

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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: November 19, 2013

Hearing Time: 10:00 a.m. Central

Location: Courtroom 7-N, St. Louis

**DEBTORS' OBJECTION TO CLAIMS
OF DRUMMOND COAL SALES, INC.**

Patriot Coal Corporation ("Patriot") and its affiliated debtors (collectively, the "Debtors"), pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, respectfully file this Objection to Claims of Drummond Coal Sales, Inc. (the "Objection"). In support of the Objection, the Debtors show the Court as follows:

Relief Requested

1. By this Objection, the Debtors object to two proofs of claim, numbered 2302 and 2303 on the Court's register (GCG Claim Nos. 3672 and 3673) (the "Claims"), because the Claims do not account for amounts to be recovered, or that reasonably could have been recovered, in mitigation by Drummond Coal Sales, Inc. ("Drummond"). The Debtors request entry of an order, pursuant to Section 502 of the Bankruptcy Code and Fed. R. Bankr. P. 3007, disallowing the Claims to the extent that they exceed \$8,550,000 each.

2. Any response to this Objection should include, among other things, (i) an appropriate caption, including the title and date of this Objection; (ii) the name of the claimant, both the EDMO and GCG claim numbers of the Claim that the Debtors are seeking to disallow,

and a description of the basis for the amount claimed; (iii) a concise statement setting forth the reasons why the Court should not sustain this Objection, including, but not limited to, the specific factual and legal bases upon which the claimant relies in opposing this Objection; (iv) copies of any documentation and other evidence which the claimant will rely upon in opposing this Objection at a hearing; and (v) the name, address, telephone number and facsimile number of a person authorized to reconcile, settle or otherwise resolve the claim on the claimant's behalf. A claimant that cannot timely provide such documentation and other evidence should provide a detailed explanation as to why it is not possible to timely provide such documentation and other evidence.

Jurisdiction

3. This Court has jurisdiction over this Objection under 28 U.S.C. § 1334. Venue of this proceeding is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

5. Ninety-nine of the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on July 9, 2012 (the "Petition Date") in the United States Bankruptcy Court for the Southern District of New York.

6. On December 19, 2012, these Debtors' cases were transferred to the United States Bankruptcy Court for the Eastern District of Missouri [Dkt. No. 1789].

7. The bar date for filing proofs of claim against these Debtors was December 14, 2012 [Dkt. No. 1388].

8. On March 1, 2013, the Court entered its Order Establishing Procedures for Claims Objections [Dkt. No. 3021].

9. Debtors Brody Mining, LLC and Patriot Ventures LLC filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on September 23, 2013 in this Court. The bar date for filing proofs of claim against these Debtors is October 24, 2013.

Objection and Argument

10. The Claims arise from the Debtors' rejection of a certain Bulk Coal Transfer and Storage Agreement dated as of June 25, 2012 between Drummond and Debtor Patriot Coal Sales, Inc. (the "Agreement"). Debtor Patriot Coal Corporation guaranteed the obligations of Patriot Coal Sales, Inc. under the Agreement by a Guaranty dated July 5, 2012.

11. The Agreement governed the use of a certain facility leased by Drummond and located in Newport News, Virginia, for purposes of receiving bulk rail shipments of the Debtors' coal, storing the coal, and transferring the coal to oceangoing vessels. Under the Agreement, Drummond agreed to provide certain services relating to the storage and handling of the coal. The price to be paid by the Debtors to Drummond was based on the number of net tons of coal transferred to vessels, with a minimum commitment by the Debtors of 2 million net tons per year. The Agreement was to be in effect during calendar years 2013 and 2014 and was substantially similar to another agreement between the parties that covered calendar year 2012. *See* Declaration of Robert W. Bennett, attached hereto as Exhibit A.

12. The Agreement was governed by New York law.

13. On or about October 2, 2012, the Debtors made an initial payment of \$1,250,002.50, as required by the terms of the Agreement.

14. On October 17, 2012, the Debtors informed Drummond in writing that because of a rapid downturn in the market price of metallurgical coal, the Debtors would not be in a position to assume the Agreement. The Debtors further advised Drummond that their business plan already incorporated the rejection or restructuring of the Agreement. But the Debtors expressed their willingness to continue to do business with Drummond at a lower per-ton price and to extend the term of the Agreement through 2016. The Debtors provided an outline of the pricing and other terms for a revised agreement with this communication (the "Mitigation Proposal").

15. Robert W. Bennett, the President of Patriot Coal Sales, Inc., met with George Wilbanks, the president of Drummond, and Dennis Steul, the Vice President-Sales of Drummond, on November 6, 2012. At that meeting, Mr. Bennett presented the Mitigation Proposal to Drummond's representatives in person.

16. Drummond rejected the Mitigation Proposal. Accordingly, the Debtors filed a Notice of Rejection of Bulk Coal Transfer and Storage Agreement on November 9, 2012 [Dkt. No. 1551]. An Order Approving the Rejection of Bulk Coal Transfer and Storage Agreement was entered on December 6, 2012 [Dkt. No. 1685].

17. Drummond filed the Claims on December 26, 2012, within the time permitted by the Court's order of December 6, 2012. Each Claim is in the amount of \$29,550,000, representing the minimum commitment under the Agreement for 2013 and 2014 at the stated per-ton prices, as adjusted for the Debtors' pre-payment of \$1,250,002.50. The Debtors do not dispute Drummond's calculation of the gross amount of the payments contemplated by the Agreement; this Objection relates solely to issues of mitigation of damages.

18. The Debtors' rejection of the Agreement represents a breach that is deemed to occur immediately before the filing of their bankruptcy petitions. 11 U.S.C. § 365(g)(1). Drummond, as the party seeking damages for breach, is charged with an obligation to make reasonable efforts to mitigate its damages and cannot recover to the extent that it fails to do so. *See, e.g., APL Co. PTE Ltd. v. Blue Water Shipping U.S. Inc.*, 592 F.3d 108, 111 (2d Cir. 2010) (applying New York law); *Wilmot v. State*, 297 N.E.2d 90, 92 (N.Y. 1973); *McClelland v. Climax Hosiery Mills*, 169 N.E. 605, 609-10 (N.Y. 1930) (Cardozo, J., concurring); Restatement (Second) of Contracts § 350 (1981).

19. The Debtors' Mitigation Proposal would have provided Drummond with payments totaling \$21,000,000 during 2013 and 2014.¹ Taking into consideration the pre-payment made by the Debtors, Drummond's loss had it accepted the Mitigation Proposal would have been only \$8,550,000. The Claims should, accordingly, be limited to this amount.

20. Courts have long recognized that reasonable mitigation efforts may require a non-breaching party to accept a revised proposal from a breaching party. *See, e.g., Siegel v. Huebshman*, 176 N.Y.S. 71, 75 (A.D. 1919) (buyer suffered no recoverable damages where seller refused to sell on credit but offered to sell for cash at lower price), *aff'd*, 130 N.E. 897 (N.Y. 1920); *Lawrence v. Porter*, 63 F. 62, 66 (6th Cir. 1894) ("The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage."); *Harry Harris, Inc. v. Quality Construction Co.*, 593 S.W.2d 872, 875 (Ky. App. 1979) ("In

¹ As discussed above, the Mitigation Proposal also would have extended the term of the Agreement through 2016. The additional amounts payable to Drummond in 2015 and 2016 are disregarded for purposes of this analysis.

refusing the appellant's second bid, the appellee failed to mitigate damages as it is required to do by law."); Restatement § 350 cmt. e & illus. 14.

21. Although there are circumstances in which a breaching party's proposal is not material to the question of mitigation, they do not apply here. For example, the Mitigation Proposal did not include a condition requiring Drummond to waive any claim for the decrease in revenue. *Cf. Gilson v. F.S. Royster Guano Co.*, 1 F.2d 82, 84 (3d Cir. 1924); Restatement § 350 cmt. 3 & illus. 15. The readiness and ability of the Debtors to perform under the terms of the Mitigation Proposal also was not subject to reasonable doubt. *Cf. Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 179 N.E. 383, 385 (N.Y. 1932). Indeed, if Drummond had accepted the Mitigation Proposal, the parties' operational interactions would have continued much as they did during 2012, and Drummond would have had the benefit of an administrative-expense priority claim in the Debtors' Chapter 11 cases if the Debtors had failed or refused to perform.

22. Even in the absence of the Mitigation Proposal, however, the amounts of the Claims would be subject to reduction to reflect Drummond's actual mitigation efforts and those that could be reasonably expected to occur before the end of 2014. *See, e.g., Hollwedel v. Duffy-Mott Co.*, 188 N.E. 266, 268 (N.Y. 1933) (requiring gross damages to be reduced by income that plaintiff "has earned, will earn, or could with reasonable diligence earn during the unexpired term").

23. The Debtors are informed and believe that Drummond has contracted with one or more customers (collectively, "Customers") to use at least a portion of the Newport News facility during all or a portion of the term of the Agreement. To the extent that Drummond's arrangements with Customers do not encompass the full scope of the Agreement (either in terms

of the quantity of coal involved or the time frame), Drummond must nevertheless be charged with the results of reasonable mitigation efforts. Absent some reason to believe that Drummond's Customers are acting unreasonably (for example, by paying an irrationally high price for Drummond's facilities and services), extrapolation of the terms of the current arrangements to cover any currently-unused capacity or time periods for which Drummond does not have a customer commitment would be appropriate. Under principles of mitigation, the Claims should thus be reduced accordingly.

WHEREFORE, the Debtors respectfully request that this Court:

- (a) disallow the Claims to the extent that they exceed \$8,550,000 each; and
- (b) grant such other and further relief as is just and proper.

Dated: October 22, 2013
St. Louis, Missouri

Respectfully submitted,
BRYAN CAVE LLP

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EXHIBIT A

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

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-51502-659

(Jointly Administered)

**DECLARATION OF ROBERT W. BENNETT IN SUPPORT
OF DEBTORS' OBJECTION TO CLAIMS OF DRUMMOND COAL SALES, INC.**

Robert W. Bennett declares, pursuant to 28 U.S.C. § 1746, to the best of his knowledge and based upon the documents available to him, as follows:

1. I am the Senior Vice President and Chief Marketing Officer of Patriot Coal Corporation and the President of Patriot Coal Sales, Inc.
2. In connection with my employment, I am familiar with the business dealings between the Debtors and Drummond Coal Sales, Inc. ("Drummond"), including the Bulk Coal Transfer and Storage Agreement dated as of June 25, 2012 between Drummond and Patriot Coal Sales, Inc. (the "Agreement").
3. The Agreement governed the use of a certain facility leased by Drummond and located in Newport News, Virginia, for purposes of receiving bulk rail shipments of the Debtors' coal, storing the coal, and transferring the coal to oceangoing vessels. Under the Agreement, Drummond agreed to provide certain services relating to the storage and handling of the coal. The price to be paid by the Debtors to Drummond was based on the number of net tons of coal transferred to vessels, with a minimum commitment by the Debtors of 2 million net tons per

year. The Agreement was to be in effect during calendar years 2013 and 2014 and was substantially similar to another agreement between the parties that covered calendar year 2012.

4. The Agreement was governed by New York law.

5. On or about October 2, 2012, the Debtors made an initial payment of \$1,250,002.50, as required by the terms of the Agreement.

6. On October 17, 2012, I informed Drummond in writing that because of a rapid downturn in the market price of metallurgical coal, the Debtors would not be in a position to assume the Agreement. I further advised Drummond that the Debtors' business plan already incorporated the rejection or restructuring of the Agreement. But I expressed the Debtors' willingness to continue to do business with Drummond at a lower per-ton price and to extend the term of the Agreement through 2016. I provided an outline of the pricing and other terms for a revised agreement with this communication (the "Mitigation Proposal").

7. I met with George Wilbanks, the president of Drummond, and Dennis Steul, the Vice President-Sales of Drummond, on November 6, 2012. At that meeting, I presented the Mitigation Proposal to Drummond's representatives in person.

8. The Mitigation Proposal would have provided Drummond with payments totaling \$21,000,000 during 2013 and 2014. Taking into consideration the pre-payment made by the Debtors, Drummond's loss had it accepted the Mitigation Proposal would have been only \$8,550,000. For purposes of this calculation, I have disregarded the additional amounts that would have been payable to Drummond in 2015 and 2016 under the Mitigation Proposal.

9. The Mitigation Proposal did not include a condition requiring Drummond to waive any claim for the decrease in revenue resulting from the changed pricing terms.

10. Drummond rejected the Mitigation Proposal. Accordingly, the Debtors rejected the Agreement.

11. I am informed and believe that Drummond has contracted with one or more customers to use at least a portion of the Newport News facility during all or a portion of the term of the Agreement.

12. I declare under penalty of perjury that the foregoing is true and correct. Executed on October 21, 2013.

/s/ Robert W. Bennett
Robert W. Bennett