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)** **Hearing Date: May 21, 2013, 10:00 a.m. (prevailing Central Time)** **Hearing Loacation: Courtroom 7 North** **Re: ECF Nos. 1995, 2056, 3419, 3870, 3941, 3946, 3947, 3948, 3949**

PAYNE-GALLATIN COMPANY REPLY BRIEF TO PANTHER MEMORANDUM OF LAW [ECF 3948] AND IN FURTHER SUPPORT OF ITS OBJECTION [ECF 2056] TO DEBTORS' LEASE ASSUMPTION MOTION [ECF 1995]

Payne-Gallatin Company, a West Virginia corporation ("PG"), respectfully files this reply brief to Panther LLC's memorandum of law ("Panther Memorandum") [ECF 3948] and to further support PG's objection (the "Objection") [ECF 2056] to Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property (the "Motion") [ECF 1995].

PRELIMINARY STATEMENT

Panther ignores the Lease prohibition (against deductions), deducting its transportation expenses (trucking fees, rail fees, transloading, and other fees, and fuel surcharges) to transport the coal from the Coal Clean Plant to the loading facilities off the Lease Premises. (Clark Declaration ¶ 8-10). Panther derives support for its position by erroneously equating the term, "f.o.b. the loading plant" with either "f.o.b. Coal Clean Plant" or "f.o.b. mine." The outcome urged by Panther is not consistent with the Lease and results in an artificial "gross sales price"

rather than "the actual price paid for coal sold to a bona fide purchaser." (Stipulation ¶ 10; Ex. A, Lease, p. 8).

Simple logic and a common sense reading of the Lease support PG's interpretation. The plain language of the Lease does not allow Panther to deduct its transportation costs in calculating its wheelage royalty.[1] Final loading of the coal does not occur at the Coal Clean Preparation Plant on the Lease Premises, but rather at various rail, ship and barge loading facilities off the Lease Premises where it is finally loaded for shipment to customers. (Payne Declaration ¶ 6-13).

ARGUMENT

A. Panther Ignores The Lease Prohibition On Transportation Expense Deductions

Panther states "[t]he Lease defines 'gross sales price' to mean 'the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant after final preparation and loading' less certain deductions not at issue here. (Lease, Art. II.1. (emphasis added).)" (Panther Memorandum pp.1-2) Panther repeats this statement at p. 6 of its Memorandum. (Panther Memorandum p. 6). Panther's definition is incomplete.

The complete Lease definition of "gross sales price" contains additional language which expressly prohibits deductions for "other expenses;"

> For the purpose of calculating the tonnage royalty as above provided, the term "gross sales price" as used herein shall mean the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant **after final preparation and loading,** less any sales tax imposed thereon, but **without any deduction for selling commissions, advertising, credit**

[1] Capitalized terms which are not defined herein have the meaning in the joint Stipulation of Facts [ECF 3941], the PG Brief [ECF 3946], the Payne Declaration [ECF 3947], the Clark Declaration [ECF 3449], or the Panther Memorandum [ECF 3948].

> **losses or other expenses**, but with deductions for discounts or allowances actually allowed to arms-length wholesalers or middlemen. (Stipulation ¶ 10; Ex. A, Lease, p. 8) (**emphasis added**).

The omitted Lease language "without any deduction for … other expenses" is significant, if not determinative. Panther's transportation expenses are "other expenses" which cannot be deducted.

Contracts are not to be interpreted to render a word or clause completely meaningless, if any reasonable meaning consistent with the other parts can be given them. Moore v. Johnson Serv. Co., 219 S.E.2d 315, 321 (W. Va. 1975). The reasonable meaning of "without any deduction … for other expenses," consistent with the Lease language "after final preparation and loading," is that Panther is not entitled to deduct its transportation expenses.

B. The Lease Does Not Measure Gross Sales Price As "FOB Mine"

The express mention of one thing implies the exclusion of another, *expressio unius est exclusion alterius*, applies to the Lease. Westfield Insurance Co. v. Paugh, 390 F.Supp.2d 511, 519-520 (N.D.W.Va. 2005), citing T. A. Ward, Jr. dba Ward Construction Co. v. L.L. Smith, d/b/a Smith Construction Co., 86 S.E.2d 539, 549 (W.Va 1955). The original parties to the Lease did not use the term "f.o.b. mine" instead they used "f.o.b. the loading plant." Panther's interpretation makes the terms synonymous. By mentioning "f.o.b. the loading plant" the parties excluded "f.o.b. mine." If Panther's premise is correct, much of the confusion created by Panther's interpretation could have been avoided by using the term "f.o.b. mine" instead of "f.o.b. the loading plant." The term "f.o.b. mine" is a common delivery term used in the coal industry for many years. (See, e.g., Temple Anthracite Coal Co. v. FTC, 51 F.2d 656 at 658 (3d Cir. 1931); Edwardsville Coal Co. v. Crown Coal & Coke Co., 20 F.2d 890 at 891 (8th Cir. Mo. 1927); Alabama By-Products Corp. v. Patterson, 151 F. Supp. 641 at 647 (N.D. Ala. 1957)).

Panther's analysis disregards the express terms of the Lease and creates ambiguity where none exists.

Citing U.S. Steel Mining Co. V. Helton, 631 S.E.2d 559 (W.Va. (2005), Panther argues the term "F.O.B. ['Free on Board'] Mine" found in the opinion entitles it to deduct its transportation expenses. (Panther Memorandum p. 8). However, U.S. Steel Mining is a severance tax case, not a wheelage royalty case, and its discussion of transportation expense deductions is limited to severance tax issues: "[n]otably for purposes of establishing a sales price and value for severance tax calculations, any transportation costs from the preparation plant to the port and thereafter to the customer … are deducted from the actual sales price." 631 S.E.2d 559, 561 (emphasis in original). The issue here is not a severance tax calculation, and the Lease does not use the term "F.O.B. ['Free on Board'] Mine." U.S. Steel Mining does not support Panther.

Similarly, Lewis v. City of Bluefield, 188 S.E. 237 (WV 1936), is a municipal license tax case. There, the West Virginia Supreme Court referred to the construction of the term "f.o.b." in a Pennsylvania state gallonage tax case. 188 S.E. 237, 240. A lease was not involved.

Panther's reliance on the "F.O.B. [Free on Board'] Mine" concept is also rebutted by Kohlsaat v. Main Island Creek Coal Co., 112 S.E. 213 (WV 1922). In Kohlsaat, the lease provided for an increased production royalty when the selling price to the consumer "at the tipple" increased above a certain benchmark. 112 S.E. 213, 214. The West Virginia Supreme Court held the lessee was not entitled to deduct the commissions it paid to its selling agent from the tipple price. 112 S.E. 213, 217

Here, the Lease measures "gross sales price" at the loading plant after final loading without deduction of expenses. PG's objection to Panther's deductions does not "read the term

f.o.b. the loading plant entirely out of the Lease." (Panther Memorandum p.8). It simply asks that Panther measure gross sales price as the Lease requires, after final loading without deduction of expenses.

C. Tom's Fork Loadout, DTA, Pier IX And The Kanawha River Docks Are Loading Plants

In arguing "the 'gross sales price' is the price Panther could obtain for the Wheeled Coal after it is processed and loaded onto trucks for transportation off the Lease Premises at the Coal Clean Preparation Plant Complex – i.e., the "loading plant" on the Lease Premises" (Panther Memorandum p. 2), Panther equates the Lease term "loading plant" with the Coal Clean Preparation Plant Complex on the Lease Premises.[2] Panther posits this conclusion without any factual or legal basis. However, the Lease does not define "loading plant." It does not locate the "loading plant" on the "Lease Premises" (Lease, p. 1, 8) and Panther provides no support for its conclusion.

In contrast, Toms Fork Loadout, DTA, Pier IX, and the Kanawha River Docks are each a "loading plant" as the term is used in the Lease. (Payne Declaration ¶ 6-13). A "plant" is "an organized physical equipment to produce any desired result, or an operating unit." (Black's Law Dictionary, Revised Fourth Edition, 1968, citing Otis Elevator Co. v. Arey-Hauser Co., D.C.Pa. 22 F.Supp. 4, 6)

The Tom's Fork Loadout, DTA, Pier IX and the Kanawha River Docks each constitute a coal loading facility, as the term has been applied by the federal counts. Demay v. Norfolk S. Ry. Co. (In re Norfolk S. Ry. Co.), 592 F.3d 907, 909 (8th Cir. Mo. 2010). ("Lamberts Point [Norfolk, Virginia] is a coal-loading facility that Norfolk Southern uses to load coal into oceangoing vessels.") Van Abbema v. Fornell, 807 F.2d 633, 634 (7th Cir. 1974) ("a facility … that would transload coal from trucks to barges on the Mississippi River. … consists of an access road …, a dumphouse in which

[2] In the Objection and its brief, PG has referred to the "demised premises" as the "Lease Premises."

tractor-trailer rigs dump coal into an underground hopper, a conveyor belt beneath the hopper that carries the coal underground to the river bank and then, supported by piers, some 300 feet into the river, and a hinged-boom loading chute on a dock where barges are moored and filled with the coal.") United States v. 30.54 Acres of Land, 90 F.3d 790, 792 (3rd Cir. 1996) (" … A coal loading facility was located on the tract, and a coal tipple, grounded on the property, extended approximately one hundred feet into the Monongahela River. The tipple and coal loading facility have been used for loading coal into barges since 1914.")

As coal loading facilities, or "loading plants," Tom's Fork Loadout, DTA, Pier IX, and the Kanawha River Docks, rather than the Lease Premises, are the point of "final loading" of the coal. The Lease requires that "gross sales price" be determined at these loading plants without deduction of Panther's transportation expenses.

D. Panther's Payment Of Wheelage Royalty Without Deductions Will Not Produce A Windfall Royalty To PG

The wheelage royalty compensates PG for more than the right to transport the coal across the Lease Premises, notwithstanding Ark Land Co. v. Harlan Lee Land, LLC, No. 10-09- GFVT, 2010 U.S. Dist. LEXIS 99390 at 10 (E.D. Ky. Sept. 22, 2010). It also compensates PG for Panther's processing coal through a "cleaning plant" on the Lease Premises. (Lease, Art. II, p. 10). It is payable "at the same time and upon the same basis as tonnage [production] royalties…." Id.

Panther's benefits from the coal processing are not realized when the coal leaves the Lease Premises, but only when the "actual price [is] paid for the coal after final preparation and loading." (Lease, Art. II.2., p. 8) As the Lease recognizes, this occurs off the Lease Premises.

PG's insistence that Panther calculate the wheelage royalty according to the Lease (with no deduction for expenses) does not mean the "wheelage royalty would vary for reasons that

have nothing to do with compensating … for use of the Lease Premises." (Panther Memorandum p. 9). The wheelage royalty will vary as the Lease provides; i.e., as the "actual price paid" for the coal rises or falls. It means that PG's wheelage royalty will be calculated according to the "definite, simple and certain method of computing the royalty based on the selling price to the consumer," stated in the Lease. Kohlsaat et al. v. Main Island Creek Coal Co., 112 S.E. 213, 216 (WV 1922) PG will not receive a windfall, only what the Lease provides.

Moreover, Panther's claim PG is now just making this claim for the wheelage underpayment because of the bankruptcy, implying PG is being opportunistic when Patriot is most vulnerable is inaccurate. Panther's transportation deductions were not disclosed to PG until late 2009 or early 2010. Once Panther disclosed the transportation deductions, PG immediately contacted Panther to investigate. PG attempted in good faith to resolve the dispute through private discussions with Panther and requested the audit prior to the bankruptcy filing. (Clark Declaration ¶ 4). Once the bankruptcy filing occurred, PG was compelled by the situation to protect its interests or risk losing 10 years worth of wheelage royalty underpayments. PG's sole objective is to receive all amounts it is properly due under the Lease.

CONCLUSION

For these reasons and those stated in its initial brief, PG respectfully request that the Court rule Panther is not entitled to deduct its transportation expenses in calculating the wheelage royalties payable under the Lease.

Dated: Charleston, West Virginia

May 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2013, a true and correct copy of the foregoing Payne-Gallatin Company Initial Hearing Reply Brief In Further Support Of Its Objection [ECF 2056] To Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property [ECF 1995] was served by (i) the Electronic Case Filing system for the United States Bankruptcy Court for the Eastern District of Missouri, St. Louis Division, on those parties consenting to such service in these cases, and (ii) by United States mail, first class postage prepaid, on the counsel and or parties listed below:

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