

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-51502-659

(Jointly Administered)

PATRIOT COAL CORPORATION and  
HERITAGE COAL COMPANY,

Plaintiffs,

v.

PEABODY HOLDING COMPANY, LLC and  
PEABODY ENERGY CORPORATION,

Defendants.

Adversary Proceeding

No. 13-04067-659

**DEFENDANTS' MOTION FOR LEAVE TO FILE UNDER SEAL  
CERTAIN EXHIBITS TO THE DECLARATION OF  
MATTHEW C. CORCORAN IN SUPPORT OF DEFENDANTS'  
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants Peabody Holding Company, LLC ("PHC") and Peabody Energy Corporation ("PEC" and, together with PHC, "Peabody") hereby respectfully move the Court for an order (1) granting Peabody leave to file under seal confidential drafts of the NBCWA Individual Employer Plan Liabilities Assumption Agreement and certain comments Patriot Coal Corporation ("Patriot") made to one of those drafts as exhibits A and B (the "Confidential Exhibits") to the Declaration of Matthew C. Corcoran in Support of Defendants' Response to

Plaintiffs' Motion for Summary Judgment and (2) providing that the filing of the Confidential Exhibits will not waive any privilege or protection applicable to the Confidential Exhibits. This motion is made pursuant to 11 U.S.C. § 107(b)(1), Federal Rule of Evidence 502(d) (made applicable by Federal Rule of Bankruptcy Procedure 9017) and Federal Rule of Bankruptcy Procedure 9018(1). In support of this motion, Peabody states as follows:

1. Patriot and one of its subsidiaries, Heritage Coal Company LLC ("Heritage" and, together with Patriot, the "Plaintiffs"), filed this adversary proceeding seeking a declaration about the meaning of the NBCWA Individual Employer Plan Liabilities Assumption Agreement, dated October 22, 2007 (the "NBCWA Liabilities Assumption Agreement") (attached as Exhibit A to the Complaint). A mere three weeks after filing their Complaint, before Peabody had even filed a responsive pleading, the Plaintiffs filed their Motion for Summary Judgment [Doc. No. 6] (the "Summary Judgment Motion") asking the Court make the declaration sought in their Complaint.

2. As will be explained in Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (to be filed later today), the unambiguous language of the NBCWA Liabilities Assumption Agreement compels denial of the Plaintiffs' Summary Judgment Motion if this adversary proceeding were ripe. Nonetheless, the Plaintiffs make in the Summary Judgment Motion certain intent-based arguments that rely on disputed facts, including the erroneous claim that Peabody was "the drafter of the NBCWA Liabilities Assumption Agreement." Plaintiffs' Memorandum of Law in Support of Summary Judgment Motion [Doc. No. 7] at 3; see also id. at 6 ("drafted by counsel to Peabody"). To the extent the Court concludes the language of the NBCWA Liabilities Assumption Agreement does not unambiguously require denial of summary judgment, then a trial is necessary, after due

opportunity for the parties to complete discovery, to determine the parties' understanding of the NBCWA Liabilities Assumption Agreement and how they expressed those understandings during the course of the negotiations.

3. To demonstrate these facts are disputed, Peabody intends to file the Confidential Exhibits—confidential drafts of the NBCWA Liabilities Assumption Agreement and certain comments Patriot made to one of those drafts. The NBCWA Liabilities Assumption Agreement was negotiated along with a series of other agreements, pursuant to which the Plaintiffs, and certain other affiliates, were spun off from PEC when PEC distributed in 2007, to its shareholders via a dividend all of Patriot's equity shares (the "Spin-Off"). The Spin-Off negotiations were confidential as they touched upon all facets of Patriot's and PEC's businesses.

4. Moreover, joint legal advice was given to Peabody and Patriot in connection with the Spin-Off negotiations, which advice may be reflected in the Confidential Exhibits. At the time of the Spin-Off negotiations, Peabody and the Plaintiffs were still affiliated and certain legal advice they received jointly may be subject to a claim of privilege. Peabody and Patriot, and certain other of their respective affiliates, agreed they would jointly own any such privilege. See Separation Agreement, Plan of Reorganization and Distribution by and between PEC and Patriot dated as of October 22, 2007 (the "Separation Agreement") § 13.05(a). The Separation Agreement parties further agreed "[i]n the event of any litigation or dispute between or among any of the Parties, . . . either such Party may waive a privilege in which the other Party or member of such Group has a shared privilege, without obtaining the consent of the other party," "provided that such waiver . . . shall not operate as a waiver of the shared privilege with respect to third parties." Id. § 13.05(e).

5. If Peabody were to file the Confidential Exhibits publicly and the Confidential Exhibits reflected privileged communications, any applicable privilege arguably would be waived with respect to third parties. Accordingly, Peabody asks out of an abundance of caution the Court grant Peabody leave to file the Confidential Exhibits under seal and to order, pursuant to Federal Rule of Evidence 502(d), that the filing of the Confidential Exhibits under seal will not constitute a waiver of any applicable privilege or protection.

6. The Court has authority to provide the requested relief with or without notice. Section 107(b) of the Bankruptcy Code expressly grants the Court authority to enter an order authorizing Peabody to file the Confidential Exhibits under seal. See 11 U.S.C. § 107(b)(1) ("On request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information."). "On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information." Fed. R. Bankr. P. 9018. Federal Rule of Evidence 502(d), made applicable by Federal Rule of Bankruptcy Procedure 9017, grants the Court authority to "order that [any] privilege . . . is not waived by disclosure connected with the litigation pending before the court."

7. For the foregoing reasons, this Court should grant the Defendants' Motion for Leave to File Under Seal Certain Exhibits to the Declaration of Matthew C. Corcoran in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment. A copy of the proposed order granting the relief requested herein may be found at [www.PatriotCaseInfo.com/orders.php](http://www.PatriotCaseInfo.com/orders.php).

WHEREFORE, Defendants pray this Court grant Defendants' Motion for Leave to File Under Seal Certain Exhibits to the Declaration of Matthew C. Corcoran in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment.

Dated: April 22, 2013

Respectfully submitted,

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