

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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In re: : Chapter 11
: Case No. 12-51502-659
: (Jointly Administered)
PATRIOT COAL CORPORATION, *et al.*, :
: Objection Deadline:
Debtors. : May 14, 2013 at 4:00 p.m.
: (prevailing Central Time)
: :
: Hearing Date:
: May 21, 2013 at 10:00 a.m.
: (prevailing Central Time)
: :
: Hearing Location:
: Courtroom 7 North
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**PEABODY’S FURTHER STATEMENT IN SUPPORT OF ITS OBJECTION
TO DEBTORS’ MOTION FOR LEAVE TO CONDUCT DISCOVERY OF
MORGAN STANLEY PURSUANT TO RULE 2004**

Debtors’ conflicts counsel seems ready to concede that they will not press this Court to rubber-stamp a third-party subpoena demanding discovery whose scope would go way beyond anything to do with this case and that would otherwise threaten Peabody’s rights. Counsel originally had asked the Court to approve subpoenas that would do just that: require delivery of information about unrelated work performed by Morgan Stanley for Peabody, notwithstanding the fact that Rule 2004 does not authorize discovery that could not possibly affect the Debtors’ estates.

After Peabody objected, Debtors’ conflicts counsel proposed modifications in a letter sent on Thursday, May 16, 2013, requesting Peabody’s response by close of business on Friday afternoon.¹ Counsel states “no resolution has been reached”² but does not tell the Court that they decided not to wait for Peabody’s response, but filed papers before noon on Friday morning.

Therefore, with respect to its objections, Peabody provides its response to the Court:

¹ “[W]e 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.” Letter of Theresa A. Foudy, Esq., Curtis, Mallet-Prevost, Colt & Mosle LLP, dated May 16, 2013 (attached as Exhibit A to Debtors’ reply) (see note 2).

² Reply of the Debtors to Peabody’s Objection to the Motion for Leave to Conduct Discovery of Morgan Stanley. Pursuant to Rule 2004 at Para. 5 (“**Debtors’ Reply**” (**Doc. No. 4008**)) (filed 11:38 AM). *See also* Reply of the Official Committee of Unsecured Creditors to the Objections of Peabody Energy Corporation to Debtors’ Motion for Leave to Serve Rule 2004 Subpoenas on Third Parties (“**Committee Reply**” **Doc No. 4011**) (filed 1:50 PM).

- Peabody **accepts** the representation of Debtors that Peabody-related discovery of Morgan Stanley will be limited to a date range of June 1, 2006 through May 1, 2008,³ subject to any objections that Morgan Stanley may make to that date range.
- Peabody **accepts** the representation of Debtors that the scope of discovery of Morgan Stanley will be limited as set forth in Paragraphs 17-19 of Debtors' reply.⁴
- Peabody **accepts** the representation of Debtors that Requests Nos. 2 and 3 are limited to documents sufficient to show the nature of, and consideration received for, engagements performed between June 1, 2006 to May 1, 2008,⁵ subject to any additional objections that Morgan Stanley may make to that date range.
- Peabody **accepts** the representation of Debtors that all Peabody-related documents produced by third parties will be treated as "AEP Confidential Information" for thirty (30) days after production.⁶ Importantly, although neither Debtors nor the Committee mentioned restrictions on disclosure of Peabody-related discovery to the United Mine Workers of America, Peabody assumes that Debtors, the Committee and the UMWA intend to honor those restrictions and Peabody will object as necessary in this regard.
- Peabody **accepts** the representation of Debtors that the agreed provisions regarding inadvertent production (to which Debtors refer as the "clawback" provisions) in the stipulated confidentiality order currently being negotiated among Debtors, the Committee and Peabody apply to material produced by third parties.⁷
- As indicated in its Objections, Peabody will **accept** the offer of any third party voluntarily to make Peabody-related documents available to Peabody for review before timely production. Of course, Debtors have no authority or right by intrusion, threat or otherwise to interfere with that review process. It remains the right and obligation of the third party ultimately to determine any questions of responsiveness and/or privilege and to produce documents timely in accordance with the terms of its stipulation with Debtors.⁸

³ Debtors' Reply Doc. 4008 at Para. 17.

⁴ Debtors' Reply Doc. 4008 at Paras. 17-19.

⁵ Debtors' Reply Doc. 4008 at Para. 18. Peabody understands this representation to modify the requests to seek only documents sufficient to show the generic nature of the engagement (*e.g.*, "consulting engagement," or "corporate advice") and the dollar amount of compensation paid therefore, which the Debtors claim they need to ascertain bias or partiality. (*Id.*) If the subpoena as modified seeks more information about unrelated engagements, Peabody will seek an immediate protective order and refer back to Debtors' papers.

⁶ Debtors' Reply Doc. 4008 at Para. 15; *see also* Committee Reply Doc. 4011 at Para. 6.

⁷ Debtors' Reply Doc. 4008 at Para. 8; *see also* Committee Reply Doc. 4011 at Para. 5.

⁸ *See* Debtors' Reply Doc. 4008 at Para. 11 (anticipating action by third party counsel to preserve any privilege).

- Peabody **accepts** the oral representation of Debtors' conflicts counsel Theresa A. Foudy, Esq., that Peabody's rights to object to the subpoena (when issued) are fully preserved, and Peabody affirmatively reserves all such rights.

* * *

Peabody respectfully requests that the Court require Debtors to modify their subpoena in accordance with the representations of conflicts counsel before any service upon Morgan Stanley. Based on those anticipated modifications, and reserving its rights to object, if necessary, to the subpoena as modified, Peabody hereby withdraws its Objections (Doc. 3972).

Dated: May 20, 2013

Respectfully submitted,

/s/ Steven N. Cousins

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David G. Heiman (admitted *pro hac vice*)

Robert S. Faxon (admitted *pro hac vice*)

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ATTORNEYS FOR PEABODY ENERGY
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 20, 2013, a copy of the foregoing Withdrawal was served via the Court's ECF electronic filing system, and served by first class mail upon counsel for Morgan Stanley & Co., LLC, Edward A. Smith, Venable LLP, Rockefeller Center, 1270 Avenue of the Americas, Twenty-Fifth Floor, New York, NY 10020, and the parties listed on the Core Party/Non-ECF Service List posted on the Garden City Group's website on May 20, 2013, a copy of which is attached hereto as Exhibit A.

Dated: May 20, 2013

Respectfully submitted,

/s/ Steven N. Cousins

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Core Party/Non-ECF Service List (Per the Case Management Order)

Patriot Coal Corporation et. al



Source *	Function/Party Represented	Company	Contact	Address 1	Address 2	City (Foreign ZIP/Country)	State	Zip	Country	Fax
MSL	Local Counsel for Debtors	BRYAN CAVE LLP	ATTN LAURA UBERTI-HUGHES, ESQ.	ONE METROPOLITAN SQUARE	211 N BROADWAY, STE 3600	ST. LOUIS	MO	63102	US	314-259-2020
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NOA	Counsel for the Official Committee of Unsecured Creditors of Patriot Coal Corporation, et al.	CARMODY MACDONALD P.C.	ATTN GREGORY D. WILLARD, ESQ.	120 S CENTRAL AVE, STE 1900		ST. LOUIS	MO	63105	US	314-854-8660
NOA	Creditors of Patriot Coal Corporation, et al.	CARMODY MACDONALD P.C.	ATTN ANGELA L. SCHISLER, ESQ.	120 S CENTRAL AVE, STE 1900		ST. LOUIS	MO	63105	US	314-854-8660
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ADM	Conflicts Counsel for the Debtors	CURTIS, MALLET -PREVOST, COLT & MOSLE LLP	ATTN S. REISMAN, ESQ. AND MICHAEL COHEN, ESQ.	101 PARK AVE		NEW YORK	NY	10178	US	212-697-1559
MSL	Counsel for Debtors	DAVIS POLK & WARDWELL LLP	ATTN BRIAN M. RESNICK, ESQ. AND MARSHALL S. HUEBNER, ESQ.			NEW YORK	NY	10017	US	212-607-7983
MSL	Claims and Noticing Agent for Debtors	GCG, INC.	ATTN ELIZABETH VRATO	190 S LASALLE ST	STE 1520	CHICAGO	IL	60603	US	312-499-6999
NOA	Counsel for the Official Committee of Unsecured Creditors of Patriot Coal Corporation, et al.	KRAMER LEVIN NAFTALIS & FRANKEL LLP	ATTN ADAM C. ROGOFF, ESQ.	1177 AVENUE OF THE AMERICAS		NEW YORK	NY	10036	US	212-715-8000
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MSL	U.S. Trustee	OFFICE OF THE UNITED STATES TRUSTEE	ATTN LEONORA S. LONG, ESQ.	TRIAL ATTORNEY	111 S 10TH ST, STE 6.353	ST. LOUIS	MO	63102	US	212-310-8007
NOA	Counsel for the Agent to the DIP Lenders, Citibank, N.A., as Administrative Agent (the "First Out DIP Agent")	WELL, GOTSHAL & MANGES LLP	ATTN ANDREA SAAVEDRA, ESQ.	767 FIFTH AVE		NEW YORK	NY	10153	US	212-310-8007
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* MSL = Master Service List
 ** NOA = Notice of Appearance
 ** Subject to continuous update and review