UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **May 21, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

REPLY OF THE DEBTORS TO PEABODY'S OBJECTION TO THE MOTION FOR LEAVE TO CONDUCT DISCOVERY OF MORGAN STANLEY PURSUANT TO RULE 2004

The Debtors respectfully submit this reply to *Peabody Energy Corporation's Objection to the Motion of the Debtors for Leave to Conduct Discovery of Morgan Stanley Pursuant to Rule 2004* [ECF No. 3972] (the "Peabody Objection"), and represent as follows:

PRELIMINARY STATEMENT

Through the *Motion of the Debtors for Leave to Conduct Discovery of Morgan Stanley Pursuant to Rule 2004* [ECF No. 3857] (the "Rule 2004 Motion"), the Debtors seek to serve a subpoena for documents upon Morgan Stanley[2] in furtherance of the Debtors' and the Committee's investigation of potential claims against Peabody and/or other entities or individuals. The Debtors' Document Requests fall within the broad scope of discovery

[1] The Debtors are the entities listed on Schedule 1 attached hereto. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

[2] Capitalized terms not defined herein have the meanings ascribed to them in the Rule 2004 Motion and the *Document Requests Pursuant to Rule 2004* (the "Document Requests") which are attached thereto as Appendix A.

contemplated by Rule 2004 of the Bankruptcy Rules ("Rule 2004"), and Morgan Stanley, as the party that delivered the Patriot Valuation Analysis and the Fairness Opinion, is a proper recipient of a subpoena issued pursuant to Rule 2004 (the "Rule 2004 Subpoena"). Indeed, Morgan Stanley has already agreed that it will accept service of the Rule 2004 Subpoena, and a stipulated order reflecting the agreement with Morgan Stanley was submitted to Chambers.

Nonetheless, Peabody filed the Peabody Objection which, if allowed, will serve no legitimate purpose other than to delay the production of documents by Morgan Stanley and interfere in the Debtors' and the Committee's investigation of the Spinoff. Indeed, Peabody does not dispute that Morgan Stanley is a party appropriately subject to Rule 2004 discovery. Rather, Peabody focuses solely on the Document Requests themselves – raising issues about purported privileges, confidentiality and scope. On these matters, the Debtors have made substantial offers of compromise, which more than suffice to resolve any legitimate concerns raised by Peabody.

Peabody, however, has rejected any compromise that does not involve Morgan Stanley *first* making its production to Peabody, which would then spend an unspecified amount of time reviewing the documents for privilege, confidentiality or relevance, *before* the documents are produced to the Debtors. Such a "pre-review" is not contemplated by federal rules or practice, is not necessary to protect any legitimate concern of Peabody, and would surely delay and impede the Debtors' and the Committee's investigation. Peabody's attempt to control the investigation into potential claims against itself should be rejected and its Objection overruled.

For the reasons set forth below, and for the reasons set out in the Rule 2004 Motion, we respectfully request that the Rule 2004 Motion be granted per the Morgan Stanley Consent Order (defined below).

PROCEDURAL HISTORY

1. On April 26, 2013, the Debtors filed the Rule 2004 Motion.

2. On May 10, 2013, the Debtors and Morgan Stanley reached agreement to consensually resolve the Rule 2004 Motion by agreeing that the Debtors can commence discovery pursuant to Rule 2004 by service of a subpoena *duces tecum* on Morgan Stanley. To that end, on May 10, 2013, the Debtors submitted the *Stipulated Order Authorizing the Issuance of a Subpoena Duces Tecum to Morgan Stanley Pursuant to Rule 2004* (the "Morgan Stanley Consent Order") setting forth that agreement.

3. On May 13, 2013, Peabody filed the Peabody Objection.

4. On May 15, 2013, counsel for Morgan Stanley submitted a letter to the Court stating that Morgan Stanley and the Debtors reached a consensual resolution of the Rule 2004 Motion and enclosing a copy of the Morgan Stanley Consent Order [ECF No. 3994].

5. Counsel for the Debtors and Peabody have conferred on the issues raised in the Peabody Objection, and the Debtors have communicated to Peabody the Debtors' proposals in an effort to resolve the Peabody Objection consensually. *See* Letter from Theresa A. Foudy to Paula Batt Wilson, dated May 16, 2013 (the "Debtors' Letter," attached hereto as **Exhibit A**). However, no resolution has been reached.

ARGUMENT

6. Peabody asserts three objections to the Rule 2004 Motion: (1) that some of the Document Requests might call for the production of documents protected by the attorney-client privilege held by Peabody or the work-product doctrine; (2) that Peabody should be able to ensure that any of its confidential information in the hands of Morgan Stanley is subject to a protective order incorporating the terms of the Court's April 23, 2013 Rule 2004 Order (as

defined in the Peabody Objection); and (3) that the scope of certain of the Document Requests is, according to Peabody, too broad.

7. Peabody does not dispute the Debtors' right to take Rule 2004 discovery of Morgan Stanley. Rather Peabody raises issues only as to the manner in which the production by Morgan Stanley will be conducted. As detailed below, Peabody's objections are misplaced and, in any event, should not prevent the Debtors from being able to immediately serve upon Morgan Stanley the subpoena that Morgan Stanley has already agreed to accept.

A. Peabody Has Not Shown That A "Pre-Review" Of The Documents Is Necessary To Protect Its Attorney-Client Privilege Or Attorney Work-Product

8. Peabody objects to Morgan Stanley's production of "any communications that *may* be protected by the attorney-client privilege, work product doctrine, or other privilege or immunity." (Peabody Objection ¶ 4 (emphasis added).) However, Peabody has not put forth any basis for believing that its privileged documents are in the hands of third-party Morgan Stanley. In the unlikely circumstance there are such privileged documents – and Morgan Stanley's counsel overlooks the privilege to produce them – the Debtors have agreed to give Peabody "clawback" rights with respect to such documents. As a result, a "pre-review" of the documents to be produced by Morgan Stanley is not necessary to protect Peabody's hypothetical attorney-client privilege or attorney work-product.

9. First, Peabody has not met its burden to show there is any reasonable basis to believe that the Document Requests to Morgan Stanley seek Peabody's privileged documents. On the contrary, the Debtors are seeking documents which are in the possession of a third party – therefore, those documents cannot be *confidential* attorney-client communications. See Jackson

v. State, 540 S.W.2d 607, 610 (Mo. Ct. App. 1976); State v. Burton, 254 S.E.2d 129, 135-36 (W. Va. 1979).

10. Similarly, the Document Requests do not seek any document prepared by Peabody or Morgan Stanley (or any other party) "in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A). As no litigation was in contemplation at the time of the Spinoff, there is no basis for Peabody's assertion that the documents sought from Morgan Stanley may contain work-product protected documents. See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, No. 96 Civ. 7223, 2003 U.S. Dist. LEXIS 9108, at *6-*7 (S.D.N.Y. Jun. 2, 2003); St. Louis Little Rock Hosp., Inc. v. Gaertner, 682 S.W.2d 146, 150 (Mo. Ct. App. 1984).

11. Second, on the off chance that Morgan Stanley somehow came into possession of confidential communications between Peabody and its counsel without the privilege being waived, counsel for Morgan Stanley, in compliance with their professional obligations, are more than capable of taking appropriate steps to protect the privilege. In fact, the Morgan Stanley Consent Order allows Morgan Stanley to withhold attorney-client privileged documents (which would, in turn, be listed and described in a privilege log in accordance with Rule 45 of the Federal Rules of Civil Procedure). See Morgan Stanley Consent Order ¶ 2.

12. Finally, in the highly unlikely circumstance that Morgan Stanley has confidential communications between Peabody and its counsel, which Morgan Stanley's counsel inadvertently produces, those documents will be subject to the "clawback" provision set forth in the stipulated confidentiality protective order being negotiated between the Debtors and Peabody (the "Proposed Protective Order"). The Debtors have specifically agreed to allow Peabody to "clawback" documents produced by third-parties if such documents are protected by the

attorney-client privilege or the work-product doctrine (provided the documents actually are protected and such protection has not been waived). *See* Debtors' Letter (Ex A).

13. In light of the foregoing, there is no need for Peabody to "pre-review" Morgan Stanley's production in order to protect its attorney-client privilege or attorney work-product.

B. The Documents Will Be Subject To Ample Confidentiality Protections

14. The Debtors and Morgan Stanley have agreed that Morgan Stanley will not begin its document production until after entry of a confidentiality protective order. *See* Morgan Stanley Consent Order ¶ 2. In addition, in the Proposed Protective Order, the Debtors have agreed to allow Peabody to designate documents produced by third-parties as "confidential." *See* Debtors' Letter (Ex. A).

15. Furthermore, the Debtors have offered to Peabody that they will treat all documents produced by Morgan Stanley as "AEP Confidential Information" – the highest level of confidentiality set forth in the Proposed Protective Order[3] – for a period of 30 days following production. *See* Debtors' Letter (Ex. A). This would afford Peabody the opportunity to review such documents and determine the appropriate level of confidentiality. Treating all of Morgan Stanley's documents as presumptively subject to the highest level of confidentiality for 30 days would provide Peabody with ample opportunity to ensure that its documents receive the protections it claims are needed, while also allowing the Debtors' counsel to obtain the responsive documents on a timely basis.

16. In light of the foregoing, there is no need for Peabody to "pre-review" Morgan Stanley's production in order to protect the confidentiality of its documents or information in the hands of Morgan Stanley.

[3] The designation of "AEP Confidential Information" would place heighted restrictions on such documents, limiting their disclosure to "professionals' eyes only."

C. The Requested Documents Are Well Within The Broad Scope Of Discovery Allowed Under Rule 2004

17. Peabody asserts that the Court should limit "the scope of Peabody-related discovery to discovery related to the Spinoff." (Peabody Objection at 2.) With one very limited exception described below, the Debtors do not disagree, as long as it is understood that "discovery related to the Spinoff" refers not only to the Spinoff itself (*i.e.*, Peabody's creation of Patriot and distribution of all outstanding Patriot shares on October 31, 2007), but also to (a) Morgan Stanley's work in connection with the "separation alternatives" – *i.e.*, the potential transaction structures considered by Peabody involving the divestiture or other disposition of subsidiaries or assets of Peabody that included some or all of the Eastern Operations, and work undertaken with respect to each alternative (including setting up a bidding system and vetting potential buyers of the Eastern Operations, evaluating a potential merger with Magnum, and Morgan Stanley's conclusion that Peabody should proceed by way of spinoff); (b) the valuation of the assets and liabilities that went into Patriot or that were ever considered in connection with the Potential Eastern Spinoff; and (c) all of Morgan Stanley's work for Peabody in connection with the Eastern Operations, the Potential Eastern Spinoff, the Spinoff Preparation, the Spinoff, the Fairness Opinion and the Valuation Analysis (as those terms are defined in the Document Requests). *See* Debtors' Letter (Ex. A). Moreover, the Debtors have agreed to limit the time frame for "Peabody-related discovery" to June 1, 2006 through May 1, 2008. *See id.*

18. Peabody's remaining scope objection is that two Document Requests seek documents for the period January 1, 2005 through the Petition Date concerning "the nature or scope of [Morgan Stanley's] engagements for the services [Morgan Stanley] performed for Peabody[,]" and the consideration it received in connection with those engagements. In the interest of compromise, the Debtors have agreed to limit the time period of those requests –

Requests 2 and 3 – to June 1, 2006 to May 1, 2008, which is the time frame surrounding the Spinoff.[4] The Debtors have also agreed to limit those Requests to documents sufficient to show the nature of, and consideration received for, the engagements performed for Peabody during this narrowed June 1, 2006 to May 1, 2008 time period. *See* Debtors' Letter (Ex. A). The Debtors are entitled to discovery of this information to ascertain whether Morgan Stanley was biased or partial in the work it performed in connection with the Fairness Opinion or the Valuation Analysis.

19. To the extent Peabody objects to the phrase "any other services You provided to Peabody" in Requests 5, 6 and 7, the Debtors agree they are only seeking documents related to the work performed by Morgan Stanley in connection with the (a) the Eastern Operations, (b) the Potential Eastern Spinoff, (c) the Spinoff Preparation, (d) the Spinoff, (e) the Fairness Opinion, and (f) the Valuation Analysis (as those terms are defined in the Document Requests). *See* Debtors' Letter (Ex. A).

20. In light of the Debtors' agreements as detailed above with regard to limiting the scope of the Document Requests, the concerns raised in Peabody's Objection have been amply addressed and the Peabody Objection should thus be deemed resolved or overruled.

[4] Notably, Peabody itself has agreed to produce documents for the time period January 1, 2005 through May 1, 2008.

CONCLUSION

WHEREFORE, and for the reasons stated in the Motion, the Debtors respectfully request that the Court (i) overrule Peabody's Objection; (ii) enter the Morgan Stanley Consent Order; and (iii) grant such other and further relief as is just and proper.

Dated: May 17, 2013
New York, New York

Respectfully Submitted,

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: /s/ Theresa A. Foudy
Steven J. Reisman
Turner P. Smith
Theresa A. Foudy
Ellen Tobin
101 Park Avenue
New York, New York 10178
(212) 696-6000

Conflicts Counsel for Debtors and Debtors in Possession

SCHEDULE 1
(Debtor Entities)

1. Affinity Mining Company
2. Apogee Coal Company, LLC
3. Appalachia Mine Services, LLC
4. Beaver Dam Coal Company, LLC
5. Big Eagle, LLC
6. Big Eagle Rail, LLC
7. Black Stallion Coal Company, LLC
8. Black Walnut Coal Company
9. Bluegrass Mine Services, LLC
10. Brook Trout Coal, LLC
11. Catenary Coal Company, LLC
12. Central States Coal Reserves of Kentucky, LLC
13. Charles Coal Company, LLC
14. Cleaton Coal Company
15. Coal Clean LLC
16. Coal Properties, LLC
17. Coal Reserve Holding Limited Liability Company No. 2
18. Colony Bay Coal Company
19. Cook Mountain Coal Company, LLC
20. Corydon Resources LLC
21. Coventry Mining Services, LLC
22. Coyote Coal Company LLC
23. Cub Branch Coal Company LLC
24. Dakota LLC
25. Day LLC
26. Dixon Mining Company, LLC
27. Dodge Hill Holding JV, LLC
28. Dodge Hill Mining Company, LLC
29. Dodge Hill of Kentucky, LLC
30. EACC Camps, Inc.
31. Eastern Associated Coal, LLC
32. Eastern Coal Company, LLC
33. Eastern Royalty, LLC
34. Emerald Processing, L.L.C.
35. Gateway Eagle Coal Company, LLC
36. Grand Eagle Mining, LLC
37. Heritage Coal Company LLC
38. Highland Mining Company, LLC
39. Hillside Mining Company
40. Hobet Mining, LLC
41. Indian Hill Company LLC
42. Infinity Coal Sales, LLC
43. Interior Holdings, LLC
44. IO Coal LLC
45. Jarrell's Branch Coal Company
46. Jupiter Holdings LLC
47. Kanawha Eagle Coal, LLC
48. Kanawha River Ventures I, LLC
49. Kanawha River Ventures II, LLC
50. Kanawha River Ventures III, LLC
51. KE Ventures, LLC
52. Little Creek LLC
53. Logan Fork Coal Company
54. Magnum Coal Company LLC
55. Magnum Coal Sales LLC
56. Martinka Coal Company, LLC
57. Midland Trail Energy LLC
58. Midwest Coal Resources II, LLC
59. Mountain View Coal Company, LLC
60. New Trout Coal Holdings II, LLC
61. Newtown Energy, Inc.
62. North Page Coal Corp.
63. Ohio County Coal Company, LLC
64. Panther LLC
65. Patriot Beaver Dam Holdings, LLC
66. Patriot Coal Company, L.P.
67. Patriot Coal Corporation
68. Patriot Coal Sales LLC
69. Patriot Coal Services LLC
70. Patriot Leasing Company LLC
71. Patriot Midwest Holdings, LLC
72. Patriot Reserve Holdings, LLC
73. Patriot Trading LLC
74. PCX Enterprises, Inc.
75. Pine Ridge Coal Company, LLC
76. Pond Creek Land Resources, LLC
77. Pond Fork Processing LLC
78. Remington Holdings LLC
79. Remington II LLC
80. Remington LLC
81. Rivers Edge Mining, Inc.
82. Robin Land Company, LLC
83. Sentry Mining, LLC
84. Snowberry Land Company
85. Speed Mining LLC
86. Sterling Smokeless Coal Company, LLC
87. TC Sales Company, LLC
88. The Presidents Energy Company LLC
89. Thunderhill Coal LLC
90. Trout Coal Holdings, LLC
91. Union County Coal Co., LLC
92. Viper LLC
93. Weatherby Processing LLC
94. Wildcat Energy LLC
95. Wildcat, LLC
96. Will Scarlet Properties LLC
97. Winchester LLC
98. Winifrede Dock Limited Liability Company
99. Yankeetown Dock, LLC

Exhibit A

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

ALMATY
ASTANA
DUBAI
FRANKFURT
HOUSTON
ISTANBUL
LONDON
MEXICO CITY
MILAN
MUSCAT
PARIS
WASHINGTON, D.C.

ATTORNEYS AND COUNSELLORS AT LAW

101 PARK AVENUE
NEW YORK, NEW YORK 10178-0061

TELEPHONE 212-696-6000
FACSIMILE 212-697-1559
WWW.CURTIS.COM

WRITER'S DIRECT:
TEL.: 212-696-8860
E-MAIIL: TFOUDY@CURTIS.COM

May 16, 2013

VIA EMAIL (PBWilson@jonesday.com)

Paula Batt Wilson, Esq.
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190

Re: *In re Patriot Coal Corp., et al.*, Case No. 12-51502 (Jointly Administered)
United States Bankruptcy Court for the Eastern District of Missouri

Dear Paula:

We write to follow up on our telephone conversation of May 14, 2013 regarding the Objections filed by Peabody Energy Corp. ("Peabody") to the Debtors' Motions for Leave to Conduct Discovery of Duff & Phelps Corp. and Morgan Stanley Pursuant to Rule 2004 (the "Rule 2004 Motions").

As I explained during our telephone conversation, the Debtors have reached agreement with each of Duff & Phelps[1] and Morgan Stanley to consensually resolve the Rule 2004 Motions. We endeavor to likewise reach agreement with Peabody to resolve its Objections to the Rule 2004 Motions. To that end, we provide the following proposals.

First, with respect to the attorney-client privilege or work product doctrine (Objections ¶ 4), there is no basis for believing that Duff & Phelps or Morgan Stanley have any documents covered by those privileges. As third-parties, any communications in their possession would not qualify as confidential attorney-client communications. Moreover, as no litigation was in contemplation at the time of the Spin-Off, work product protection does not apply. Nonetheless, to resolve any possible concern that Peabody could have, the Debtors have agreed in the stipulated confidentiality order being negotiated by the Debtors and Peabody (the "Draft Confidentiality Order") to allow Peabody to "clawback" any Peabody-privileged document produced by a third party (provided that document actually is privileged and any privilege has not been waived).

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[1] Capitalized terms not defined herein have the meaning ascribed in the Rule 2004 Motions.

Second, in response to Peabody's objection regarding Peabody's "confidential documents and information" that may be in the possession of Duff & Phelps or Morgan Stanley (Objections ¶ 5), we will agree to treat all documents produced by Duff & Phelps and Morgan Stanley as "AEP Confidential Information" (the highest level of protection provided by the Draft Confidentiality Order) for a period of 30 days from the date they are produced to the Debtors. This would afford Peabody ample opportunity to review such documents and determine the appropriate level of confidentiality, thereby protecting against the concerns raised by Peabody in the Objections.

Finally, on scope, Peabody objects that Peabody-related discovery should be limited to "discovery related to the Spin-Off." (Objections at 2.) With one very limited exception described below, the Debtors agree that they are not seeking documents for engagements that Duff & Phelps and Morgan Stanley may have performed for Peabody that are wholly unrelated to the investigation of the Spin-Off. However, it must be understood in that context that the Debtors consider anything relating to the Consol Asset Exchange, the Peabody/CNX/CONSOL Fair Value Analysis, the Eastern Operations, the Potential Eastern Spin-Off, the Spinoff Preparation, the Spinoff, the Solvency Opinion, the Fairness Analysis, and the Valuation Analysis (as each of these terms is defined in the Document Requests) to be related to the investigation of the "Spin-Off." With that understanding, the Debtors agree that they are not seeking documents related to unrelated engagements with the exception of Document Requests 2 and 3. Moreover, the Debtors agree to limit the time period for the "Peabody related requests" to June 1, 2006 to May 1, 2008. In response to your objection to Document Requests 2 and 3 (which sought certain limited documents up to the Petition Date), the Debtors agree that they will also limit those Requests to the time period from June 1, 2006 to May 1, 2008. The Debtors further agree to limit Requests 2 and 3 to documents sufficient to show the nature of, and consideration received for, the engagements that the third parties performed for Peabody during this narrowed June 1, 2006 to May 1, 2008 time period.

In light of the short time frame under which we are working, we ask that you inform us by the close of business on Friday, May 17, 2013 whether Peabody will agree to withdraw its Objections to the Rule 2004 Motions.

Sincerely,

Theresa A. Foudy ET

Theresa A. Foudy

cc: Joseph W. Bean, Esq. (via email: jbean@patriotcoal.com)
(Patriot Coal Corporation)

P. Bradley O'Neill, Esq. (via email: boneill@kramerlevin.com)
(Kramer Levin Naftalis & Frankel LLP)

Steven J. Reisman, Esq. (via email: sreisman@curtis.com)
(Curtis, Mallet-Prevost, Colt & Mosle LLP)