

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

**In re:**

**PATRIOT COAL CORPORATION, *et al.*,**

**Debtors.**

**Case No. 12-51502 (Jointly Administered)  
Chapter 11**

**Objection Deadline:  
January 24, 2013 at 12:00 p.m.**

**Hearing Date:  
January 29, 2013 at 10:00 a.m.**

**Hearing Location: Courtroom 7 North**

**LRPB'S LIMITED OBJECTION TO DEBTORS' MOTION FOR AUTHORIZATION  
TO ASSUME OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL  
REAL PROPERTY**

H.A. Robson Trust, PRC Holdings, LLC, The Board of Trustees of Prichard School, The Trust with A.M. Prichard, III, Sarah Ann Prichard and Lewis Prichard dated December 30, 1983, The Robert B. LaFollette Trust for the benefit of Marjorie J. Wright, The Robert B. LaFollette Trust for the benefit of Alice A. Wright, The Latelle M. LaFollette Trust for the benefit of Marjorie J. Wright, The Latelle M. LaFollette Trust for the benefit of Alice A. Wright, LaFollette Holdings, Ltd., Alice Ann Wright, Wright Holdings, LLC, Broun Properties, LLC, LML Properties, LLC and Riverside Park, Inc. (collectively, "LRPB") file this limited objection ("Limited Objection") to Debtors' Motion for Authorization to Assume or Reject Unexpired Leases of Nonresidential Real Property (the "Motion") and state as follows:

**I. BACKGROUND**

1. The Debtors commenced these bankruptcy cases on July 9, 2012 (the "Petition Date") by filing voluntary petitions for relief under chapter 11 of title 11 of the United States

Code (“Bankruptcy Code”) with the United States Bankruptcy Court for the Southern District of New York.

2. On December 19, 2012, the Debtors’ bankruptcy cases were transferred from the Southern District of New York to the United States Bankruptcy Court for the Eastern District of Missouri, St. Louis Division.

3. LRPB and various Debtors are party to that certain Restatement of Leases and Other Documents dated September 28, 1984 among LaFollette, Robson, Prichard & Broun, *et al.* and Cedar Coal Co. and The Charleston Bank, N.A., as Trustee (as amended, assigned and subleased from time to time, the “LRPB Lease”).<sup>1</sup>

4. On January 15, 2013, the Debtors filed the Motion seeking, *inter alia*, to assume various nonresidential real property leases including, but not limited to, the LRPB Lease. On January 18, 2013, counsel to the Debtors agreed to extend LRPB’s objection deadline to January 24, 2013 at 12:00 p.m.

## **II. LIMITED OBJECTION TO MOTION**

5. LRPB generally does not object to the Debtors’ assumption of the LRPB Lease except as otherwise set forth herein. Since the filing of the Motion, counsel for LRPB and the Debtors have been in regular communication addressing issues associated with the proposed assumption, including, but not limited to, the cure amounts, timing associated with payment of the same, and adequate assurance of future performance. LRPB is cautiously optimistic that it will be able to resolve these issues, but files this Limited Objection in an abundance of caution to both formally memorialize its limited concerns with the proposed assumption and reserve its

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<sup>1</sup> The Debtors identify various amendments, assignments, and amendments to/of the LRPB Lease in Schedule A attached to the proposed order included with the Motion.

right to supplement and prosecute its limited objections at the time of the hearing on the Motion (if ultimately necessary).

6. Following are the limited issues that comprise LRPB's Limited Objection:

**a. Deadline to Make Cure Payments**

- i. Paragraph 13 of the Motion proposes to pay applicable Cure Amounts<sup>2</sup> "30 days after the order is entered with respect to an Assumed Lease, **or as soon thereafter as reasonably practicable.**" (Emphasis added).
- ii. Under section 365(b)(1) of the Bankruptcy Code, a debtor may not assume an unexpired lease unless, at the time of assumption of the lease, the debtor cures, or provides adequate assurance that the debtor will promptly cure, the default. 11 U.S.C. § 365(b)(1); In re MP Invs., L.L.C., 2010 Bankr. LEXIS 6294, \*7 (Bankr. S.D. Iowa Nov. 18, 2010).
- iii. By stating that the Debtors intend to pay the Cure Amounts 30 days after the order is entered or "as soon thereafter as reasonably practicable," there is no definitive deadline by which the Debtors must pay the Cure Amounts. LRPB requests that any order approving the Motion require the Debtors to make all cure payments within 30 days after the order is entered or as soon thereafter as reasonably

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<sup>2</sup> Capitalized terms not defined herein shall have the meaning set forth in the Motion.

practicable, but no later than 45 days after entry of the order authorizing the assumption of leases.

**b. Adequate Assurance of Future Performance**

- i. LRPB requests that the Debtors provide it with adequate assurance of future performance as required under section 365(b)(1)(C) of the Bankruptcy Code.
- ii. In order to assume an unexpired lease of nonresidential real property, section 365(b)(1)(C) of the Bankruptcy Code requires the debtor to “provide adequate assurance of future performance under such . . . lease.” 11 U.S.C. § 365(b)(1)(C). This does not “require a guarantee of future performance but must be based upon more than the debtor’s speculative plans.” In re MP Invs., 2010 Bankr. LEXIS 6294 at \*12.
- iii. In deciding whether adequate assurance has been given, “the Court must give a practical pragmatic construction based on the circumstances of each case.” In re Tama Beef Packing, Inc., 277 B.R. 407, 411 (Bankr. N.D. Iowa 2002). Furthermore, it is helpful to show sufficient financial backing or similar forms of security, as “[t]he viability of a proposal and accuracy of projections will be factors in the Court’s determination of adequate assurance.” Id.
- iv. Considering the current posture of the case coupled with some of the operational and industry challenges the Debtors face, LRPB requests

the Debtors provide it with information sufficient to satisfy its requirement to adequately assure future performance.

**c. Disputed Cure Amounts and Unpaid Taxes.**

- i. LRPB disputes the proposed Cure Amounts set forth in the Motion. Among other things, the proposed Cure Amounts relating to the LRPB Lease do not include unpaid tax obligations required to be made in accordance with the LRPB Lease. Prior to filing this Limited Objection, counsel to LRPB contacted Debtors' counsel in an attempt to resolve certain disputed cure amounts related to unpaid royalties and taxes due under the LRPB Lease. The parties are currently working together in good faith to ascertain the correct cure amounts. Nonetheless, LRPB notes its objection for the record and reserves its right to supplement this Limited Objection in order to provide more specificity related to the disputed cure amounts if necessary.
- ii. While it is black letter law that a debtor assumes *cum onere* when assuming a nonresidential real property lease pursuant to section 365 of the Bankruptcy Code, United States v. Gerth, 991 F.2d 1428, 1432 (8th Cir. 1993), LRPB requests that any order entered approving the assumption of the LRPB Lease include a savings provision that preserves the parties respective rights under the LRPB Lease, including, without limitation, rights relating to contingent,

unliquidated claims that might arise in connection with the LRPB Lease in the future.

**RESERVATION OF RIGHTS**

7. LRPB reserves the right to supplement this Limited Objection prior to or at the hearing on the Motion. In addition, LRPB reserves all of its rights under the LRPB Lease, as a matter of law and/or equity, including all remedies available under the LRPB Lease in the event of a future default by the Debtors after the assumption of the LRPB Lease.

WHEREFORE, LRPB requests that the Court sustain its Limited Objection and grant such further relief as it deems fair and appropriate.

Dated: January 24, 2013

Respectfully submitted,

POLSINELLI SHUGHART PC

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was electronically filed with the U.S. Bankruptcy Court, Eastern District of Missouri by using the e-filing system, which will send a Notice of Electronic filing this 24<sup>th</sup> day of January, 2013, to:

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All creditors and parties in interest that are receiving electronic notice in this case.

/s/ Rebecca M. O'Brien