankruptcy Code contains a general prohibition of retention plans; (b) section 503(c)(2) of the Bankruptcy Code places limitations on severance payments; and (c) section 503(c)(3) of the Bankruptcy Code sets forth standards governing other transfers to managers. See 11 U.S.C. § 503(c). The Debtors submit that neither sections 503(c)(1) nor 503(c)(2) of the Bankruptcy Code are applicable under the circumstances. In addition, although section 503(c)(3) of the Bankruptcy Code may be applicable to the Key Employee Incentive Plan, review of a business decision regarding compensation pursuant to section 503(c)(3) mirrors review under the business judgment rule pursuant to section 363(b) of the Bankruptcy Code. See Dana Corp., 358 B.R. at 576 (applying business judgment rule to

evaluate incentive plan). Accordingly, the Debtors' implementation of the Key Employee Incentive Plan should be authorized as a sound exercise of the Debtors' business judgment.

A. The Key Employee Incentive Plan Is Not a Retention Plan Governed by Section 503(c)(1) or a Severance Plan Governed by Section 503(c)(2)

29. Section 503(c)(1) of the Bankruptcy Code applies solely to retention plans. See 11 U.S.C. § 503(c)(1). Section 503(c)(2) provides for restrictions applicable only to severance plans. See 11 U.S.C. § 503(c)(2). Neither provision applies to performance-based incentive plans. See, e.g., In re Velo Holdings, Inc., No. 12-11384 (MG), 2012 WL 2015870, at *6 (Bankr. S.D.N.Y. June 6, 2012) (finding that an incentive-based plan alleviated the need for a section 503(c)(1) analysis); Borders Grp., 453 B.R. at 471 (finding that “the Debtors [had] met their burden of establishing that the KEIP [was] incentivizing, thereby alleviating the need for a section 503(c)(1) analysis”); Dana Corp., 358 B.R. at 584 (concluding that sections 503(c)(1) and 503(c)(2) did not apply to incentive plans); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y.), Hr’g Tr. 84–85, Apr. 26, 2006 (stating that sections 503(c)(1) and 503(c)(2) of the Bankruptcy Code do not apply to incentive programs); In re Nobex Corp., No. 05-20050 (CSS) (Bankr. D. Del.), Hr’g Tr. 67, Jan. 12, 2006 (explaining that section 503(c)(1) does not apply to incentive programs).

30. Merely stylizing a bonus program as an “incentive” plan, however, does not automatically exempt an insider compensation strategy from the requirements of section 503(c)(1) of the Bankruptcy Code. See, e.g. In re Residential Capital, LLC, 478 B.R. 154, 170 (Bankr. S.D.N.Y. 2012) (“The Debtors must show that the KEIP is a ‘pay for value’ plan that offers incentives based on performance rather than a ‘pay to stay’ plan.”); In re Hawker Beechcraft, Inc., 479 B.R. 308, 313 (Bankr. S.D.N.Y. 2012) (“The Court must examine a proposed KEIP . . . [to] determine whether the proposed targets are designed to motivate insiders

to rise to a challenge or merely report to work.”). The milestones and targets triggering the incentives must force the participants to stretch and cannot be compared to “lay-ups” or “free throws” for the ease by which the participants could achieve the targets. See Dana Corp., 358 B.R. at 583; Hawker Beechcraft, 479 B.R. at 313 n.7.

31. Here, the primary effect of the Key Employee Incentive Plan is to incentivize the KEIP Participants in a manner that will benefit the Debtors’ business as a whole and, as a result, all stakeholders. Importantly, the Key Employee Incentive Plan does not contain either retention based or severance components. The KEIP Participants are not paid in the event their employment is terminated for cause, nor are they paid for merely maintaining their employment for a certain time period. Rather, award opportunities available under the Key Employee Incentive Plan are paid only upon the Debtors achieving specific performance targets.

32. The Debtors and the Backstoppers have focused on the costs of administering these chapter 11 cases, and strongly desire an efficient and value maximizing resolution to the Debtors’ chapter 11 cases. Thus, the Backstoppers and the Debtors have agreed that the Key Employee Incentive Plan must be based on an ambitious timeline agreed to between the Debtors and the Backstoppers for the Debtors’ ultimate emergence from chapter 11. The Key Employee Incentive Plan requires the KEIP Participants to negotiate a resolution of issues surrounding the Arbitration (or, in the alternative, to be heavily involved in litigating the Estimation Motion) and the Debtors to acquire Dunkard Creek’s assets as a condition precedent to emerging from chapter 11. Given the gridlock to date and the acrimonious tone surrounding the Arbitration in these chapter 11 cases, none of the remaining goals in the Debtors’ proposed timeline will be easy to reach (and meeting the first goal required tremendous efforts by the KEIP Participants). Simply put, the Key Employee Incentive Plan provides challenging performance targets that

cannot be compared to “lay-ups” or “free throws.” Cf. Dana Corp., 358 B.R. at 583; Hawker Beechcraft, 479 B.R. at 313 n.7. Indeed, there is no guarantee that the KEIP Participants will receive all of the payments under the Key Employee Incentive Plan because if the Debtors do not meet the applicable targets, the KEIP Participants cannot receive the related incentive award.

33. Moreover, the Key Employee Incentive Plan is significantly different than a proposed incentive plan that was rejected by the bankruptcy court in Hawker Beechcraft. There, the bankruptcy court found that the debtors’ proposed incentive plan paid “a bonus for consummating a plan that [was] likely to occur,” and set milestones that were “subject to extension.” Hawker Beechcraft, 479 B.R. at 313–314. Here, the Key Employee Incentive Plan requires the KEIP Participants to push ahead with an ambitious, non-negotiable timeline that will be particularly challenging to satisfy given the Debtors’ remaining obstacles. Successfully overcoming those challenges will require both dedication and perseverance on the part of the KEIP Participants.

34. Accordingly, the Debtors respectfully submit that sections 503(c)(1) and 503(c)(2) do not apply to the Key Employee Incentive Plan or to this Motion, and the Key Employee Incentive Plan constitutes an appropriate, performance-based incentive plan.

B. The Key Employee Incentive Plan Satisfies the Requirements of Section 503(c)(3) of the Bankruptcy Code

35. The Debtors’ implementation of the Key Employee Incentive Plan is authorized under section 503(c)(3) of the Bankruptcy Code. 11 U.S.C. § 503(c)(3). Section 503(c)(3) prohibits certain transfers made to officers, managers, consultants, and others that are both outside the ordinary course of business and not justified by the facts and circumstances of the case. Id. In applying section 503(c)(3), the court in Dana Corp. noted that the “test in section 503(c)(3) appears to be no more stringent than one courts must apply in approving any

administrative expense under section 503(b)(1)(A) . . . [an] expense must be an actual, necessary cost, or expense of preserving the estate.” Dana Corp., 358 B.R. at 576; see also In re Global Home Prods., LLC, 369 B.R. 778, 783 (Bankr. D. Del. 2007) (noting that a review under section 503(c)(3) of the Bankruptcy Code, as opposed to section 503(c)(1), “utilizes the more liberal business judgment review under § 363”).

36. Further, courts that have analyzed section 503(c)(3)’s prohibition on “other transfers” have applied a standard based upon the standard applied under section 363(b)—specifically, transfers are approved if such transfers are a sound exercise of a debtor’s business judgment and warranted by the facts and circumstances of the case. See Global Home Prods., 369 B.R. at 783; Velo Holdings, 2012 WL 2015870, at *9 (“Courts have held that the ‘facts and circumstances’ language of section 503(c)(3) creates a standard no different than the business judgment standard under section 363(b).”); In re Borders Grp., Inc., 453 B.R. 459, 473 (Bankr. S.D.N.Y. 2011) (noting that section 503(c)(3)’s “facts and circumstances” test “creates a standard no different that the business judgment standard under section 363(b) of the Bankruptcy Code”); In re Mesa Air Grp., No. 10-10018, 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sept. 24, 2010); In re Nobex Corp., No. 05-20050, 2006 WL 4063024, at *2 (Bankr. D. Del. Jan. 19, 2006).

37. The court in Dana Corp. set forth six factors to consider in determining whether an incentive plan is appropriate: (a) whether the plan is calculated to achieve the desired performance; (b) whether the cost of the plan is reasonable in the context of a debtor’s assets, liabilities, and earning potential; (c) whether the scope of the plan is fair and reasonable or discriminates unfairly among employees; (d) whether the plan is consistent with industry standards; (e) whether the debtor performed due diligence in investigating the need for the plan;

and (f) whether the debtor received independent counsel in performing due diligence, creating, and authorizing the plan. See Dana Corp., 358 B.R. at 576–77. These factors are not exhaustive elements required for approval of an incentive plan; rather, they are factors to be considered as a court evaluates the totality of the circumstances related to an incentive plan. See id. at 576.

38. As set forth below, the Key Employee Incentive Plan is fully justified by the facts and circumstances of these chapter 11 cases and, therefore, satisfies the requirements of section 503(c)(3) of the Bankruptcy Code and the standard set forth in Dana Corp.:

- The Key Employee Incentive Plan Is Calculated to Achieve Desired Performance. The Key Employee Incentive Plan is calculated to achieve the desired performance—specifically, a prompt emergence from chapter 11. The Key Employee Incentive Plan contemplates the Debtors: (a) obtaining successful resolution of the Arbitration through a settlement or, in the alternative, a successful estimation of the Disputed Mechanics’ Lien claims; and (b) attaining confirmation of the Plan on an expeditious time frame, including acquiring Dunkard Creek’s assets. The payments under the Key Employee Incentive Plan are carefully tailored to motivate the KEIP Participants to successfully drive the initiatives necessary to attain these goals, and if the Debtors fail to meet the performance goals set forth in the Key Employee Incentive Plan, the KEIP Participants are not entitled to receive the related awards under such Plan.
- The Cost of the Key Employee Incentive Plan Is Reasonable. The cost of the Key Employee Incentive Plan is reasonable, market-based, and, in the context of the size of the Debtors’ funded debt, de minimis. Indeed, the aggregate amount of the Key Employee Incentive Plan award opportunities—estimated at maximum to be approximately \$1.6 million—which is less than 0.2 percent of the Debtors’ more than \$1 billion in funded debt that is being restructured in these chapter 11 proceedings.
- The Scope of the Key Employee Incentive Plan Is Fair and Reasonable. The Key Employee Incentive Plan includes the four KEIP Participants, who will make significant contributions to the Debtors’ restructuring activities during these chapter 11 cases. In light of the size of the Debtors’ operations, the scope of the proposed Key Employee Incentive Plan is fair and reasonable.
- The Key Employee Incentive Plan’s Award Opportunities Are Consistent with Market Practices. As described more fully in the Friske Declaration, Towers Watson developed compensation benchmarks for the four KEIP Participants and also analyzed incentive plans approved in other chapter 11 cases. Based on this data and as further disclosed in the Friske Declaration, the target and maximum award opportunities available under the Key Employee Incentive Plan (expressed as a percent of base salary) are in the range of reasonableness in comparison to observed market practices.

- The Debtors Performed Due Diligence in Developing the Key Employee Incentive Plan. To ensure that the target opportunities available under the Key Employee Incentive Plan are competitive and market-based, the Debtors, with the assistance of Towers Watson, performed considerable due diligence and analyzed the KEIP Participants' total direct compensation as compared to total direct compensation provided at other power companies and disclosed post-petition incentive plan opportunities. Moreover, the Debtors thoroughly negotiated the Key Employee Incentive Plan with the Backstoppers, the key constituents in these chapter 11 cases, and the Backstoppers fully support the relief requested in this Motion. The Backstoppers' full support provides significant indication that the Key Employee Incentive Plan is justified by the facts and circumstances of these cases. See, e.g., In re Nortel Networks, No. 09-10138 (KG) (Bankr. D. Del.) Hr'g Tr. 26, Mar. 20, 2009 (approving incentive plan where prepetition secured lenders, whose "money is being used to pay these programs . . . , is in full support").
- The Debtors Received Independent Counsel in Developing the Key Employee Incentive Plan. Towers Watson and the Debtors' other advisors counseled the Debtors' management and independent director regarding all aspects of the Key Employee Incentive Plan. In addition, the Debtors received significant input regarding the Key Employee Incentive Plan from the Backstoppers, who are significant supporters of the Debtors' Plan. On these facts, the Debtors submit that they have received sufficient counsel regarding the Key Employee Incentive Plan. See Borders Grp., 453 B.R. 459, 477 (Bankr. S.D.N.Y. 2011) (noting that a debtor receives sufficient counsel when it receives counsel from its retained compensation consultants, counsel, and other advisors).

39. Based on the foregoing, the Debtors respectfully submit that the Key Employee Incentive Plan is a proper exercise of the Debtors' business judgment and use of the Debtors' resources, is justified by the facts and circumstances of these chapter 11 cases, and, therefore, satisfies the requirements of section 503(c)(3) of the Bankruptcy Code. The Key Employee Incentive Plan will motivate the KEIP Participants to the ultimate benefit of all parties in interest in these chapter 11 cases and should be approved.

Notice

40. The Debtors will provide notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the holders of the 50 largest unsecured claims against the Debtors (on a consolidated basis); (c) the administrative agent under the Longview prepetition credit agreement, dated as of February 28, 2007 (as amended from time to time, the

“Longview Credit Agreement”); (d) counsel for the administrative agent under the Longview Credit Agreement; (e) the collateral agent under the Longview Credit Agreement; (f) counsel for the collateral agent under the Longview Credit Agreement; (g) counsel for the Backstoppers; (h) the United States Environmental Protection Agency; (i) the United States Attorney’s Office for the District of Delaware; (j) the Office of the Attorney General for the State of West Virginia; (k) the Internal Revenue Service; and (l) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

41. No prior request for the relief sought in this Motion has been made to this or any other court.

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WHEREFORE, for the reasons set forth herein and in the Friske Declaration, the Debtors respectfully request entry of an order, substantially in the form attached hereto as **Exhibit A**: (a) authorizing and approving the Debtors' Key Employee Incentive Plan for the KEIP Participants; and (b) granting related relief.

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Wilmington, Delaware
Dated: November 27, 2013

/s/ Zachary I. Shapiro

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