UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	:	**Chapter 11**
	:	**Case No. 12-51502-659**
	:	**(Jointly Administered)**
PATRIOT COAL CORPORATION, *et al.*,	:	
	:	**Objection Deadline:**
Debtors.	:	**April 16, 2013 at 4:00 p.m.**
	:	**(prevailing Central Time)**
	:	
	:	**Hearing Date:**
	:	**April 23, 2013 at 10:00 a.m.**
	:	**(prevailing Central Time)**
	:	
	:	**Hearing Location:**
	:	**Courtroom 7 North**

OBJECTION TO THE MOTION OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR LEAVE TO CONDUCT DISCOVERY OF PEABODY ENERGY CORPORATION PURSUANT TO RULE 2004

After five years of operation, a global recession, dramatic decreases in coal demand and pricing, increasingly heavy regulatory burdens, and what it calls "staggering labor costs," Patriot Coal Corporation is now looking for ways to blame its financial collapse on Peabody Energy Corporation, seeking extensive pre-suit discovery to prepare what will be a time-barred claim for fraudulent transfer. Bankruptcy Rule 2004 certainly permits pre-suit discovery, what some courts have even called a "quick fishing expedition," and Peabody already has agreed to provide more than enough discovery under Rule 2004 to satisfy a good-faith inquiry. Where, as here, Patriot already has proposed to set aside two million dollars for litigation against Peabody, Movants[1] should not be allowed to use Rule 2004 to seek the exhaustive discovery contemplated

[1] The Rule 2004 Motion was filed on April 2, 2013 (Doc. No. 3494) by the debtors and debtors-in-possession in these proceedings (collectively, "Patriot") and the Committee of Unsecured Creditors of Patriot Coal Corporation (the "Creditors' Committee") (together, "Movants"). The United Mine Workers of America ("UMWA") is a member of the Creditors' Committee.

by their Motion, for at least three reasons.

- First, this is an obvious and improper attempt to by-pass Civil Rule 26. By its own statements, Patriot is working on a plan for litigation against Peabody.
- Second, Patriot has extensive resources for pre-suit investigation. Movants have access to Patriot executives involved in the spin-off and to all the documents and databases that Peabody transferred to Patriot at the time of the spin-off.
- Third, Peabody already has agreed to allow a Rule 2004 "quick fishing expedition" under a paradigm that Movants themselves established. Movants should not be permitted to impose still higher costs and burdens on Peabody under the rubric of a purported pre-suit "investigation."

With respect to the third point, Peabody has agreed to produce paper records and electronic files of 14 key custodians whom Movants chose—and will restore and produce email and attachments for those custodians on five broad topics, already designated by Movants, from restored back-up tapes from four dates to be chosen by Movants (which would cover the full time period Movants request)—all at Peabody's cost. As described below, in a further gesture of good faith, Peabody is making an additional offer to accept Movants' date range and to restore and produce email and attachments for the nine additional custodians that Movants requested—again at Peabody's cost.

Movants have taken the position that the custodian-based discovery they proposed is not enough, and that Peabody also should be forced to incur the vastly greater cost and burden to restore (and produce hundreds of thousands of additional pages of email and attachments from) more than 40 sets of back-up tapes, and also to conduct exhaustive searches of wide-ranging corporate records to satisfy 37 different document requests. None of this is legitimately necessary to "investigate" a potential adversary proceeding against Peabody. If it were, Patriot

would not have proposed already to set aside $2 million for a Litigation Trust to fund litigation against Peabody.[2]

Even if it were not clearly heading toward litigation against Peabody (which it is), the fact remains that Patriot is no ordinary Rule 2004 movant in need of pre-suit discovery from a stranger company. The record shows that, in blaming Peabody for Patriot's collapse, Patriot and its spin-off counsel are attempting to rewrite the corporate history they helped create.

* * *

Five years ago, Patriot was a successful billion-dollar spin-off of Peabody Energy Corporation. The company that became Patriot was conceived because Peabody recognized the opportunities available to a separate company if it were strategically focused in the Eastern United States. Peabody began the process of realigning some of its Eastern subsidiaries to become part of a new entity. As Patriot took shape, high-level Peabody executives took the opportunity to lead the new company, including, among others, Peabody's then-Chairman and former Chief Executive Officer Irl Engelhardt and its Executive Vice President Richard Whiting.

In April 2007, Mr. Whiting and his team, including General Counsel Joseph Bean, relocated to a separate floor at Peabody's headquarters. Mr. Bean hired New York counsel, Davis Polk & Wardwell LLP, to represent Patriot in negotiating the various agreements that underlay the proposed spin-off. Thus, it was Patriot's current counsel in these proceedings, Davis Polk, under the direction of Patriot's current General Counsel in these proceedings, Joseph Bean, who assisted the nascent Patriot management team in negotiating agreements to effectuate the Spin-Off, including the Separation Agreement, Plan of Reorganization and Distribution.

[2] Patriot's Fifth Section 1114 proposal, posted at www.patriotcaseinfo.com; *see* Notice of Fourth 1113 Proposal and Fifth 1114 Proposal (Doc. No. 3583) (filed 04/11/2013).

After negotiations concluded, the new entity was launched as Patriot Coal Corporation on October 31, 2007 (the "Spin-Off"). Patriot's then-current management team and its board of directors enjoyed both a rising market and the confidence of independent analysts:

- "Peabody has drafted in a strong team of seasoned coal miners from the group to run the new company. We see this as part of the commitment from [Peabody] to make this spin out successful. . . . Well timed issue, as interest in international coal market rises. With expectations for international coal prices rising, we believe the market will welcome this new coal miner." *John Bridges, J.P. Morgan*[3]

- "We believe that given Patriot management's background, Patriot truly will be at the forefront of consolidating the Central Appalachian market. This should help make the region operate more efficiently in general, which would be positive for pricing." *Jeremy Sussman, Natixis Bleichroeder*[4]

At the time of the Spin-Off and thereafter, Patriot was solvent, adequately capitalized and positioned for success. Patriot controlled 1.2 billion tons of coal reserves and was led by a management team boasting a combined 142 years of experience in the coal industry.[5] Peabody took the additional step of having an affiliate undertake a contractual agreement to fund Patriot's payment obligations for $614 million in retiree healthcare liabilities in order to ensure the new company's success.[6] In the twelve months following the Spin-Off, and as adjusted for the 2-for-1 stock split in August 2008, Patriot's stock price quadrupled, rising from $18 per share to $80 per share.[7]

[3] October 16, 2007, JP Morgan, *Peabody Energy Spinning Out Patriot*.

[4] October 31, 2007, Natixis Bleichroeder, *Patriot Coal Corp., Initiating Coverage: Can Peabody's Spin-off Help Unlock Value in Patriot Coal?*

[5] October 22, 2007 Patriot Coal Corporation 8-K, attached as Ex. 1, at 3.

[6] *Id.* at 37. Accounting for that arrangement, in the first six months of 2007, the entities comprising Patriot raised $539.5 million in revenues, earned $15.9 million in net income and had $85.5 million of Adjusted EBITDA. *Id.* at 2.

[7] Patriot Coal Corporation 2008 Annual Report, attached as Ex. 2, at 1, 47.

That was more than five years ago. Patriot is now a different company in a different environment than existed at the time of the Spin-Off. For example, during its first year as an independent company, Patriot's management and board decided to purchase Magnum Coal Company, a company larger than Patriot, issuing $200 million of new debt and ultimately assuming $1.5 billion of additional liabilities in connection therewith.[8] The judgments made by Patriot's management were affirmed by the continued willingness of independent and sophisticated third parties to lend money to Patriot and by the public markets' valuations of Patriot's debt and equity.

Over time, however, macroeconomic factors led to Patriot's downfall. Patriot itself has repeatedly characterized the causes of its failure in the same phrases:

- devastating economic and market conditions, including: the global financial crisis; decreased demand for coal; rising costs and regulatory burdens; and increased liabilities as a result of the entry of certain Patriot subsidiaries into "me too" agreements incorporating the National Bituminous Wage Agreement of 2011.[9]
- declining coal demand, increasing regulations, and "staggering labor costs."[10]
- "the drop in coal demand and prices, increasingly adverse regulatory compliance requirements, and unsustainable wage, benefit, and retiree healthcare costs."[11]

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[8] June 18, 2008 Patriot Coal Corporation Amendment No. 2 to Form S-4, attached as Ex. 3, at 95, 153.

[9] Declaration of Mark N. Schroeder Pursuant to Local Bankruptcy Rule 1007-2 (Docket No. 4), at ¶¶ 21-39.

[10] Mem. of Law in Support of Plaintiffs' Motion For Summary Judgment (Case No. 13-04067-659, Doc. No. 7) at 8.

[11] Patriot's Fifth Section 1114 proposal, posted at www.patriotcaseinfo.com; *see* Notice of Fourth 1113 Proposal and Fifth 1114 Proposal (Doc. No. 3583) (filed 04/11/2013).

By Patriot's own calculation, the costs associated with complying with environmental regulations have significantly increased Patriot's liabilities acquired in the Magnum acquisition. Specifically, as of the date of the Magnum acquisition, Patriot estimated that its costs to treat selenium discharges had a fair value of $85.2 million. *See* Patriot Coal Corporation, 2009 Annual Report, Feb. 24, 2010, at pg. 35. By year-end 2012, Patriot estimated that such costs were approximately five times greater, with an estimated fair value of $443.0 million. *See* Patriot Coal Corporation, 2012 Annual Report, Feb. 22, 2013, attached as Ex. 5, at pg. 19.

As another example of increasing regulatory demands upon Patriot after the Spin-Off, following the 2010 explosion at Massey Energy's Upper Big Branch mine in West Virginia, Appalachian coal producers face increased scrutiny by the Mine Safety and Health Administration. *See* Massey Energy's Investigation into Explosion Takes New

The historical reality is that, in 2007 and thereafter, Patriot had the advantages of an experienced leadership team; it was solvent and well-funded; and it had access to capital for expansion. Five years later, the language of Patriot's Rule 2004 Motion—which speaks in terms of Peabody "unloading" liabilities and "dictating" contractual terms—reflects Movants' desire to rewrite history to blame Peabody for Patriot's collapse, so the Court will allow them to take exhaustive discovery, unfettered by the ordinary restraints of Civil Rule 26.

To be clear, what the Rule 2004 Motion seeks is not a ruling on a few disputed points. The Rule 2004 Motion does not seek a "fishing expedition" through the records and current email of key custodians, because Peabody already has agreed to that. The Rule 2004 Motion does not seek the restoration of old emails from a sample of back-up tapes at Peabody's cost, because Peabody already has agreed to that as well. Instead, the Rule 2004 Motion asks this Court to send a fleet of fishing trawlers through Peabody's records, forcing Peabody to restore dozens of back-up tapes and to make exhaustive searches through reams of corporate records. Even if any potential claim were not time-barred (which it is[12]), no such armada is defensible here, for at least four reasons.

First, Patriot is poised to litigate, and discovery should be informed by actual factual and legal allegations set forth in a complaint. Wide-ranging and amorphous discovery under

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Direction, available at http://www.stockbloghub.com/2010/12/06/mee-massey-energys-investigation-into-explosion-takes-new-direction/60004 (citing Patriot as a "loser" in the aftermath of Massey explosion).

[12] Bankruptcy Code section 548 allows the trustee to challenge as fraudulent only those transfers made or obligations incurred within the two years prior to the commencement of a debtor's bankruptcy case. *See* 11 U.S.C. § 548(a)(1). Because all of the allegedly fraudulent transfers that Movants seek to "investigate" occurred more than two years prior to the Petition Date (July 9, 2012), Movants are prohibited from bringing claims relating to those transfers under section 548 of the Bankruptcy Code. In addition, under the Uniform Fraudulent Transfer Act - a version of which has been adopted by 44 states, including Missouri (where Peabody and Patriot are headquartered) and Delaware (where Peabody and Patriot are incorporated) - both actual and constructive fraudulent transfer claims generally are extinguished if not brought within four years after the transfer was made or the obligation was incurred. *See, e.g.,* Mo. Ann. Stat. § 428.049; Del. Code Ann. tit. 6, §1309. The Spin-Off occurred more than four years prior to the Petition Date; thus, all actual and constructive fraudulent transfer claims relating thereto were extinguished prior to the Petition Date.

Bankruptcy Rule 2004 is improper here. Second, the players are not strangers to each other or to the underlying transactions. Patriot executives, Patriot's current General Counsel, Joseph Bean, and its current counsel, Davis Polk, worked across the table from Peabody and its counsel to negotiate the structure and terms of the Spin-Off. Third, Peabody already has agreed to produce substantive and wide-ranging discovery along parameters that Movants themselves originally proposed, at substantial cost and burden to Peabody, and should not be forced to incur vastly higher costs and burdens, without the protections of Civil Rule 26, before a complaint is filed.

Fourth, as a further gesture, which Peabody would have made if Movants had not ignored Peabody's last request for a conference, Peabody will expand its offer to include paper and electronic documents from files to which the agreed custodians had access for the entire discovery period requested by Movants (January 1, 2005 through May 1, 2008).[13] In addition, Peabody will undertake the additional cost and burden of reviewing and producing documents from the email boxes of not only the 14 custodians to which Peabody already agreed, but also those of all of the nine additional custodians requested by Movants, for a total of 23 restored custodian mailboxes from the four sets of back-up tapes, all at Peabody's cost.

The Rule 2004 Motion takes advantage of every offer made by Peabody in negotiation but backtracks on Movants' own offers.[14] In its last attempt to resolve this dispute, therefore, Peabody thus supplements an already-generous offer. More than that Peabody declines to do, and this Court should not order, without the protections of Civil Rule 26. For these reasons, set

[13] This is the discovery period requested by Movants in meet-and-confer discussions. Yet its proposed subpoena is not so limited. Peabody objects to Movants' requests to the extent they require the production of documents before January 1, 2005 and/or after May 1, 2008.

[14] In addition to the fundamental issue with respect to the expansion of custodian-based discovery they proposed, Movants have expanded from 9 to an undefined number the "former Peabody employees" about whom they seek discovery from Peabody. *See* Rule 2004 Motion, Exhibit H, 03/19/2013 letter from P. Wilson to M. Russano & P. O'Neill at 3 (referring to Movants' request on March 6, 2013 for the restoration of email boxes from nine (9) former Peabody employees), Ex. 10 hereto; *see also* Rule 2004 Motion at 11 ¶ 5 (acknowledging in footnote that proposal involved nine individuals).

forth more fully below, Peabody respectfully requests that the Court deny the Rule 2004 Motion to the extent it seeks more than Peabody already has agreed to provide.

LEGAL STANDARD

1. Bankruptcy Rule 2004 examinations are "designed to be quick fishing expedition[s]," *In re French*, 145 B.R. 991, 992 (Bankr. D.S.D. 1992), the primary purpose of which is "to quickly ascertain the extent and location of the estate's assets." *In re Wilcher*, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985) (both emphases supplied).

2. From that, two initial points follow. First, "the availability of Rule 2004 as a discovery tool is not unlimited." *Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.)*, 127 B.R. 267, 274 (D. Col. 1991); *see also In re Apex Oil Co.*, 101 B.R. 92, 103 (Bankr. E.D. Mo. 1989). Second, Rule 2004 is not self-executing. It provides that "[o]n motion of any party in interest, the court *may* order the examination of any entity." Fed. R. Bankr. P. 2004(a) (emphasis supplied).[15] The power to order such an examination resides within this Court's sound discretion. *In re Rosenberg*, 303 B.R. 172, 175 (B.A.P. 8th Cir. 2004); *In re French,* 145 B.R. 991, 993 (Bankr. D.S.D. 1992) (exercising discretion to deny government's Rule 2004 motion and requiring discovery to proceed under Civil Rules).

3. Therefore, it is within the Court's discretion to reduce a Rule 2004 request to a "range which should satisfy the concept of a good faith inquiry." *In re Texaco Inc.*, 79 B.R. 551, 556 (Bankr. S.D.N.Y. 1987). To that end, relevance alone is not sufficient to support a Rule 2004 order. The Court is required to make a finding of good cause before granting examination under Rule 2004, "balanc[ing] the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination. That documents meet the requirement

[15] *See also* NORTON BANKRUPTCY RULES, 2009-10 ed., Rule 2004 ed. comment (c), at 136-37 (creditors do not have an absolute right to conduct examinations under Rule 2004).

of relevance does not alone demonstrate that there is good cause for requiring their production." *In re the Drexel Burnham Lambert Grp., Inc*., 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991) (internal citations omitted).

ARGUMENT

A. MOVANTS ARE NOT ENTITLED TO ANY ADDITIONAL DISCOVERY BECAUSE LITIGATION IS "LIKELY TO BE FILED."

4. Given the broad reach of Rule 2004 examinations, courts have noted in commentary that "it is tactically advantageous . . . to submit [a party] to a Rule 2004 examination before filing a complaint because thereafter more limited discovery subject to the [Federal Rules of Civil Procedure] will be all that is available." *In re Valley Forge Plaza Assocs.*, 109 B.R. 669, 674-75 (Bankr. E.D. Pa. 1990) (internal citations and quotation marks omitted). For this reason, courts have expressed concern that Rule 2004 examinations not be used as a tactic to circumvent the safeguards of the Federal Rules of Civil Procedure,[16] and parties poised to litigate may not use the examination. 10 COLLIER ON BANKRUPTCY ¶ 7026.01, at 7026-2 (16th ed. 2010) ("If an adversary proceeding or contested matter is pending or *is likely to be filed*, it is improper for one of the parties to use a Rule 2004 examination as a substitute for, or in addition to, discovery pursuant to Civil Rule 26 *et seq.* of the Civil Rules or to circumvent the rule's procedural protections provided to the parties and witnesses.") (emphasis supplied).

5. There can be no dispute that an adversary proceeding likely will be filed against Peabody. More than seven months ago, in the transfer of venue hearing, Patriot's counsel stated that "[t]he circumstances surrounding Patriot's Spin-Off from Peabody will most assuredly be looked at with extraordinary seriousness by both the debtors and the creditors' committee.

[16] *See 2435 Plainfield Ave., Inc. v. Twp. of Scotch Plains (In re 2435 Plainfield Ave., Inc.)*, 223 B.R. 440, 456 (Bankr. D.N.J. 1998) (*quoting* NORTON BANKRUPTCY LAW & PRACTICE for the proposition that "courts will usually not allow a 2004 exam where an adversary proceeding is pending, because the party requesting the examination is likely seeking to avoid the procedural safeguards of [the Federal Rules of Civil Procedure]").

We're already on it, Your Honor, you won't be surprised to hear."[17] Counsel for the Creditors' Committee went further, revealing to the Court that his firm had "been working on a preliminary report to the committee about claims against Peabody." Specifically, as of September 12, 2012, the Creditors' Committee was already considering the very claim against Peabody mentioned in the Rule 2004 Motion: fraudulent transfer.[18]

6. On April 11, 2013, Patriot filed a Notice with this Court regarding Patriot's Fifth Section 1114 proposal. In it, Patriot set forth its agreement to set aside $2 million to fund a Litigation Trust to pursue claims against Peabody. Patriot went so far as to state the proposed percentages for the division of any recovery from litigation among itself, its unsecured creditors and its shareholders.[19]

7. There is no question that a suit is "likely to be filed" before this Court, and thus Movants' requests should be narrowly tailored to prevent them from using Rule 2004 to circumvent proper Civil Rule 26 discovery. 10 COLLIER ON BANKRUPTCY ¶ 7026.01, at 7026-2.[20]

B. MOVANTS HAVE AMPLE INFORMATION FROM PATRIOT TO CONDUCT ANY LEGITIMATE PRE-SUIT INVESTIGATION.

8. Where, as here, the moving parties already have access to sufficient information from which to determine whether to file suit, the use of Bankruptcy Rule 2004 is not appropriate.

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[17] Transcript from Sept. 12, 2012 Hearing, attached as Ex. 6, at 226:15-19.

[18] *Id.* at 309:5-10.

[19] Patriot's Fifth Section 1114 proposal, posted at www.patriotcaseinfo.com; *see* Notice of Fourth 1113 Proposal and Fifth 1114 Proposal (Doc. No. 3583) (filed 04/11/2013). Of course, the UMWA, a member of the Creditors' Committee, already has filed suit against Peabody and one of its subsidiaries, alleging that Peabody conceived and executed a "corporate scheme" to transfer its largest liabilities to a new corporation (Patriot) that would "inevitably fail." *Hubert Lowe, et al. v. Peabody Holding Company, LLC*, S.D. W. Va., No. 2:12-cv-06925, Doc. No. 39, attached as Ex. 7 at PAGEID # 875, ¶ 147.

[20] *In re Recoton,* 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004) is not to the contrary. While the court in *In re Recoton* allowed discovery, it did so in part because the Creditors' Committee had stated "unequivocally and convincingly that it ha[d] not decided whether or not to pursue litigation." *Id.* at 756. As shown *infra*, Patriot and the Creditors' Committee already are making plans to divide the proceeds of any litigation recovery against Peabody.

In re GHR Energy Corp., 35 B.R. 534, 536-38 (Bankr. D. Mass. 1983) (denying Rule 2004 examination because "it seems that the debtors are now in a position to file an action against certain of the individuals and entities if they so choose"). Movants have independent access to key witnesses and information about the Spin-Off and related transactions, through Patriot's own employees, former executives, documents and transferred financial and operational databases. If that were not enough, Peabody already has agreed to a fishing expedition, at Peabody's own expense, under the parameters suggested by Movants. Movants do not cite, and Peabody has not found, a case in which a court has ordered, under the auspices of Bankruptcy Rule 2004, this type of additional broad-ranging discovery under these unique circumstances.

9. As mentioned earlier, high-level Peabody executives left Peabody to become part of the Patriot management team. These individuals included Peabody's Senior Vice President—Business and Resource Development, Charles Ebetino; its Executive Vice President and Chief Marketing Officer Richard Whiting; its Associate General Counsel Joseph Bean; its Group Vice President for U.S. Eastern Operations Jiri Nemec; and its Chairman of the Board and former Chief Executive Officer, Irl Engelhardt.[21] The Patriot management team took with them more than 50 other Peabody employees involved in all aspects of Peabody's business.[22] As former Peabody executives, Patriot's management team had extensive knowledge regarding both Peabody's reorganization and the Spin-Off itself. Thus, especially in Patriot's General Counsel Joseph Bean and Patriot's Senior Vice President—Global Strategy & Corporate Development, Charles Ebetino, Movants have access to an invaluable resource—the very individuals involved

[21] Patriot Coal Corp. Form 8-K, Ex. 1, at 88-91.

[22] As noted earlier, Movants' proposed order is broader than the proposals discussed in the meet-and-confer sessions. For example, Movants' proposed order seeks discovery of documents and restored emails from all of these former Peabody employees, not just the nine whom Movants identified in the course of the meet-and-confer discussions.

in the transaction underlying their potential claim.[23]

10. Moreover, Movants have abundant documentation from Patriot's own files and the files and databases that were transferred to Patriot at the time of the Spin-Off. When Movants assert that Peabody "assiduously ensured" that Patriot employees could not take certain documents with them (Rule 2004 Motion at p. 4), they appear to be referring to a review by Peabody and a certification that documents retained by the Patriot employees related solely to Patriot and not to its competitor Peabody as it would be constituted after the Spin-Off (Rule 2004 Motion Ex. G, at 1). Nowhere do Movants explain their insinuation that this certification or review were problematic, and there is no suggestion they were.

11. With respect to documents, such as Word, Excel and PowerPoint, the employees moving to Patriot identified which of these documents they wished to transfer. A preliminary estimate suggests that more than 8 GB of information was transferred based on these identifications, which, using standard vendor estimates, amounts to more than 500,000 pages of Word documents alone. The future Patriot employees also were able to transfer email from the Peabody mailboxes that, under the system's retention parameters, could have dated back to late 2006.

12. With respect to financial and operational data, including general ledger and human resources data, Patriot received copies of the Peabody databases containing this type of information in their entirety in the summer of 2008, rather than having to select specific data. Then, over the course of six months, Patriot was to delete such data as it believed was not relevant to its own operations. The time for such deletion was, in fact, extended into the spring of 2009 at Patriot's request.

[23] With respect to Mr. Bean, of course, Peabody refers to relevant, non-privileged information in his possession and does not waive any attorney-client privilege or work product protection that may apply.

13. In citing this data transfer, Peabody does not argue (as Movants suggest) that Patriot has access to every piece of information relating to a potential claim or that Patriot employees were permitted to take with them any piece of information regarding Peabody they would like. (Rule 2004 Motion at 12.) Rather, Peabody is simply pointing out that what Patriot has is substantial—more than enough to allow Movants to decide whether to file a claim. Indeed, Movants have not cited a case in which a Court has approved a Rule 2004 examination when the moving party was itself intimately involved in the underlying transaction and has at its disposal the very individuals involved in the transaction underlying their potential claim.[24]

C. MOVANTS HAVE NO LEGITIMATE NEED FOR MORE DISCOVERY THAN THE "QUICK FISHING EXPEDITION" PEABODY ALREADY HAS OFFERED.

1. To supplement Patriot's resources, Peabody already agreed to a "quick fishing expedition" into its own key witnesses and documents.

14. Buried in the exhibits to the Rule 2004 Motion, and attached as Exhibit 10 here, is the generous offer that Peabody made regarding discovery, an offer that tracks almost perfectly the custodian-based discovery proposal set forth by Movants themselves.

15. To recap briefly, Movants' opening salvo was a set of 67 document requests (many of which had no date limit).[25] After Peabody objected and counsel conferred, it took some weeks for Movants to sort through their own requests, but Movants narrowed them to documents and email from 15 custodians relating to five broad topics.[26] After Movants agreed to

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[24] The UMWA has shown it has sufficient factual information to allege, under the constraint of Rule 11 sanctions, that Peabody "conceived [of] and implemented [a] corporate scheme[] to spin-off or sell [its] largest liabilities, including retiree, pension, and health and welfare benefits, into [a] new corporation[], Patriot . . ., which would inevitably fail." *Hubert Lowe, et al. v. Peabody Holding Company, LLC, et al.*, S.D. W. Va. No. 2:12-cv-06925, Doc. No. 39 at PAGEID# 875, ¶ 147, attached as Ex. 7. This is precisely the type of fraudulent transfer claim that Movants claim they still need to "investigate." Because Movants already have sufficient information to bring such a claim, Rule 2004 is not appropriate. *In re GHR Inc.*, 35 B.R. at 536-38.

[25] See January 11, 2013 Draft 2004 Subpoena, attached as Ex. 8.

[26] January 31, 2013 email from M. Russano to R. Faxon, attached as Ex. 9.

delete Peabody's CEO, Gregory Boyce, from the list of custodians,[27] Peabody agreed to produce responsive, non-privileged hard copy documents on the five broad topics collected from the 14 custodians (recognizing that some are retired and one is deceased) and additional responsive, non-privileged electronic documents on the five broad topics from the following locations:

- The custodians' active mailboxes, plus all documents attached to those emails;
- The personal computers or any external storage devices of the custodians;[28]
- Specific folders on shared drives that are labeled with the custodians' own names, in which they stored documents and which were identified as likely containing responsive information;
- Specific folders on shared drives that any of the custodians identified as folders where they stored documents relating to the five broad "topics" (even though the folders were accessible to, and used by, others (for example, others in a department)); and
- Specific folders to which Peabody understands that two retired custodians and one deceased custodian, respectively, had access.[29]

Thus, contrary to Movants' claims, Peabody has not limited its search for electronic documents to folders belonging to certain custodians as originally envisioned. Peabody searched in every folder that a custodian identified as containing potentially responsive information, whether or not that folder belonged to a custodian. Further, for custodians to whom Peabody did not have access or who could not identify the likely location of relevant documents, Peabody looked in every folder to which those custodians had access. Its search, therefore, went far beyond searching for folders created or maintained by the custodians themselves. Peabody further

[27] Movants now take the untenable position that, pursuant to Rule 2004, they are entitled to *depose* Mr. Boyce, and they do so before seeing any information as to what Mr. Boyce's role was in the reorganization or Spin-Off. This is transparently an attempt to harass Peabody. *See In re Mittco, Inc.,* 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984) (holding that Rule 2004 requests should be limited if the purpose is to harass or abuse).

[28] By the phrase "personal computers," Peabody refers to all available laptops issued by Peabody to the custodians. Peabody also queried the available custodians about whether they stored company documents on home computers (none) and external storage devices (one, which was collected).

[29] Peabody has agreed that it will make these searches; Peabody has not agreed, as Movants state, that it "must" make them. Rule 2004 Motion at 13 ¶ 24.

assured Movants that, in the unlikely event that specific documents identified by Movants in connection with their five broad topics did not appear in the custodians' emails or files, Peabody would be willing to consider those requests individually.[30]

16. Peabody initially resisted the additional burden of restoring back-up tapes. Email on back-up tapes is routinely considered "inaccessible" by the courts and Peabody felt (justifiably) that Movants had plenty of material from their independent sources, and the broad discovery to which Peabody already had agreed, to conduct any legitimate pre-suit investigation. In an effort to satisfy Movants, however, Peabody agreed to restore first one, and then four, sets of back-up tapes, and to review and produce email and attachments for the 14 Peabody custodians on those tapes, giving Movants their choice of specific dates for restoration within the agreed-upon time period. (Movants have never chosen any dates.)

17. Restoring back-up tapes for four (4) separate dates will provide an extremely large volume of discovery. Specifically, as described in more detail at Paragraph 25 *infra,* by staggering the four dates, Movants can obtain an extremely large quantity of email and attachments covering the entire agreed period of discovery (*i.e.,* January 1, 2005 through May 1, 2008).

18. When Movants flatly refused to discuss sharing the costs of any restoration, Peabody removed that obstacle by offering to pay the cost of restoring those tapes itself.

19. Peabody did not ask Movants to share the costs of attorney review, although those costs are substantial and obviously, they will increase along with the increased number of sets of back-up tapes (from one to four sets) and custodian mailboxes (from 14 to 23) that Peabody has agreed to restore.

[30] March 19, 2013 Letter from P. Wilson to M. Russano and B. O'Neill, et al., Ex. 10, at 3-4.

20. Without responding to Peabody's request for a conference about its offer, Movants unilaterally declared an impasse and filed their Rule 2004 Motion. Had they responded in a meaningful way to Peabody's offer, Peabody would have continued negotiating the scope of the 2004 requests.[31] In fact, as set forth above, as a further gesture to resolve this Rule 2004 Motion, Peabody will agree to produce documents for the entire period requested by Movants (January 1, 2005 through May 1, 2008) and to restore from the four back-up tapes email and attachments on the five broad topics from all 23 requested custodians. But more than that is not reasonable by any standard, nor is it required under any proper application of Rule 2004.

21. Thus, Peabody asks the Court to reject Movants' request that Peabody restore and review more than 40 sets of back-up tapes at its own expense and conduct a wide-ranging search for electronic documents in places besides those Peabody has already reasonably identified.[32]

2. Rule 2004 does not entitle Movants to just any discovery they want.

22. In their Rule 2004 Motion, instead of honoring the custodian and topic lists they proposed in January 2013, Movants attach 37 document requests (which, by their own terms, violate the time range proposed by Movants during negotiations).

23. Given that Peabody has made a generous offer of production and Movants already have key documents and individuals with knowledge at their disposal, what Movants seek here is not information sufficient to conduct an "investigation," but improper wide-ranging discovery to

[31] Peabody and Movants conferred most recently on an agreed confidentiality order on April 1, 2013. Movants provided their response today (April 16, 2013). At the time this paper was prepared, Peabody and its counsel had not had an opportunity to review that response.

[32] Without intending to burden the Court with an exhaustive list of objections to the instructions and definitions attached to Movants' proposed subpoena, Peabody objects to those definitions and instructions, as well as to their scope. *See, e.g., In re Texaco Inc.,* 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987) (stating that Pennzoil's definition of "document" was so overbroad as to "border[] on the ridiculous"). Notably, even *Pennzoil's* overbroad definition did not include the term "doodlings," as Movants' does. Further, on April 1, 2013—the day before filing the Rule 2004 Motion—Movants proposed a list of search terms, but those search terms do not narrow the universe of documents Peabody would have to review in any meaningful way.

use in the adversary proceeding they intend to file. This cannot be plainer than in Movants' demands for an exhaustive search of Peabody's files and for the restoration of more than 40 sets of back-up tapes to provide otherwise inaccessible email and attachments.

24. To be clear, Peabody has already conducted a thorough search for documents in electronic folders likely to contain responsive information. It looked not only in folders that "belonged" to the identified custodians, but also in the general folders where those custodians kept documents or had access. The exhaustive search for documents now contemplated by Movants is wholly unreasonable in this context and completely inconsistent with the custodian-based and topic-based discovery they themselves proposed. With respect to back-up tapes, Movants argue that "restoring only four backups over a three-year period guarantees that Movants will not receive the overwhelming majority of relevant outbound email and email in 'deleted' folders." (Rule 2004 Motion at p. 14.) But Bankruptcy Rule 2004 does not guarantee production of "the overwhelming majority of relevant" documents; it provides for production of documents sufficient to "satisfy the concept of a good faith inquiry." *In re Texaco Inc.*, 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987).

25. That much information is already being offered by Peabody, and at its own, substantial expense. During the period at issue, as Movants know, the Peabody email system did not automatically delete email in a custodian's inbox or saved in a custodian-created folder unless it was older than one year. The system automatically deleted email in sent folders every 60 days and in the trash folder daily. Peabody mailboxes were backed up on a set of tapes six times a week. Therefore, each set of back-up tapes Peabody has offered to restore should include one year of email in each custodian's inbox and one year of email saved in any folder in the custodian's mailbox, including any sent email saved in those folders. Thus, Movants could

retrieve most, if not all, of the email for the agreed-upon time period by strategically choosing the dates of the four sets of back-up tapes to be restored and reviewed by Peabody.[33]

26. The information Patriot already has, coupled with Peabody's outstanding discovery offer, is sufficient to provide Movants with the information they need to determine whether to file suit. Movants' request for more than this—for every potentially relevant email, whether on a back-up tape or active system, in an inbox, outbox or deleted box, and every document in any conceivable location—turns Rule 2004 into a standard, overreaching discovery request that would be clearly objectionable under Civil Rule 26, but without Civil Rule 26's protections. Bankruptcy Rule 2004, however, is not a device by which Movants can conduct an end-run around Civil Rule 26. *See In re Bennett Funding*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) ("[C]ourts are wary of attempts to utilize Fed. R. Bankr. P. 2004 to avoid the restrictions of the Fed. R. Civ. P. in the context of adversary proceedings"); *In re Valley Forge*, 109 B.R. at 675 ("Many courts have expressed distaste for efforts of parties to utilize [Rule] 2004 examinations to circumvent the restrictions of the [Federal Rules of Civil Procedure] in the context of adversary proceedings or contested matters"). Movants should be limited to the discovery Peabody has offered.

D. ONLY OUTSIDE COUNSEL FOR THE UMWA SHOULD BE PERMITTED TO VIEW DISCOVERY PRODUCED BY PEABODY.

27. Peabody respectfully request that the Court also deny the Rule 2004 Motion to the extent it seeks to force Peabody to share its Rule 2004 discovery with the UMWA itself, rather than its outside counsel.

[33] Peabody recognizes that, as sent emails were deleted every 60 days, some sent emails may not be included in its four-tape restoration. (By that logic, however, Movants might demand that Peabody restore every single back-up tape for every day over a period of more than three years, just so that Movants could review the trash folders that are emptied daily. Movants' current demand is only slightly less overreaching.) As a practical reality, given the identities of the 23 custodians that Movants themselves chose, it is extremely likely that a majority of those sent emails will be found in the inboxes or folders of other identified custodians who received them.

28. The UMWA sued Peabody in the *Lowe* case,[34] alleging that Peabody conceived and executed a "corporate scheme" to spin-off or sell its largest liabilities, including retiree, pension and health and welfare benefits, to a new corporation, Patriot, that would "inevitably fail."[35] The case remains pending.

29. Under the "pending proceeding" rule, the UMWA should not be allowed to leverage Bankruptcy Rule 2004 discovery in these proceedings when it has available to it legitimate discovery vehicles in its own lawsuit. The "pending proceeding" rule is "well recognized" and states that "once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the Fed. R. Bankr. P. 7026, et seq., rather than by a Fed. R. Bankr. P. 2004 examination," *Bennet Funding*, 203 B.R. at 28, as long as the proposed examination does not seek discovery that is unrelated to the adversary proceeding, *id.* at 29.

30. Importantly, the application of the rule is not limited to instances in which the examinee is involved in an adversary proceeding in bankruptcy court. Indeed, "courts have also recognized that Rule 2004 examinations may be inappropriate 'where the party requesting the Rule 2004 examination could benefit their pending litigation outside of the bankruptcy court against the proposed Rule 2004 examinee.'" *In re Wash. Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (*quoting In re Enron Corp.*, 281 B.R. 836, 842 (Bankr. S.D.N.Y. 2002))).

31. There is no question that there is substantial overlap concerning the information sought by the the UMWA as a member of the Creditors' Committee via Bankruptcy Rule 2004 and the discovery sought by the UMWA as a party in the pending *Lowe* case.[36] Forcing Peabody to share discovery with the UMWA in these proceedings unfairly prejudices Peabody in

[34] *Hubert Lowe, et al. v. Peabody Holding Company, LLC et al.*, S.D. W. Va. No. 2:12-cv-06925.

[35] Ex. 7 at PAGEID # 875, ¶ 147.

[36] *See, e.g.,* Rule 26(f) Report detailing discovery sought in *Lowe*, attached as Ex. 11.

violation of the "pending proceeding" rule. *See Bennett Funding*, 203 B.R. at 30 (rejecting Rule 2004 examination because even a carefully crafted examination could not avoid delving into issues covered in a pending adversary proceeding); *2435 Plainfield Ave.*, 223 B.R. at 456-57 (granting motion to quash Bankruptcy Rule 2004 motion because the 2004 motion sought information directly addressed by adversary filing).

32. Peabody has refused, justifiably, to have its discovery materials shared with the general counsel of the UMWA, Grant Crandall, who personally appears as representing the UMWA on the pleadings in the *Lowe* case, notwithstanding the UMWA's representation that Mr. Crandall would "wall himself off" from further involvement in the *Lowe* case. With legitimate discovery available to the UMWA under Civil Rule 26 in *Lowe*, there is no reason to force Peabody to rely on the representations of a union that has waged a highly public campaign vilifying Peabody and accusing it in ad campaigns of improperly reneging on obligations to former employees.[37]

33. The compromise offered by Peabody, that discovery could be shared with the UMWA's outside counsel, Frederick Perillo, protects the UMWA's legitimate interests as a member of the Creditors' Committee and is both reasonable and fair. The Rule 2004 Motion should be denied to the extent it attempts to force Peabody to share Rule 2004 discovery with the UMWA.

* * *

[37] *See* Jeffrey Tomich, *Union targets Peabody, Arch with ad campaign,* Jan. 11, 2013 (available at http://www.stltoday.com/business/local/union-targets-peabody-arch-with-ad-campaign/article_c880eb2f-c2e7-53f5-bc9f-ff6626bf9dda.html (last visited on [February 20], 2013).

CONCLUSION

For these reasons, Peabody respectfully requests that the Court enter an order (1) DENYING the Rule 2004 Motion (Doc. No. 3494) to the extent it seeks discovery in excess of that already offered by Peabody; and (2) GRANTING Peabody such other and further relief as the law, justice and equity require.

Dated: April 16, 2013

Respectfully submitted,

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ATTORNEYS FOR PEABODY ENERGY CORPORATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	:	
	:	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	:	**Case No. 12-51502-659**
	:	**(Jointly Administered)**
Debtors.	:	

SUMMARY OF EXHIBITS

The following exhibits (the "Exhibits") are referenced in support of Peabody Energy Corporation's ("Peabody") Objection to the Notice and Motion of the Debtors and the Official Committee of Unsecured Creditors for Leave to Conduct Discovery of Peabody Energy Corporation Pursuant to Rule 2004 (the "Objection"). Copies of these exhibits will be provided as required by the Local Rules. Peabody reserves the right to supplement and amend the Exhibit Summary and submit additional exhibits in support of the Objection.

Exhibit 1	A true and accurate copy of excerpts from Patriot Coal Corporation's October 22, 2007 8-K
Exhibit 2	A true and accurate copy of excerpts from Patriot Coal Corporation's 2008 Annual Report
Exhibit 3	A true and accurate copy of excerpts from Patriot Coal Corporations June 18, 2008 Amendment No. 2 to Form S-4
Exhibit 4	A true and accurate copy of excerpts from Patriot Coal Corporation's 2009 Annual Report, Feb. 24, 2010
Exhibit 5	A true and accurate copy of excerpts from Patriot Coal Corporation's 2012 Annual Report, Feb. 22, 2013
Exhibit 6	A true and accurate copy of excerpts from Transcript from Sept. 12, 2012 Hearing

Exhibit 7	A true and accurate copy of excerpts from Amended Complaint filed in *Hubert Lowe, et al. v. Peabody Holdings Company, LLC*, S.D. W. Va. No. 2:12-cv-06925 ("*Lowe*")
Exhibit 8	A true and accurate copy of January 11, 2013 letter from M. Russano and P. Bradley O'Neill and draft Rule 2004 Subpoena
Exhibit 9	A true and accurate copy of January 31, 2013 e-mail from M. Russano to R. Faxon, et al.
Exhibit 10	A true and accurate copy of March 19, 2013 letter from P. Wilson to M. Russano, et al.
Exhibit 11	A true and accurate copy of 26(f) Report in *Lowe* litigation

Dated: April 16, 2013

Respectfully submitted,

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