

**Objection Deadline: September 12, 2012 at 4:00 p.m.**  
**Hearing Date: To Be Determined**

**BROWN RUDNICK LLP**

7 Times Square  
New York, NY 10036  
(212) 209-4800  
Laura F. Weiss  
lweiss@brownrudnick.com

One Financial Center  
Boston, MA 02111  
(617) 856-8200  
Jeffrey L. Jonas  
Jessica L. Conte  
jjonas@brownrudnick.com  
jconte@brownrudnick.com

*Counsel to CapitalSource Bank*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**PATRIOT COAL CORPORATION, *et al.*,**

**Debtors.**

**Chapter 11**

**Case No. 12-12900 (SCC)**

**(Jointly Administered)**

**OBJECTION OF CAPITALSOURCE BANK TO DEBTORS' NOTICE OF REJECTION  
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND  
THE ABANDONMENT OF EXPENDABLE PROPERTY**

CapitalSource Bank ("CapitalSource") through its undersigned counsel hereby submits this objection (the "Objection") to the above-captioned debtors' (the "Debtors") *Notice of Rejection of Certain Executory Contracts and Unexpired Leases and the Abandonment of Expendable Property as Listed on Scheduled "A" Attached Hereto* (the "Rejection Notice") [Docket No. 501]. In support of the Objection, CapitalSource respectfully states as follows:

## **BACKGROUND**

1. CapitalSource and Patriot Leasing Company LLC (“Patriot”) are parties to a Master Lease Agreement (the “Master Lease”) dated February 8, 2011 and thirty-two related Equipment Schedules (as amended, modified, and supplemented, the “Schedules”). Pursuant to the Master Lease and the Schedules, CapitalSource leases various equipment to Patriot. Each Schedule incorporates the terms and conditions of the Master Lease.

2. On October 28, 2011, pursuant to the Master Lease, the parties executed Equipment Schedule Series A No. 29 which includes Rider No.1 to Equipment Schedule Series A No. 29 and Rider No. 2 to Equipment Schedule Series A No. 29 (collectively, “Schedule 29”). On November 9, 2011, the parties signed a letter agreement with respect to Schedule 29 that includes a complete list of equipment governed by Schedule 29.

3. On July 9, 2012, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in this Court.

4. On August 16, 2012, the Court entered the *Order Establishing Procedures for the Rejection of Executory Contracts and Unexpired Leases and for the Abandonment of Personal Property* [Docket No. 370] which governs the procedures for the ongoing rejection of the Debtors’ executory contracts and unexpired leases.

5. On August 31, 2012, the Debtors filed the Rejection Notice [Docket No. 501]. By their Rejection Notice, the Debtors seek to reject the leases of certain equipment leased from CapitalSource – three individual pieces of equipment and two sets of multiple pieces of equipment – listed on Schedule A to the Rejection Notice. Specifically, the Debtors seek to reject the following equipment:

<b>Equipment Description</b>	<b>Serial Number</b>	<b>Schedule</b>
Scoop Batteries (2) & Charger (1)	HIB-7049; HIB-7044; BA069700011	Schedule 29
Scoop Batteries (2) & Charger (1)	HIB-7121; HKB-7122; BA07070013	Schedule 29
14CM15-11EX Continuous Miner	JM6467	Schedule 23 <sup>1</sup>
14CM15-11EX Continuous Miner	JM6468	Schedule 23
Fairchild 35C-WH-DC Scoop	T339-578	Schedule 29

6. Certain of the equipment that the Debtors seek to reject is covered by Schedule 29. Schedule 29 consists of fifteen pieces of equipment: one finger duster, two battery powered scoops and four sets of batteries and chargers (each set includes two batteries and one charger). As illustrated above, the Debtors seek to reject only some of the equipment listed on Schedule 29.

7. On September 7, 2012, the Debtors agreed to extend the date by which CapitalSource was required to object to the Rejection Notice from September 10, 2012 at 4:00 p.m. until September 12, 2012 at 4:00 p.m.

### **ARGUMENT**

8. The Debtors improperly “cherry pick” which equipment on Schedule 29 they seek to reject. Pursuant to Bankruptcy Code Section 365, “[i]t is well-settled that a debtor cannot assume part of an unexpired lease while rejecting another part; the debtor must assume the lease *in toto* with both the benefits and burdens intact.” In re S.E. Nichols Inc., 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990) (citations omitted); see also In re MF Global Holdings Ltd., 466 B.R. 239, 241 (Bankr. S.D.N.Y. 2012) (“A executory contract may not be assumed in part and

---

<sup>1</sup> The two continuous miners that the Debtors are seeking to reject pursuant to the Rejection Notice are the only pieces of equipment covered by Schedule 23. CapitalSource does not object to the rejection of the two continuous miners but reserves all of its rights in connection with the payment of post-petition rents and rejection damages and otherwise.

rejected in part.”) (citations omitted); 3 Collier on Bankruptcy ¶ 365.03[3] (16th ed. 2012) (“An executory contract may not be assumed in part and rejected in part. The trustee must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits.”) (internal footnotes omitted). Thus, the Debtors should not be permitted to reject seven pieces of equipment from Schedule 29 while retaining the benefits of the remaining eight pieces of equipment.

9. Additionally, the language in Schedule 29 indicates that the parties intended that the equipment on each Schedule be considered collectively. See, e.g., Rider 1 to Schedule 29 (On November 1, 2014, Patriot has the option to purchase “all but not less than all of the Equipment” pursuant to certain terms and conditions); Rider 2 to Schedule 29 (“Upon the early termination or cancellation of the Schedule, Lessee shall return all, but not less than all, of the Equipment to Lessor . . .”). Thus, the Debtors cannot, as they attempt to do in the Rejection Notice, sever individual pieces of equipment for rejection within Schedule 29.

10. Accordingly, the Debtors cannot choose to reject only some of the equipment leased from CapitalSource pursuant to Schedule 29. Rather, the Debtors must assume or reject Schedule 29 in whole.

#### **RESERVATION OF RIGHTS**

11. CapitalSource expressly reserves all of its rights to assert additional objections to the Rejection Notice either at or prior to the hearing on the Rejection Notice and otherwise, including, without limitation, in connection with the Debtors’ efforts, if any, to reject additional equipment in the future.

**CONCLUSION**

WHEREFORE, for the reasons set forth herein, CapitalSource respectfully requests that the Court (a) sustain the Objection, (b) deny the Rejection Notice with respect to the rejection of the equipment listed on Schedule 29, and (c) grant to CapitalSource such other and further relief as this Court deems just and proper under the circumstances.

Dated: New York, NY  
September 12, 2012

Respectfully submitted,

CAPITALSOURCE BANK

By its attorneys,

/s/ Laura F. Weiss

---

Laura F. Weiss, Esq.  
Brown Rudnick LLP  
7 Times Square  
New York, NY 10036  
Telephone: (212) 209-4800  
Facsimile: (212) 209-4801  
lweiss@brownrudnick.com

Jeffrey L. Jonas, Esq.  
Jessica L. Conte, Esq.  
One Financial Center  
Boston, MA 02111  
Telephone: (617) 856-8200  
Facsimile: (617) 856-8201  
jjonas@brownrudnick.com  
jconte@brownrudnick.com