

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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In re: : Chapter 11
: Case No. 12-51502-659
: (Jointly Administered)
PATRIOT COAL CORPORATION, *et al.*, :
: Objection Deadline:
Debtors. : May 14, 2013 at 4:00 p.m.
: (prevailing Central Time)
: :
: Hearing Date:
: May 21, 2013 at 10:00 a.m.
: (prevailing Central Time)
: :
: Hearing Location:
: Courtroom 7 North
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**PEABODY ENERGY CORPORATION'S OBJECTION
TO MOTION OF DEBTORS FOR LEAVE TO CONDUCT DISCOVERY OF
MORGAN STANLEY PURSUANT TO RULE 2004**

Peabody Energy Corporation (“**Peabody**”) objects to the motion filed by Debtors seeking discovery from Morgan Stanley (“**Morgan Stanley**”) on three limited grounds.¹

First, Peabody objects to discovery of work performed by Morgan Stanley for Peabody that was unrelated to the spin-off of Patriot Coal Corporation. Peabody specifically objects to discovery requests covering almost five years *after* the date of the spin-off (October 31, 2007).

Second, Peabody objects to any production by Morgan Stanley to the extent it involves communications that may be protected by the attorney-client privilege, work product doctrine or other immunity or protection, which may belong to Peabody alone or to Peabody and Patriot jointly under the terms of their Separation Agreement.

¹ The Rule 2004 Motion against Morgan Stanley was filed on April 26, 2013 (Doc. No. 3857) by the debtors and debtors-in-possession in these proceedings (collectively, “**Debtors**”) and notes that the Debtors are working in a “joint and coordinated fashion” with the Official Committee of Unsecured Creditors (the “**Creditors’ Committee**”). (Notice and Motion of the Debtors for Leave to Conduct Discovery of Morgan Stanley Pursuant to Rule 2004 at 8 ¶ 21.) Peabody reserves the right to object to the subpoena under Fed. R. Civ. P. 45, which is applicable pursuant to Rule 9016 of the Federal Rules of Bankruptcy Procedure.

Third, Peabody objects to any production by Morgan Stanley until Peabody has had an opportunity to make the appropriate confidentiality designations pursuant to the Stipulated Confidentiality Protective Order under discussion among Peabody, Debtors, and the Creditors' Committee, which is intended expressly to cover third-party productions.

ARGUMENT

A. THIS COURT SHOULD RESTRICT THE SCOPE OF PEABODY-RELATED DISCOVERY TO DISCOVERY RELATED TO THE SPIN-OFF.

1. Discovery pursuant to Rule 2004, while broad, is not without limits.

Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.), 127 B.R. 267, 274 (D. Col. 1991) (“the availability of Rule 2004 as a discovery tool is not unlimited.”); *see also In re Apex Oil Co.*, 101 B.R. 92, 103 (Bankr. E.D. Mo. 1989).

2. In their Rule 2004 motion, Debtors identified one topic of investigation: work performed by Morgan Stanley in connection with the October 2007 spin-off. *See* Notice and Motion of the Debtors for Leave to Conduct Discovery of Morgan Stanley Pursuant to Rule 2004 at 12 ¶¶ 28. Accordingly, Peabody objects to those of Debtors' requests that seek documents that either pre-date or post-date the period of Morgan Stanley's engagement with respect to the spin-off. *E.g.*, Documents Requested Pursuant to Rule 2004 at 12 ¶¶ 2,3 (requesting information from “January 1, 2005 through the Petition Date” (July 9, 2012)).

3. Peabody further objects that Debtors' requests improperly seek to sweep in entirely unrelated engagements for Peabody, including, for example:

- “[A]ll engagement letters, documents and communications concerning the nature or scope of Your engagement or the services You performed for Peabody or Patriot during the time period January 1, 2005 through the Petition Date, including ***but not limited to*** the Eastern Operations, the Potential Eastern Spin-Off, or the Spin-Off.” (Documents Requested Pursuant to Rule 2004 at 12 ¶ 2 (emphases added).)

- “[A]ll documents and communications concerning the amounts and sources of fees or other consideration You received in connection with the Eastern Operations, the Potential Eastern Spin-Off, the Spin-Off, **or any other engagement or service You performed.**” (*Id.* at 12 ¶ 3 (emphasis added).)
- “All documents provided by Peabody or Patriot to You relating to the Valuation Analysis or the Fairness Analysis **or any other services You provided.**” (*Id.* at 12-13 ¶ 5 (emphasis added).)
- “All documents and communications concerning Your analysis or evaluation of documents or information provided to You by Peabody or Patriot in connection with the Valuation Analysis, the Fairness Analysis, **or any other services You provided** to Peabody or Patriot.” (*Id.* at 13 ¶ 6 (emphasis added).)
- “All documents and communications concerning Your meetings and discussions with Peabody’s management team, Patriot’s prospective management team, or Patriot’s management team (whether in-person or by videoconference, telephone, fax, email or otherwise) **in connection with the services You provided** to Peabody or Patriot.” (*Id.* at 13 ¶ 7 (emphasis added).)

B. PEABODY OBJECTS TO REQUESTS THAT INVADE THE ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT DOCTRINE OR OTHER PROTECTIONS THAT APPLY TO PEABODY OR TO PEABODY AND PATRIOT JOINTLY.

4. Peabody objects to production by Morgan Stanley of any communications that may be protected by the attorney-client privilege, work product doctrine, or other privilege or immunity. Further, Debtors’ requests involving Patriot could implicate privileges that Patriot and Peabody hold jointly pursuant to the October 22, 2007 Separation Agreement, Plan of Reorganization, and Distribution (the “**Separation Agreement**”), and that Patriot may not waive unilaterally. (Separation Agreement § 13.05(a).) Under the same agreement, Peabody controls the assertion or waiver of all privileges with respect to information relating solely to its business, whether or not such information is in the possession of Peabody or Patriot. (*Id.* § 13.05 (b)(i).)

**C. NO PRODUCTION BY MORGAN STANLEY SHOULD BE PERMITTED
OTHER THAN PURSUANT TO A STIPULATED CONFIDENTIALITY
PROTECTIVE ORDER PROTECTING PEABODY INFORMATION.**

5. Peabody also objects to the extent the Motion seeks the production of Peabody's confidential documents and information in the possession of Morgan Stanley before entry of a confidentiality protective order that protects Peabody confidential information — including, but not limited to, documents and information relating to Peabody's contracts or other commercial arrangements with American Electric Power — and restricts disclosure of Peabody documents and information to the United Mine Workers of America (the "UMWA"), as this Court has ordered.

6. Peabody will cooperate with Morgan Stanley to ensure appropriate review and designation of confidential information and restrictions on UMWA access pursuant to the proposed orders under discussion among Peabody, Debtors and the Creditors' Committee, specifically a proposed order covering this Court's April 23, 2013 rulings on the Debtors/Creditors' Committee's Rule 2004 motion (the "April 23, 2013 Rule 2004 Order"), and also a stipulated confidentiality protective order, which is expressly intended to cover third-party productions (the "Stipulated Confidentiality Protective Order"). Peabody respectfully requests that this Court order any production by Morgan Stanley to take place only pursuant to a confidentiality protective order incorporating the terms of those two orders.

* * *

CONCLUSION

For these reasons, Peabody respectfully requests that the Court enter an order (1) DENYING the Rule 2004 Motion (Doc. No. 3857) to the extent it seeks discovery unrelated to the Patriot spin-off; (2) DENYING the Rule 2004 Motion (Doc. No. 3857) to the extent it seeks production without adequate opportunity for Peabody to assert applicable privileges and/or make appropriate confidentiality designations; (3) ORDERING any production by Morgan Stanley to take place only pursuant to the terms of a protective order incorporating the terms of the April 23, 2013 Rule 2004 Order and the anticipated Stipulated Confidentiality Protective Order between and among Peabody, Debtors and the Creditors' Committee; and (4) GRANTING Peabody such other and further relief as the law, justice and equity require.

Dated: May 13, 2013

Respectfully submitted,

/s/ Steven N. Cousins

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