

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)

**PATRIOT COAL CORPORATION and
HERITAGE COAL COMPANY,**

Plaintiffs,

v.

**PEABODY HOLDING COMPANY, LLC and
PEABODY ENERGY CORPORATION,**

Defendants.

Adversary Proceeding No. 13-04067-659

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule of Bankruptcy Procedure 7056(C), Defendants Peabody Holding Company, LLC ("PHC") and Peabody Energy Corporation ("PEC" and, together with PHC, "Peabody"), respectfully submit this response to the Plaintiffs' Statement of Undisputed Material Facts [Doc. No. 8] (the "Statement of Facts"): ¹

¹

Capitalized terms used but not otherwise defined herein shall have the meanings given to them in Defendants' Response to Plaintiffs' Motion for Summary Judgment.

PRELIMINARY STATEMENT

Peabody has not completed investigation of the facts relating to this adversary proceeding, has not completed, or even begun, discovery in it and has not completed preparation for trial. Peabody responds to the Statement of Facts based upon information and documents acquired and reviewed to date, which may not be inclusive of all sources of information and documents relevant to the matters in dispute. The proceeding is still in its initial stages and additional sources of material information may be identified later; or, through discovery and further investigation, the significance of presently known information or documents better appreciated. Accordingly, the present responses to the Statement of Facts are without prejudice to supplementation or modification at a later date.

Most of the numbered paragraphs contained in the Statements of Facts are imbued with arguments and, in some instances, contain assertions that, even if accurate, are not material to the dispute. Peabody's response to the Statement of Facts is not an admission that any undisputed fact is material or that the significance the Plaintiffs attach, or characterization the Plaintiffs give, to a fact is accurate.

For each numbered paragraph contained in the Statement of Facts to which Peabody does not make an unqualified statement that the paragraph is undisputed as to both its accuracy and materiality, Peabody is asserting its belief that a trial is necessary, after due opportunity for discovery, to determine the truth and significance of the allegations contained therein.

Unless specifically admitted herein, Defendants dispute all allegations in the Statement of Facts.

RESPONSE TO STATEMENT OF FACTS

Plaintiffs' Statement of Fact 1 For decades prior to 2007, Peabody owned a number of Appalachian and Illinois Basin mining operations. Unlike the majority of Peabody's assets in the western United States and abroad, these eastern operations were heavily staffed with miners represented by the UMWA. (Ex. D at 1-3; Ex. E at 18, 35.)

RESPONSE: Peabody objects to this Statement of Fact as vague, particularly with respect to the term "decades," and the phrases "Appalachian and Illinois Basin," "majority of Peabody's assets," "western United States," and "eastern operations." Responding further, Peabody states the cited material does not support the Plaintiffs' factual assertions. Ex. D—Excerpts from Patriot's October 22, 2007 8-K—shows only that Patriot and/or its subsidiaries had certain mining operations in Appalachia and the Illinois Basin and that 61% of Patriot and its subsidiaries' employees were represented by the UMWA. (Ex. D to Plaintiffs' Motion for Summary Judgment [Doc. No. 6] ("Summary Judgment Motion") at 1-3.) Ex. E—Excerpts from PEC's 10-K for year end December 31, 2007—shows only the percentage of union employees who were employed by certain PEC subsidiaries. (Ex. E to the Summary Judgment Motion at 18, 35.) Although PEC had previously had an ownership interest in certain subsidiaries owned by Patriot that had mining operations in Appalachia and the Illinois Basin, neither PEC nor PHC has engaged in mining operations itself, nor has either of them ever employed any union miners. Peabody disputes Statement of Fact 1 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 2 Thousands of unionized miners have retired from these operations. Peabody was obliged to provide substantial healthcare and pension benefits to its UMWA retirees. (Hatfield Decl. ¶ 28.)

RESPONSE: Peabody objects to this Statement of Fact as vague, particularly with respect to the term "[t]housands" and the phrase "these operations." Responding further, Peabody states the cited material does not support the Plaintiffs' factual assertion. The Declaration of Bennett K.

Hatfield (the "Hatfield Declaration") in Support of Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [Doc. No. 3222] ¶ 28, merely states PEC's former subsidiaries had obligations to approximately 9,500 retirees. Neither PEC nor PHC has ever employed any union miners and, except as explained in the next succeeding sentence, neither PEC nor PHC has ever had any obligations to pay or fund healthcare or pension benefits to any UMWA retirees under any collective bargaining agreement with the UMWA. Responding further, Peabody states that PHC has an obligation to fund certain obligations of Heritage to pay for retiree benefits to certain Heritage retirees under the terms of the NBCWA Liabilities Assumption Agreement. (See generally Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement.) Peabody disputes Statement of Fact 2 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 3 The benefits received by UMWA retirees are determined by individual employer plans in accordance with UMWA labor agreements. (Schroeder Decl. ¶ 35.)

RESPONSE: Peabody objects to this Statement of Fact as vague, particularly with respect to the phrases "individual employer plans," "UMWA retirees" and "UMWA labor agreements." Responding further, Peabody states that the National Bituminous Coal Wage Agreement of 2011 (the "NBCWA") requires members of the Bituminous Coal Operators' Association ("BCOA") and signatories of agreements adopting the NBCWA ("Me Too Agreements") to maintain individual employer plans for the provision of health benefits to certain of their respective retirees represented by the UMWA. Peabody also states that other agreements between UMWA and companies with coal mining operations may require those companies to maintain individual employer plans for the provision of health benefits to certain of their retirees represented by the UMWA. (See Declaration of Mark N. Schroeder Pursuant to

Local Bankruptcy Rule 1007-2 ("Schroeder Declaration") ¶ 35.) Peabody disputes any remaining allegations contained in Statement of Fact 3.

Plaintiffs' Statement of Fact 4 The NBCWA is the labor agreement between the UMWA and the BCOA. The NBCWA is periodically renegotiated. (Schroeder Decl. ¶ 34.)

RESPONSE: Peabody states the NBCWA is a labor agreement between the UMWA and the members of the BCOA. The BCOA has authority to negotiate on its members' behalf the NBCWA with the UMWA, and the BCOA and the UMWA have periodically renegotiated the terms of the NBCWA in the past. Peabody disputes any remaining allegations contained in Statement of Fact 4.

Plaintiffs' Statement of Fact 5 Typically, all coal employers with UMWA-represented operations other than the BCOA are signatory to "me too" agreements that bind them to the terms of the NBCWA or to individually negotiated variants thereof. (Schroeder Decl. ¶ 34.)

RESPONSE: Peabody objects to this Statement of Fact as vague and ambiguous, particularly with respect to the term "typically" and the phrase "UMWA-represented operations." Responding further, Peabody states that most non-BCOA represented coal operators that employ UMWA represented workers are signatories to Me Too Agreements. Peabody disputes any remaining allegations contained in Statement of Fact 5.

Plaintiffs' Statement of Fact 6 The NBCWA and Heritage's and Eastern Associated's "me too" agreements were last renegotiated in 2011. They are not due to be renegotiated again until 2016. (Ex. F at 19.)

RESPONSE: Peabody does not dispute that Heritage and EACC last entered Me Too Agreements in 2011, but disputes the Me Too agreements were negotiated. (See Schroeder Declaration ¶ 34 ("[T]he UMWA has historically demanded that all unionized companies sign a "Me-Too" agreement that binds these companies to the terms of the existing NBCWA.").) Responding further, Peabody states that it is unable to ascertain when Heritage's and EACC's Me Too Agreements will expire because Peabody does not have a copy of those Me Too Agreements

or the NBCWA. Peabody also states that Heritage and EACC currently are attempting to terminate their Me Too Agreements through their 1113/1114 Motion. (See Notice of Fourth 1113 Proposal and Fifth 1114 Proposal [Doc. No. 3583] (filed 04/11/2013), posted at www.patriotcaseinfo.com.). Peabody disputes Statement of Fact 6 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 7 On August 13 and 14, 2007, Peabody Holding, the UMWA, and, for limited purposes, Heritage, entered into the Acknowledgement and Assent. The Acknowledgement and Assent memorializes Peabody's obligations to the Assumed Retirees following the Spinoff. (Ex. B.)

RESPONSE: Peabody states that on August 13 and 14, 2007, PHC, the UMWA and, for limited purposes, Heritage entered into the Acknowledgment and Assent attached as Exhibit B to the Summary Judgment Motion. Responding further, Peabody states that the Acknowledgement and Assent is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes that the Acknowledgement and Assent created any Peabody obligations to any Heritage retirees and disputes further that it "memorializes Peabody's obligations to the Assumed Retirees following the Spinoff," other than to the extent of its reference to a certain separate assumption agreement, specifically the NBCWA Liabilities Assumption Agreement. The Acknowledgement and Assent specifically provides that the "NBCWA Liability Assumption Agreement will not: (a) make PHC a party to any collective bargaining agreement with the UMWA; (b) create a labor law relationship between PHC and the UMWA; or (c) create any right of action by the UMWA or its members or retirees against PHC for benefits under any provision of the PCC Labor Contract or any other labor agreement." (Ex. B to the Summary Judgment Motion, Acknowledgement and Assent ¶ B.2.) Peabody disputes Statement of Fact 7 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 8 The Acknowledgment and Assent states that "[Heritage], a signatory to a 'me too' labor contract ('[Heritage] Labor Contract') that incorporates by reference Article XX of the National Bituminous Coal Wage Agreement of 2007 ('2007 NBCWA')," would be transferred to Patriot in connection with the Spinoff. (Ex. B ¶ A.1.)

RESPONSE: Peabody states that the Acknowledgement and Assent is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents.

Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the Acknowledgement and Assent, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the Acknowledgement and Assent without reference to all relevant sections of the Acknowledgement and Assent. Peabody disputes Statement of Fact 8 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 9 The Acknowledgement and Assent states, "At the completion of the spin-off of Patriot, [Peabody Holding] will enter into an agreement ('NBCWA Liability Assumption Agreement') with [Heritage] and/or Patriot pursuant to which [Peabody Holding] will agree to be primarily obligated to pay for benefits of retirees of [Heritage] and such retirees' eligible dependents under the terms of an employee welfare plan maintained by [Heritage] pursuant to Article XX of the [Heritage] Labor Contract . . . or any [Heritage] successor labor agreement . . ." (Ex. B ¶ A.2.)

RESPONSE: Peabody states that the Acknowledgement and Assent is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents.

Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the Acknowledgement and Assent, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the Acknowledgement and Assent without reference to all relevant sections of the Acknowledgement and Assent. Peabody specifically disputes any inference that the quoted language from the Acknowledgement and Assent creates any sort of obligation to the UMWA, its members or retirees, other than "the right to file a lawsuit against PHC in a court with

jurisdiction over the parties for any benefits PHC has agreed to pay under the NBCWA Liabilit[ies] Assumption Agreement, or as otherwise provided under the Individual Employer Plan." (Ex. B. to the Summary Judgment Motion, Acknowledgement and Assent ¶ B.2.c; see also id. ¶ A.4.) Peabody disputes Statement of Fact 9 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 10 The Acknowledgement and Assent states that, "[i]n recognition of the benefits to UMWA retirees and their eligible dependents from an agreement between [Peabody Holding] and [Heritage] through which [Peabody Holding] would undertake the assumption of the liabilities as described above," the UMWA "[a]ssents to the entry of such an agreement," referring to the NBCWA Liabilities Assumption Agreement. (Ex. B ¶ B.)

RESPONSE: Peabody states that the Acknowledgement and Assent is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents.

Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the Acknowledgement and Assent, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the Acknowledgement and Assent without reference to all relevant sections of the Acknowledgement and Assent. Peabody specifically disputes any inference that the quoted language from the Acknowledgement and Assent creates any sort of obligation to the UMWA, its members or retirees, other than "the right to file a lawsuit against PHC in a court with jurisdiction over the parties for any benefits PHC has agreed to pay under the NBCWA Liabilit[ies] Assumption Agreement, or as otherwise provided under the Individual Employer Plan." (Ex. B. to the Summary Judgment Motion, Acknowledgement and Assent ¶ B.2.c; see also id. ¶ A.4.) Peabody disputes Statement of Fact 10 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 11 The Acknowledgment and Assent is an agreement between Peabody and the UMWA for Peabody to be liable for the healthcare provided in Heritage's existing "me too" labor contract or any successor labor contract. (Ex. B.)

RESPONSE: Peabody states that the Acknowledgement and Assent is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents.

Responding further, Peabody disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their characterization of the Acknowledgement and Assent without reference to all relevant sections of the Acknowledgement and Assent. Responding further, Peabody specifically disputes that the Acknowledge and Assent made Peabody "liable for the healthcare provided in Heritage's existing 'me too' labor contract or any successor labor contract." The Acknowledgement and Assent specifically provides that the "NBCWA Liability Assumption Agreement will not: (a) make PHC a party to any collective bargaining agreement with the UMWA; (b) create a labor law relationship between PHC and the UMWA; or (c) create any right of action by the UMWA or its members or retirees against PHC for benefits under any provision of the PCC Labor Contract or any other labor agreement." (Ex. B to the Summary Judgment Motion, Acknowledgement and Assent ¶ B.2.) Peabody disputes Statement of Fact 11 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 12 On October 31, 2007, Peabody completed the Spinoff contemplated by the Acknowledgment and Assent. (Ex. E at 3.)

RESPONSE: Peabody does not dispute Statement of Fact 12, but disputes it is material.

Plaintiffs' Statement of Fact 13 Peabody consolidated, among other assets, its operations in the Appalachia and Illinois Basin regions with UMWA-represented labor within Patriot, then a subsidiary of Peabody. Peabody then distributed the common shares of Patriot to Peabody Energy's stockholders. (Ex. D at 1-3; Ex. E at 3.)

RESPONSE: Peabody objects to this Statement of Fact as vague, particularly with respect to the term "then," and the phrases "its operations" and "Appalachia and Illinois Basin regions."

Peabody states the cited material does not support the Plaintiffs' factual assertions. Ex. D—

Excerpts from Patriot's October 22, 2007 8-K—shows only that Patriot and/or its subsidiaries had certain mining operations in Appalachia and the Illinois Basin and that 61% of Patriot and its subsidiaries' employees were represented by the UMWA. (Ex. D to the Summary Judgment Motion at 1-3.) Ex. E—Excerpts from PEC's 10-K for year end December 31, 2007—shows only that PEC spun-off Patriot on October 31, 2007, by distributing the shares of Patriot stock to PEC's stockholders as of October 22, 2007. (Ex. E to the Summary Judgment Motion at 3.) Responding further, Peabody states that at certain times prior to October 31, 2007, Patriot was a subsidiary of PEC. Peabody also states that at the time of the Spin-Off, PEC had consolidated within Patriot certain subsidiaries with mining operations in Appalachia and the Illinois Basin. Responding further, Peabody states that certain of those consolidated subsidiaries had employees and retirees represented by the UMWA. Peabody disputes Statement of Fact 13 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 14 A number of companies included in the Spinoff, including Patriot's current subsidiaries Heritage and Eastern Associated, carried substantial liabilities attributable to their retiree healthcare obligations under the NBCWA. (Hatfield Decl. ¶¶ 28, 30.)

RESPONSE: Peabody states that Heritage and EACC, and certain other Patriot subsidiaries, were signatories to Me Too Agreements at the time of the Spin-Off that required Heritage and EACC to maintain individual employer plans for the provision of health benefits to certain of their retirees represented by the UMWA, and Heritage and EACC did maintain such plans and had liabilities under such plans. (See Hatfield Decl. ¶¶ 28, 30.) Peabody disputes any remaining allegations contained in Statement of Fact 14.

Plaintiffs' Statement of Fact 15 To reduce the liabilities of the newly formed Patriot enterprise, Peabody and Patriot entered into several agreements effective as of the date of the Spinoff, each drafted by Peabody counsel, including the NBCWA Liabilities Assumption Agreement. (Exs. A, G, H.)

RESPONSE: Peabody states that Peabody, Patriot and Heritage entered as of October 22, 2007, the NBCWA Liabilities Assumption Agreement attached as Exhibit A to the Summary Judgment Motion, which agreement includes a referenced Attachment A not included as part of Exhibit A. Responding further, Peabody states that Peabody and Patriot entered as of October 22, 2007, the Section 9711 Coal Act Liabilities Assumption Agreement attached as Exhibit G to the Summary Judgment Motion, which agreement includes a referenced Attachment A not included as part of Exhibit G. Peabody also states that Peabody, Patriot and Heritage entered as of October 22, 2007, the Salaried Employee Liabilities Assumption Agreement attached as Exhibit H to the Summary Judgment Motion, which agreement includes a referenced Attachment A not included as part of Exhibit H. Responding further, Peabody states that the NBCWA Liabilities Assumption Agreement, the Section 9711 Coal Act Liabilities Assumption Agreement and the Salaried Employee Liabilities Assumption Agreement are written documents that speak for themselves, to which Peabody refers for a true and complete statement of their contents. Peabody disputes that any of the agreements were drafted solely by Peabody's counsel, and states its counsel participated along with others in the drafting process and that the agreements were negotiated by sophisticated opposing parties represented by sophisticated counsel. (See Exs. A-C to the Declaration of Matthew C. Corcoran in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment (the "Corcoran Declaration").) Peabody disputes that the existence and the terms of the Section 9711 Coal Act Liabilities Assumption Agreement and the Salaried Employee Liabilities Assumption Agreement are material. Peabody disputes any remaining allegations contained in Statement of Fact 15.

Plaintiffs' Statement of Fact 16 Peabody and Patriot entered into the Section 9711 Coal Act Liabilities Assumption Agreement. Under that agreement, Peabody Holding assumed liabilities associated with retiree healthcare benefits under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9711. (Ex. G.)

RESPONSE: Peabody states that Peabody and Patriot entered the Section 9711 Coal Act Liabilities Assumption Agreement attached as Exhibit G to the Summary Judgment Motion, which agreement includes a referenced Attachment A not included as part of Exhibit G. Responding further, Peabody states that the Section 9711 Coal Act Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes that it assumed retiree healthcare benefits liabilities under the Coal Industry Retiree Health Benefit Act of 1992; the Section 9711 Coal Act Liabilities Assumption Agreement requires Peabody to fund certain Heritage obligations to pay retiree healthcare benefits under the Coal Industry Retiree Health Benefit Act of 1992. (Ex. G to the Summary Judgment Motion, Salaried Employee Liabilities Assumption Agreement §§ 1(b) & 2(a).) Peabody disputes Statement of Fact 16 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 17 Peabody, Patriot, and Heritage entered into the Salaried Employee Liabilities Assumption Agreement. Under that agreement, Peabody Holding assumed the retiree healthcare liabilities of certain former salaried employees of Heritage. (Ex. H.)

RESPONSE: Peabody states that Peabody, Patriot and Heritage entered the Salaried Employee Liabilities Assumption Agreement attached as Exhibit H to the Summary Judgment Motion which agreement includes a referenced Attachment A not included as part of Exhibit H. Responding further, Peabody states that the Salaried Employee Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes that it assumed the retiree healthcare liabilities of certain former salaried employees; the Salaried Employee Liabilities

Assumption Agreement requires Peabody to fund certain Heritage obligations to pay the retiree benefits of certain former salaried employees. (Ex. H to the Summary Judgment Motion, Salaried Employee Liabilities Assumption Agreement §§ 1(b) & 2(a).) Peabody disputes Statement of Fact 17 is material and disputes any remaining allegations contained therein.

Plaintiffs' Statement of Fact 18 Neither the Section 9711 Coal Act Liabilities Assumption Agreement nor the Salaried Employee Liabilities Assumption Agreement contains a provision analogous to the one at issue in this action. (Exs. G, H.)

RESPONSE: Peabody objects to this Statement of Fact as vague, particularly with respect to the phrase "a provision analogous to the one at issue in this action." Peabody states that the Section 9711 Coal Act Liabilities Assumption Agreement and the Salaried Employee Liabilities Assumption Agreement are written documents that speak for themselves, to which Peabody refers for true and complete statements of their contents. Peabody disputes that the existence and the terms of the Section 9711 Coal Act Liabilities Assumption Agreement and the Salaried Employee Liabilities Assumption Agreement are material. Peabody disputes any remaining allegations contained in Statement of Fact 18.

Plaintiffs' Statement of Fact 19 The NBCWA Liabilities Assumption Agreement states that Heritage "has an obligation to provide retiree healthcare pursuant to its 'me too' labor contract which incorporates by reference Article XX of the NBCWA." (Ex. A, Recital 3.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Peabody disputes any remaining allegations contained in Statement of Fact 19.

Plaintiffs' Statement of Fact 20 The NBCWA Liabilities Assumption Agreement states that "the parties desire that [Heritage] continue to provide the retiree healthcare required by Article XX of the NBCWA (or any successor [Heritage] labor contract)." (Ex. A, Recital 4.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Peabody disputes any remaining allegations contained in Statement of Fact 20.

Plaintiffs' Statement of Fact 21 The NBCWA Liabilities Assumption Agreement states that Peabody Holding "has agreed to assume the liabilities of [Heritage] for provision of healthcare pursuant to Article XX of the NBCWA (or any successor [Heritage] labor contract) to [the Assumed Retirees] to the extent expressly set forth in this Agreement." (Ex. A, Recital 5.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Responding further, Peabody states that PHC has an obligation to fund certain obligations of Heritage to pay for retiree benefits to certain Heritage retirees under the terms of the NBCWA Liabilities Assumption Agreement. (See generally Ex. A to the Summary Judgment Motion,

NBCWA Liabilities Assumption Agreement.) Peabody disputes any remaining allegations contained in Statement of Fact 21.

Plaintiffs' Statement of Fact 22 Peabody Holding "assum[ed], and agree[d] to pay and discharge when due in accordance [with the NBCWA Liabilities Assumption Agreement], the [Assumed Liabilities]." (Ex. A § 2(a).)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Responding further, Peabody states that PHC has an obligation to fund certain obligations of Heritage to pay for retiree benefits to certain Heritage retirees under the terms of the NBCWA Liabilities Assumption Agreement. (See generally Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement.) Peabody disputes any remaining allegations contained in Statement of Fact 22.

Plaintiffs' Statement of Fact 23 The NBCWA Liabilities Assumption Agreement defines the term "NBCWA Individual Employer Plan" as "a plan for the provision of healthcare benefits to retirees of [Heritage] and their eligible dependents maintained by [Heritage] pursuant to Article XX of the NBCWA." (Ex. A § 1(c).)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted portions, although only portions, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have

drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement.

Peabody disputes any remaining allegations contained in Statement of Fact 23.

Plaintiffs' Statement of Fact 24 The NBCWA Liabilities Assumption Agreement defines the Assumed Liabilities by reference to the benefits owed to the Assumed Retirees under the NBCWA Individual Employer Plan. (Ex. A § 1(d).)

RESPONSE: Peabody objects to this Statement of Fact as vague and ambiguous, particularly with respect to the phrase "by reference to." Responding further, Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their characterization of the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Responding further, Peabody also states that the Plaintiffs defined "Assumed Liabilities" on pages 6-7 of their Memorandum of Law [Doc. No. 7] in Support of the Summary Judgment Motion with a quotation from a portion of the NBCWA Liabilities Assumption Agreement's fifth recital. Peabody specifically disputes that the NBCWA Liabilities Assumption Agreement's recitals define any liabilities that Peabody assumed. Responding further, Peabody states the NBCWA Liabilities Assumption Agreement defines the "NBCWA Individual Employee Liabilities" as the "amounts [Heritage] pays for benefits to those retirees of [Heritage] identified on Attachment A hereto, and such retirees' eligible dependents, under the terms of the NBCWA Individual Employer Plan," which is defined as a plan "maintained by" Heritage. (Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement §§ 1(c) & 1(d).) Peabody disputes any remaining allegations contained in Statement of Fact 24.

Plaintiffs' Statement of Fact 25 The NBCWA Liabilities Assumption Agreement provides that Peabody Holding has assumed liability for different levels of benefits provided by future NBCWA and "me too" agreements by providing that "[c]hanges to benefit levels, cost containment programs, plan design or other such modifications contained in [Heritage's] future UMWA labor agreements that are applicable to the retirees and eligible dependents subject to this Agreement shall be included for the purposes of the definition of [the Assumed Liabilities]." (Ex. A § 1(d).)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Peabody specifically disputes that changes to Peabody's obligations are limited to changes contained in future NBCWAs and Me Too Agreements. (Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement § 1(d).) Peabody disputes any remaining allegations contained in Statement of Fact 25.

Plaintiffs' Statement of Fact 26 Modifications contained in Heritage's future UMWA labor agreements will be reflected in the Assumed Liabilities "provided that, for purposes of any successor [Heritage] labor contract, [the Assumed Liabilities] shall be based on benefits that are the lesser of (i) benefits provided in any future UMWA labor agreement with [Eastern Associated] and (ii) benefits provided in any future NBCWA labor agreement or any successor labor agreement and offered to [Eastern Associated], or which [Eastern Associated] had the opportunity to sign." (Ex. A § 1(d).)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that the Plaintiffs accurately quoted a portion, although only a portion, of the language from the NBCWA Liabilities Assumption Agreement, but specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have

drawn from their selective quotation from the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement.

Peabody disputes any remaining allegations contained in Statement of Fact 26.

Plaintiffs' Statement of Fact 27 Under the NBCWA Liabilities Assumption Agreement, the Assumed Liabilities are to be determined by reference to the lesser benefits of the UMWA labor contract negotiated with either Heritage or Eastern Associated. (Ex. A.)

RESPONSE: Peabody objects to this Statement of Fact as vague and ambiguous, particularly with respect to the phrases "are to be determined," "by reference to," and "the lesser benefits of." Responding further, Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their characterization of the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Responding further, Peabody states that Peabody does not have any obligation to fund if Heritage has no obligation to pay for retiree benefits via a plan maintained pursuant to a labor contract. (Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement §§ 1(c), 1(d) & 2(a).) To the extent Heritage has a labor contract obligation to pay retiree benefits, then Peabody's funding obligation is limited to the lesser of the benefit levels contained in Heritage's and EACC's plans maintained pursuant to their respective labor contracts. (Id.) Peabody disputes any remaining allegations contained in Statement of Fact 27.

Plaintiffs' Statement of Fact 28 The NBCWA Liabilities Assumption Agreement is governed by Delaware law. (Ex. A § 19.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document which speaks for itself, to which Peabody refers for a true and complete statement of

its contents. Responding further, Peabody states that section 19 of the NBCWA Liabilities Assumption Agreement provides that "the validity, construction, operation and effect of any and all of the terms of this Agreement shall be determined and enforced in accordance with the laws and regulations of the State of Delaware." (Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement § 19.) Peabody disputes any remaining allegations contained in Statement of Fact 28.

Plaintiffs' Statement of Fact 29 Peabody is the primary obligor of the Assumed Liabilities. (Ex. A § 2(a); Ex. B ¶ A.2.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes that Peabody is the primary obligor of the NBCWA Individual Employee Plan Liabilities, to the extent this might suggest or be intended to suggest an obligation on the part of Peabody that is independent of that for which Heritage is obligated, as explained in the next sentence. Responding further, Peabody states that Peabody is obligated to fund only whatever healthcare benefits Heritage is obligated, via a plan maintained pursuant to its labor agreement, to pay to union retirees that are covered by the NBCWA Liabilities Assumption Agreement. (Ex. A to the Summary Judgment Motion, NBCWA Liabilities Assumption Agreement §§ 1(c), 1(d) & 2(a).) Peabody disputes any remaining allegations contained in Statement of Fact 29.

Plaintiffs' Statement of Fact 30 The Debtors have sought to modify healthcare benefits of union-represented retirees pursuant to 11 U.S.C. § 1114. (1114 Proposal.)

RESPONSE: Peabody states that the Debtors have sought to terminate their obligation to pay healthcare benefits of union-represented retirees pursuant to 11 U.S.C. § 1114. (See Fourth 1114 Proposal). Peabody disputes any remaining allegations contained in Statement of Fact 30.

Plaintiffs' Statement of Fact 31 If Peabody is permitted to reduce or eliminate its Assumed Liabilities, those obligations would be the responsibility of Heritage. (Hatfield Decl. ¶ 33.)

RESPONSE: Peabody states that the NBCWA Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody disputes any negative inferences or conclusions the Plaintiffs might seek to have drawn from their characterization of the NBCWA Liabilities Assumption Agreement without reference to all relevant sections of the NBCWA Liabilities Assumption Agreement. Peabody disputes any remaining allegations contained in Statement of Fact 31.

Plaintiffs' Statement of Fact 32 If the Court rules in favor of Patriot and Heritage in this action, the 1114 Motion would not apply to the Assumed Retirees, their benefits will not be modified, and their retiree healthcare would continue to be paid for by Peabody. (1114 Proposal ¶ 6.)

RESPONSE: Peabody states that the Fourth 1114 Proposal is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Responding further, Peabody states that no portion of this item is properly the subject of, or characterizable as, a statement of fact. Responding further, Peabody states that a ruling in favor of the Plaintiffs in this action would be inappropriate for the reasons stated in Peabody's Motion to Dismiss and its Response to the Plaintiffs' Motion for Summary Judgment. Peabody disputes any remaining allegations contained in Statement of Fact 32.

Plaintiffs' Statement of Fact 33 Hours after the Debtors filed the 1114 Motion and the complaint in this action, Peabody issued a press release proclaiming that, should the bankrupt Obligor Companies obtain relief pursuant to the 1114 Motion, Peabody would seek to reduce or eliminate benefits for the Assumed Retirees. (Ex. C.)

RESPONSE: Peabody states that it made the press release attached as Exhibit C to the Summary Judgment Motion. Responding further, Peabody states that the press release it issued on March 14, 2013, is a written document that speaks for itself, to which Peabody refers for a

true and complete statement of its contents. Peabody also states that the press release states only that Peabody will exercise its contractually bargained for rights. (See Ex. C to the Summary Judgment Motion.) Peabody disputes any remaining allegations contained in Statement of Fact 33.

Plaintiffs' Statement of Fact 34 Certain salaried retirees who were not assumed by Peabody may have their benefits reduced as part of the Patriot bankruptcy. Peabody must continue paying for the benefits of the salaried retirees for whom it assumed responsibility. (Debtors' Mot. for an Order Authorizing the Modification and Termination of Certain Non-Vested Benefits for Non-Union Retiree Benefit Participants Pursuant to 11 U.S.C. §§ 105(a) and 363(b) [ECF No. 3503] ¶¶ 2, 22.)

RESPONSE: Peabody states that the Salaried Employee Liabilities Assumption Agreement is a written document that speaks for itself, to which Peabody refers for a true and complete statement of its contents. Peabody specifically disputes that Peabody is the primary obligor of the Salaried Employee Liabilities, to the extent this might suggest or be intended to suggest an obligation on the part of Peabody that is independent of that for which Heritage is obligated, as explained in the next sentence. Responding further, Peabody states that Peabody is obligated to fund only whatever healthcare benefits Heritage is obligated to provide to certain retirees that are covered by the Salaried Employee Liabilities Assumption Agreement. (Ex. H to the Summary Judgment Motion, Salaried Employee Liabilities Assumption Agreement §§ 1(b) & 2(a).)² Peabody disputes Statement of Fact 34 is material and disputes any remaining allegations contained therein.

ADDITIONAL FACTS

Peabody believes the unambiguous language of the NBCWA Liabilities Assumption Agreement compels denial of the Plaintiffs' Summary Judgment Motion because (1) Peabody

² Peabody expressly reserves all of its rights and remedies under the Salaried Employee Liabilities Assumption Agreement.

must fund only what Heritage has to pay and (2) any modification to Heritage's or EACC's obligations would necessarily be included in a labor agreement. To the extent the Court concludes the language of the NBCWA Liabilities Assumption Agreement does not unambiguously require denial of summary judgment, then Peabody believes the following disputed facts are material, and a trial is necessary, after due opportunity for discovery, to determine: (1) Peabody's, Patriot's and Heritage's understanding of the NBCWA Liabilities Assumption Agreement during the course of its negotiations; and (2) the manner, if at all, in which Peabody, Patriot or Heritage expressed those understandings to each other during the course of its negotiations. The following undisputed facts are relevant to the dispute about the preceding two facts:

1. Attached as Exhibit A to the Declaration of Matthew C. Corcoran in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment (the "Corcoran Declaration") is a true and correct copy of a draft of the NBCWA Liabilities Assumption Agreement with handwritten comments dated June 9, 2007.

2. Attached as Exhibit B to the Corcoran Declaration is a true and correct copy of a May 2, 2007 draft of the NBCWA Liabilities Assumption Agreement that Patriot received.

Dated: April 22, 2013

Respectfully submitted,

/s/ Steven N. Cousins

David G. Heiman

Carl E. Black

John M. Newman, Jr.

JONES DAY North Point

901 Lakeside Avenue

Cleveland, Ohio 44114

Telephone: 216-586-3939

Facsimile: 216-579-0212

dgheiman@jonesday.com

ceblack@jonesday.com

jmnewman@jonesday.com

Steven N. Cousins (MO 30788)

David L. Going (MO 33435)

Susan K. Ehlers (MO 49855)

ARMSTRONG TEASDALE

7700 Forsyth Boulevard, Suite 1800

St. Louis, Missouri 63105

Telephone: 314-621-5070

Facsimile: 314-621-5065

scousins@armstrongteasdale.com

dgoing@armstrongteasdale.com

sehlers@armstrongteasdale.com

ATTORNEYS FOR DEFENDANTS
PEABODY ENERGY CORPORATION and
PEABODY HOLDING COMPANY, LLC