

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

In re:
PATRIOT COAL CORPORATION, et al.,
Debtors.

Chapter 11
Case No.: 12-51502-659 (KSS)
Jointly Administered

**PAYNE-GALLATIN COMPANY OBJECTION
TO DEBTORS' MOTION FOR AUTHORIZATION to (i) ASSUME
OR (ii) REJECT UNEXPIRED LEASES OF NONRESIDENTIAL
REAL PROPERTY WITH RESPECT TO CONTRACT ID LND 323**

Payne-Gallatin Company, a West Virginia corporation (“this Lessor”), by its undersigned counsel, hereby respectfully submits this objection (the “Objection”) to Debtors’ Motion For Authorization To (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [Doc 1995] (“Debtors’ Motion”) with respect to Debtors’ Contract ID LND 323.

In support of this Objection, this Lessor states as follows:

(i) Assumed Lease To Which The Objection Pertains

Lease dated October 15, 1976 (the “Lease”) between this Lessor (as “Payne-Gallatin Mining Company”) and the predecessors in interest of Panther LLC, Case No. 12-12967 (“Panther”) and/or Magnum Coal Company LLC, Case No. 12-12957 (“Magnum”).

(ii) Basis For The Objection

The Cure Amount stated in Debtors’ Motion Schedule A (\$184,311.97) is less than the actual monetary default under the Lease required to be cured pursuant to Bankruptcy Code § 365, 11 U.S. C. § 365.

(iii) Provisions Of Assumed Lease Or Any Other Agreement Under Which The Objecting Party Contends Any Uncured Default Exists

- a. Lease Article IX (pp. 15-16) [Taxes]
- b. Lease Article II. 2. (p. 10) [Wheelage Royalty]
- c. Other Lease provisions as may be applicable pursuant to IV b. infra

(iv) Amount Asserted As Cure Amount

a. 1.1 Unpaid Pre-Petition Property Tax

First Half 2012 Cabin Creek District, Kanawha County, WV (Exhibit B)	\$6,476.13
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1.2 Unpaid Pre-Petition Wheelage Royalty

(a) June 30, 2012 unpaid wheelage	\$155,201.57	
(b) July 1 - 8, 2012 unpaid wheelage	9,832.79	165,034.36

1.3 Underpayment of Pre-Petition Wheelage Royalty From July 8, 2002 to July 8, 2012

Underpayment of wheelage royalty from July 8, 2002 to July 8, 2012, resulting from deduction of trucking and rail expenses from gross sales price of coal crossing Lease premises; see Suttle and Stalnaker PLLC report dated 12.13.12 attached as Exhibit A.	<u>399,658.00</u>
	<u>\$571,168.49</u>

and

- b. Amounts accrued and payable under the Lease on and after 07.09.12 but unpaid on 01.29.13, if any;

and

- c. Interest on amounts supra as provided by West Virginia Code §37-6-9.

This Lessor objects to Debtors' assumption of the Lease without payment in full of the amount asserted as the Cure Amount, supra. As referenced in Debtors' Motion, paragraph 34, this Lessor will be available to confer with Debtors to attempt to consensually resolve this Objection.

Prior to the filing of these bankruptcy cases, this Lessor had requested to inspect and audit the Patriot Coal Corporation books and records pertaining to the wheelage royalty payable under the Lease. [Copy of this Lessor's 05/22/12 letter to Patriot Coal Corporation attached as Exhibit B.] Lease Article XVIII provides certain rights to the Lease parties in connection with any dispute or controversy arising under the terms of the Lease. [Copy of Lease Article XVIII attached as Exhibit C. A complete copy of the Lease was attached as Exhibit A to this Lessor's proof of claim against Magnum filed on December 14, 2012, and will be provided to the Court or any parties upon request.] Subject to applicable bankruptcy law, this Lessor respectfully reserves all rights under the Lease, including but not limited to those under Lease Article XVIII, with respect to the underpayment of wheelage royalty due under the Lease asserted as part of the Cure Amount, supra.

Dated: January 22, 2013
Charleston, West Virginia

Respectfully submitted,
/s/ Thomas Persinger
Thomas Persinger
WVSB No. 2874
Admission pro hac vice
THOMAS PERSINGER PLLC
P. O. Box 2828
Charleston, WV 25330-2828
Telephone number: (304) 343-0850
Telecopier number: (304) 343-1677
E: mtplaw@frontier.com
Counsel for Payne-Gallatin Company

EXHIBIT A



INDEPENDENT ACCOUNTANTS' REPORT ON APPLYING AGREED-UPON PROCEDURES

Andrew A. Payne, III
Payne Gallatin Company
300 Capitol Street, Suite 1503
Charleston, West Virginia 25301

We have performed the procedures enumerated below, which were agreed to by Payne Gallatin Company (the specified party), solely to assist you with respect to the wheelage royalty payable to Payne Gallatin Company from Magnum Coal Company LLC under a lease dated October 15, 1976. Patriot Coal Company (as related to Magnum Coal Company) is responsible for calculation and recordkeeping regarding the wheelage royalty and provided the records for our review. These agreed upon procedures were designed to quantify the amount of the transportation cost deducted by Magnum Coal in the wheelage royalty calculation. Legal counsel should be consulted regarding the appropriateness of that deduction.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of the party specified in the report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

Our procedures are as follows:

Initial testing:

- From royalty calculation recap, selected 13 months ranging from June 2009 through February 2012 for review of calculation of payments made by Magnum Coal Company LLC to Payne Gallatin Company.
- From selected sample, selected largest sales order and viewed coal sales invoices supporting total sales.
- Verified tonnage per invoice and agreed to supporting documentation provided by Patriot personnel.
- Verified and agreed sales price used in calculation to original contract provided by Patriot personnel.
- Reviewed sales contracts to determine if there were any pricing terms that included adjustments to the sales price.
- Recalculated average sales price used in royalty calculation.
- Obtained description of what is included in freight costs from Patriot personnel.

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A Professional Limited Liability Company

- Reviewed monthly Magnum/Patriot (SIR) Invoices Sales Recap for Panther LLC provided by Patriot for each month for items that would impact Amount Billed and accordingly the royalty calculation.

Subsequent testing:

- Requested royalty calculation workpapers from June 2002 through December 2011 from Patriot personnel. Agreed to sample from same time period due to concerns from Patriot personnel that request was too broad to facilitate. Reduced time period for review to begin with January 2006 based on Patriot communication that earlier years were unavailable.
- Viewed 19 selected royalty calculations to determine transportation cost treatment in royalty calculation.
- Selected 6 coal sales agreements based on representative shipping destinations from months sampled and reviewed noting shipping terms.
- Calculated average trucking costs over all 32 months of royalty calculations tested.
- Summarized rail transportation costs deducted in royalty calculation.

The results of our procedures:

- Patriot uses an adjusted average price per ton to calculate the monthly royalty due.
- The average monthly price per ton is reduced for freight, quality, commissions, demurrage, fuel surcharges, transfers, and other debits/(credits). Confirmed with personnel that freight costs have always been deducted. Specific testing further confirmed that freight was deducted on items tested.
- Freight appears to include all associated costs for transportation from the Prep Plant to Toms Fork Load out and/or multiple docks (including but not limited to Quincy, Chelyan, Port Amherst, DTA, Pier IX). Patriot personnel informed us that the following types of charges are included in the freight deduction:
 - Transloading fees – the fees charged to the mines for coal being loaded onto barges/trains by a third party.
 - Rail fees – fees charged by the railroads to haul the coal.
 - Trucking fees – fees charged by outside trucking companies to haul the coal from the mine to a dock/rail load out.
 - PSC (Public Service Commission) fee – fees paid to the WV Public Service Commission for the trucking companies to haul the coal on public roads.
 - Fuel surcharge – rates included on the rail bills to cover the fuel costs of shipping the coal.
 - Put thru fees/Terminal fees – rate charged by Peabody or Drummond to load the coal onto vessels being exported from DTA or Pier IX.
 - Barge fees –rate the barge line charged for hauling coal from the dock to AEP, however that contract ended this past year.

- Using data available from the months sampled, the average trucking rate per ton deducted from 2006 through August 2012 is \$2.25. Based on historical Magnum remittance advice obtained from Payne Gallatin personnel, total tons crossing the Payne Gallatin property from July 2002 through June 30, 2012 were 27,563,173.56. The calculated amount of the trucking deduction in the royalty calculation over that July 2002 through June 2012 is \$310,086.

Average trucking rate per ton	\$	2.25
Applicable tons that crossed		27,563,173.56
Wheelage royalty rate per contract		<u>.005</u>
Trucking Deduction	\$	<u>310,086</u>

- Using data available from the months sampled, rail charges were also deducted in calculating the royalty. The rail deductions appear beginning May 2011, but we were only able to obtain specific detail beginning August 2011. Based on that information, the calculated amount of the rail deduction in the royalty calculation from September 2011 through June 30, 2012 is \$89,572.

Rail charges deducted September 2011 through June 2012	\$	17,914,366
Wheelage royalty rate per contract		<u>.005</u>
Rail Deduction	\$	<u>89,572</u>

- The total calculated amount of the trucking and rail charges as deducted in the royalty calculation through June 30, 2012 is \$399,658.

Trucking Deduction	\$	310,086
Rail Deduction		<u>89,572</u>
Total Deduction	\$	<u>399,658</u>

We were not engaged to, and did not, conduct an audit, the objective of which would be the expression of an opinion on the accounting records. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of Payne Gallatin Company and is not intended to be and should not be used by anyone other than those specified parties.

Smith & Spalmer, LLC
 Charleston, West Virginia
 December 13, 2012

EXHIBIT B

COPY

Payne Gallatin Mining Company

◆◆◆
300 Capitol Street, Suite 1503 ◆
Charleston ◆ WV, 25301
Phone 304-344-9203 ◆ Fax 304-343-9240

May 22, 2012

U.S. REGISTERED MAIL
Patriot Coal Corporation
500 Lee St E Ste 202
Charleston, WV 25301
Attn: John Eagan

10.15.76 Lease between
Payne-Gallatin Mining Co., Lessor
and OCAMCO, Lessee

Dear John:

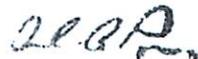
Pursuant to ARTICLE IV (page 12) of the lease from Payne-Gallatin Mining Company, a West Virginia corporation, Lessor, to OCAMCO, a West Virginia corporation, Lessee, dated October 15, 1976 (the "1976 Lease"), as subsequently assigned and amended, Payne-Gallatin Company, a West Virginia corporation ("Payne-Gallatin"), successor by change of name to Payne-Gallatin Mining Company, hereby requests to inspect, audit and make copies of your books and records pertaining to the wheelage royalty payable under ARTICLE II (p. 10) of the 1976 Lease.

Pursuant to Lease ARTICLE IV, Payne-Gallatin also requests to inspect the books and records of any railroad company, water transportation company, or trucking company transporting coal for which the wheelage royalty is payable under the Lease.

Payne-Gallatin hereby designates Patricia D Clark, C.P.A. and Chris Deweese, CPA, of the firm of Suttle & Stalnaker, 1411 Virginia Street East Ste 100, Charleston, West Virginia 25301 as its agent for this audit, and reserves the right to name additional agents, engineers, and attorneys for this purpose.

Please contact me in order that arrangements for this audit may be made.

Very truly yours,



Andrew A. Payne, III
President

CC: D. E. Workman, Jr., P.E.
Thomas Persinger, Esq.
Chris Deweese, C.P.A.
Patricia D. Clark, C.P.A.

EXHIBIT C

the same extent and with like effect as though this lease had never been made, and Lessor in making said re-entry and taking possession of said property shall have the right to do so without the service of a declaration in ejectment upon Lessee or tenants in possession, or without notice or process, as required by Chapter 37, Article 6, Sections 19 and 20 of the official Code of West Virginia. In case Lessor exercises the right herein provided to declare this lease forfeited, Lessor shall not be liable to Lessee for any injury or damage by reason thereof, and Lessee hereby expressly waives and releases any and every claim for any such injury or damage. But the exercise by Lessor of the right to declare this lease forfeited shall not be held to release or impair any then existing obligation or liability of Lessee hereunder or any right or remedy herein granted to or in any manner vested in Lessor or otherwise available to them for the collection of the rentals, royalties or other money payable hereunder or the enforcement of any other liability.

ARTICLE XVII. No delay or omission of Lessor to exercise any right, remedy or lien accruing upon any default or forfeiture hereunder, or otherwise available to it, shall impair, prejudice or waive any such right, remedy or lien, but every such right, remedy and lien may be exercised by Lessor on account of any subsequent breach in the same manner and to the same extent as if such delay or omission had not occurred.

ARTICLE XVIII. Should any dispute or controversy arise between the parties hereto as to any matter arising under the terms of this lease, then, as a condition precedent to the bringing of any suit or action, the controversy shall be submitted to arbitration in the following manner:

The party desiring to submit such controversy to arbitration shall give to the other party ten (10) days' notice in writing

specifying definitely the matter upon which an award is desired and naming the arbitrator selected by such party, and the other party, within ten (10) days of the receipt of such notice, shall give written notice to the party desiring such arbitration of the arbitrator selected by it, and the two arbitrators so chosen shall select a third. The arbitrators to be selected by the parties hereto must be disinterested, qualified, experienced coal-mining engineers, and the third arbitrator must be disinterested and may be, but need not be, a coal-mining engineer. If such two arbitrators are unable to agree upon a third arbitrator within twenty (20) days from the naming of the second arbitrator, the third arbitrator shall be appointed by the Judge of the District Court of the United States for the Southern District of West Virginia upon application of either of the parties hereto. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing, which hearing shall be not less than ten (10) days nor more than twenty (20) days after the selection of the third arbitrator, and shall proceed with the hearing unless for some good cause, of which the arbitrators, or a majority of them shall be the judges, it shall be postponed until some later day within a reasonable time. Both parties hereto shall have full opportunity to be heard on any question thus submitted, and the determination of the arbitrators or a majority of them shall be made in writing and a copy thereof delivered to each of the parties hereto and shall be final and conclusive upon the parties in reference to the question or questions thus submitted, including reasonable compensation to the arbitrators, and by whom such costs shall be paid. Such costs may be assessed to either Lessor or Lessee, or both of them. If for any reason a final award shall not have been made by the arbitrators within three (3) months from the date of the naming of the second arbitrator, the arbitration shall be of no effect, and either party may bring suit or action with respect to the matter

involved in such controversy, unless both of the parties shall nevertheless proceed with such arbitration. It is understood and agreed, however, that, except as otherwise provided, any cause of action, right or remedy hereby reserved to or otherwise existing for the benefit of Lessor for the collection of rentals or royalties or other moneys to become due and payable hereunder shall not be questions for arbitration. Pending an award by the arbitrators as to any disagreement submitted to arbitration, no action shall be taken by either Lessor or Lessee as to the matters in disagreement, and if the award of the arbitrators is in favor of Lessor, Lessee shall be given a reasonable time of not less than thirty (30) days from the date of said award in which to remedy or correct the matter or condition for which it was found to be in default.

ARTICLE XIX. Lessor has made and now makes no representations whatever as to the quality or quantity of the coal in or under the demised premises in any way whatever, and so long as this lease shall remain in force and not be terminated, as herein provided, the obligations to pay the minimum rent or royalty, as herein provided, shall continue and remain in force.

ARTICLE XX. The giving of any notice to Lessee under the provisions hereof, the manner of which is not herein expressly provided, shall be sufficient if in writing, and one copy thereof, addressed to Lessee, is left with the superintendent, manager or an agent in charge of the mines or of the mine office of Lessee, and one copy thereof is sent by U. S. registered mail to CCAMCO at P. O. Box 87, Mabscott, West Virginia 25871, until Lessor is in writing notified of some other address. If there shall be no one found in charge of the mines or of the mine office of Lessee, one copy of said notice

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, a true and correct copy of the foregoing Objection To Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property With Respect To Contract ID LND 323 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 that have consented to such service in these cases, and (ii) by FedEx service on the chambers of the Honorable Kathy A. Surratt-States, United States Bankruptcy Court for the Eastern District of Missouri, 111 South 10th Street, 4th Floor, St. Louis, MO 63102, and (iii) by United States mail, first class postage prepaid, on the parties and or counsel listed below:

(a) Chambers of the Honorable Kathy A. Surratt-States
United States Bankruptcy Court for the
Eastern District of Missouri
111 South 10th Street, 4th Floor
St. Louis, MO 63102

(b) Counsel to the Debtors:

(i) Davis Polk & Wardwell LLP
Attn: Marshall S. Huebner
Brian M. Resnick
450 Lexington Avenue
New York, NY 10017

(ii) Bryan Cave LLP
Attn: Laura Uberti Hughes
211 North Broadway
St. Louis, MO 63102

(c) Conflicts counsel to the Debtors:

Curtis, Mallet-Prevost, Colt & Mosle LLP
Attn: Steven J. Reisman
Michael A. Cohen
101 Park Avenue
New York, NY 10178

(d) Office of the United States Trustee
USBC Eastern District of Missouri
Attn: Paul A. Randolph
Leonora S. Long
Thomas F. Eagleton US Courthouse
111 S. 10th Street, Suite 6-353
St. Louis, MO 63102

(e) Counsel for the Official Committee of Unsecured Creditors:

(i) Kramer Levin Naftalis & Frankel LLC

Attn: Thomas Moers Mayer,
Adam C. Rogoff
Gregory G. Plotko
1177 Avenue of the Americas,
New York, NY 10036

(ii) Carmody MacDonald P.C.

Attn: Gregory D. Willard
120 South Central, Suite 1800
St. Louis, MO 63105-1705

(f) The Debtors' authorized claims and noticing agent:

Patriot Coal Corporation
c/o GCG, Inc.
P.O. Box 9898
Dublin, OH 43017-5798

/s/ Thomas Persinger

Thomas Persinger

WVSB No. 2874

Admission pro hac vice

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