UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Objection Deadline:** **September 5, 2013 at 4:00 p.m.** **(prevailing Central Time)** **Hearing Date:** **September 13, 2013 at 10 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

JOINT MOTION OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO COMPEL PRODUCTION OF DOCUMENTS BY PEABODY ENERGY CORPORATION

Patriot Coal Corporation ("**Patriot**") and its affiliated debtors (collectively, the "**Debtors**"), as debtors and debtors in possession, and the Official Committee of Unsecured Creditors of Patriot Coal Corporation (the "**Committee**," and, together with the Debtors, the "**Fiduciaries**"), supported by the accompanying declarations of Andrew Dove (the "**Dove Decl.**") and Dan Brassil (the "**Brassil Decl.**"), move to compel Peabody Energy Corporation ("**Peabody**") to complete its production of documents in compliance with this Court's order authorizing discovery pursuant to Rule

[1] The Debtors are the entities listed on Schedule 1 attached to this motion. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

2004 of the Federal Rules of Bankruptcy Procedure [Dkt. No. 4114] (the "**Rule 2004 Order**") by October 1, 2013, and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Fiduciaries seek the Court's intervention – again – to set a reasonable deadline for Peabody to complete its production in response to the Rule 2004 subpoena that the Court authorized the Fiduciaries to serve on Peabody. Although the Fiduciaries provided Peabody with a form of document request in January 2013, almost eight months ago, to date Peabody has only produced 3,428 documents and states that its production will not be complete until next year.

2. This is not the first time this matter has been before the Court. As the Court is aware, the Fiduciaries are investigating potential claims arising out of Peabody's spinoff of Patriot. In April 2013, after 14 weeks of negotiations had failed to produce an agreement on the terms of discovery, this Court granted the Fiduciaries' motion to conduct Rule 2004 discovery.

3. That ruling, however, has failed to accelerate Peabody's production. The four months since have predominantly been consumed with additional preliminary matters – the negotiation of the forms of the Rule 2004 Order and a confidentiality agreement, the identification of the specific backup tapes to be restored and searched, and the negotiation of search terms that minimize the need to review electronic information. Peabody's very leisurely cooperation has further delayed discovery, and, as a result, Peabody has produced only a small amount of hardcopy documents and virtually *no* electronic materials.

4. At the same time it has failed to provide much actual discovery, Peabody has refused to provide the Fiduciaries with updates on the status of its review of electronic documents or the mechanics of its document review. Only when the Fiduciaries brought this issue before the Court, at a conference on August 20, 2013, did Peabody outline the status of its production, astonishingly estimating that it could not complete production before an unspecified date in the "early part of next year." *See* Tr. at 77:4-6. At that conference, the Court encouraged Peabody to consider ways to expedite its production and asked the Fiduciaries to file this motion.

5. The schedule that Peabody suggests – which would provide it with a year or more after the Rule 2004 process began to complete production – is outlandish. Not only has Peabody known the scope of the relevant documents requests since January, but a drastically quicker process is readily achievable, given the scope of the materials it has identified, the sophisticated search terms agreed by the parties, a protective order that provides for a Rule 502(d) privilege clawback, the availability of automated e-discovery review analytics that substantially streamline production, and the substantial manpower (if needed) that Peabody's counsel can bring to bear. Accordingly, the Court should direct that Peabody complete its production in response to the Fiduciaries' Rule 2004 subpoena by October 1, 2013, a date that is eminently reasonable in light of the scope of potentially responsive materials it has identified, the resources available to it, and the time that has elapsed since Peabody was informed of the Fiduciaries' requests. To ensure that the matter proceeds smoothly towards that date, the Fiduciaries respectfully request that the Court also schedule regular telephonic status conferences to allow Peabody to update the parties concerning any matters relevant to the completion of its production.

JURISDICTION

6. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408, 1409, and 1412.

BACKGROUND

I. The Fiduciaries' Information Requests and Initial Negotiations

7. As part of their investigation of potential estate claims, on January 11, 2013, pursuant to Local Rule of Bankruptcy Procedure 2004-1(A), the Fiduciaries wrote to Peabody, providing a copy of a proposed Rule 2004 subpoena and asking to meet and confer. *See* Dove Decl. at ¶ 2. Thereafter, the parties entered into negotiations concerning those requests. These negotiations were not primarily focused on the substance of the requests, but rather on a series of collateral matters: changes in Peabody's electronic data systems, the range of potential custodians of electronic data, the proper date-range of discovery, the availability of electronic data contained on earlier systems, and the logistics and cost of the restoration of that data. *Id*. Confidentiality also played a prominent role, in particular because Peabody sought to limit the disclosure of Rule 2004 materials to the United Mine Workers of America (the "**UMWA**"), a Committee member. *Id*.

8. During the course of discussions in February and March, Peabody's counsel represented that responsive hardcopy documents had already been assembled and would be produced imminently, pending the entry of a protective order. *Id*. at ¶ 3. The Fiduciaries emphasized that Peabody's preparations for production should not await formal authorization from the Court.

9. On April 2, after weeks of negotiations had failed to produce a resolution, the Fiduciaries filed a motion seeking a determination of five outstanding disputes and authority to serve a subpoena under Rule 2004. *See* Dkt. No. 3494. In its response, Peabody agreed to the Fiduciaries' requests on two of the outstanding issues. *See* Dkt. No. 3674. At the hearing on April 23, 2013, the Court resolved the remaining disputes – including, among other things, directing Peabody to search broadly for responsive documents and approving procedures for the UMWA's participation in the Committee's review – and authorized the Fiduciaries' discovery under Rule 2004. *See* Tr. at 160:16-161:9.

10. Any hope the Fiduciaries nurtured that material discovery would be forthcoming after that hearing was quickly frustrated. Simply agreeing upon a proposed Rule 2004 Order with Peabody took approximately five weeks. Dove Decl. at ¶ 4. Negotiations over a stipulated protective order lasted ten weeks. *Id*. at ¶ 5. Finally, on June 5 and 7, agreed forms of both the Rule 2004 Order and the protective order [Dkt. No. 4115] were submitted to the Court and promptly entered. On June 10, the Fiduciaries served the approved form of subpoena calling for production within ten days. Dove Decl. at ¶ 6. Peabody served a formal objection to the subpoena on June 20, but subsequent conferences and correspondence clarified that Peabody was responding to the subpoena subject to the parties' agreements. *Id*.

II. The State of Production

A. Hardcopy Documents.

11. After the conclusion of the April 23 hearing, the only open issues that might have delayed Peabody's production of hardcopy materials were the entry of the

Rule 2004 Order and the protective order. These steps were completed, and a Rule 2004 subpoena served, by June 10.

12. Nevertheless, in the ensuing months, Peabody has produced very few documents. At the April 23 hearing, Peabody claimed that "[w]e've been prepared to produce at least some documents for quite some time but because of the absence of a confidentiality order, we have not done that," Tr. at 42:5-7, and advertised that a "huge" quantity of documents was presumably forthcoming. *Id*. at 42:12. These comments were hardly surprising; Peabody had received the Fiduciaries' discovery requests many months earlier, and the Fiduciaries had repeatedly expressed their view that document retrieval and review should not wait for formal approval by the Court. Despite Peabody's representations, however, substantial production of hardcopy documents has not occurred. Instead, documents have trickled in over two months, in seven separate productions. *See* Dove Decl. at ¶ 20. As of August 29, the Fiduciaries have received only 3,428 documents, nearly all of which appear to be scans of hardcopy documents. *Id*.

B. Electronic Materials.

13. Discovery of electronic materials has proceeded even more slowly, with the resolution of two preliminary issues extremely slow to arrive: (i) the selection of dates for the restoration of archival backup tapes; and (ii) "search terms" to be employed by Peabody in searching its electronic documents. In many instances, the source of delay was straightforward: Peabody's failure to respond quickly. In attempting to identify specific backup tapes to restore – a matter that was not the subject of negotiation, but rather driven by Peabody's review of information it alone held – the Fiduciaries repeatedly identified specific tapes only to wait weeks for Peabody's reply. *See* Dove Decl. at ¶ ¶ 8-12. After several such delays, a list of specific backup tapes appeared to

have been agreed by July 3, six weeks after the Fiduciaries provided their initial list. *Id*. at ¶ 11. Three weeks later, however, on July 25, Peabody informed the Fiduciaries that one tape was "corrupted." *Id*. at ¶ 12. The Fiduciaries identified a replacement the next day, and the list was finalized. *Id*.

14. The negotiation of electronic data search terms was equally prolonged. With the aid of an electronic data search consultant, the Fiduciaries formulated sophisticated and highly refined search terms and provided them to Peabody on April 1. *Id*. at ¶ 15. Peabody did not respond at all for over a month, and then provided only initial high-level comments. *Id*. at ¶ 16. The Fiduciaries waited two months to receive a complete set of comments reflecting terms that Peabody would accept. *Id*. at ¶ 17. Thereafter, negotiations accelerated, with the parties reaching agreement on 60% of terms by July 3 and the remainder by July 25, four months after the process began. *Id*. at ¶ 19.

C. The August 20 Conference

15. In July, as the negotiation of preliminary matters drew to a conclusion, the Fiduciaries pressed Peabody to determine when its production of electronic materials would begin and end. *Id*. at ¶ 21. Peabody demurred, disclaiming any obligation to update the Fiduciaries regarding the status or mechanics of its review and production. *Id*. Accordingly, the Fiduciaries proposed a status conference at which the absence of meaningful progress in the nearly nine-month-old effort to obtain discovery could be explained and addressed. *Id*. at ¶ 22. Peabody resisted any conference. *Id*. In an email dated August 15, Peabody argued that providing information concerning the status of production would constitute a "new" obligation, which could only be imposed after the expense and delay of a formal motion. *Id*. at ¶ 23.

16. Despite Peabody's resistance, the Fiduciaries raised the status of its production at a conference on the omnibus calendar on August 20, 2013. At that conference, Peabody disclosed for the first time that the application of the sophisticated negotiated search terms has retrieved 630,000 documents, which Peabody was reviewing for responsiveness. *See* Tr. at 76:6-25. Peabody also revealed that it had just discovered 80 boxes of documents at Iron Mountain, a storage facility that it had inexplicably failed to search earlier. *Id*. Finally, pressed for a deadline to complete its production, Peabody suggested it could do so "some time in the early part of next year." *Id*. at 77:1-6.

17. After hearing both sides, the Court encouraged Peabody to "look at what can be done to speed up this process to something sooner than that, keeping in mind that it is a large undertaking to go through all of those documents." *Id*. at 83:21-23. The Court also directed the Fiduciaries to file this motion. *Id*. at 83:13-14.

ARGUMENT

I. A Timely Date Certain for Peabody's Completion of Production Is Required

18. A Rule 2004 investigation is intended to "ascertain the extent and location of the estate's assets" – including potential causes of action. *In re Wilcher*, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985).[2] As Peabody stressed earlier in this process, Rule 2004 discovery is meant to be "quick." *See* Obj. to Rule 2004 Mot. at 1, 2, 8, 13 [Dkt. No. 3674]. Speed is critical to keep pace with the accelerated timetable in chapter 11 cases.

[2] *See also In re Bakalis*, 199 B.R. 443, 447 (Bankr. E.D.N.Y. 1996) ("Its purpose is to facilitate the discovery of assets and the unearthing of frauds and has been likened to a quick 'fishing expedition' into general matters and issues regarding the administration of the bankruptcy case.") (citing cases).

It also helps to conserve estate resources that would otherwise be consumed in endless preliminaries.

19. The Fiduciaries first provided Peabody with their Rule 2004 discovery requests in January. This Court authorized Rule 2004 discovery in April. In an effort to spare the Court the burden – and the estate the expense – of resolving litigated discovery matters, the Fiduciaries have tried extensively to cooperatively resolve issues raised by Peabody. Since January, the Fiduciaries have held approximately 30 conference calls with Peabody and exchanged over 100 emails and letters. Dove Decl. at ¶ 22. While this effort has, after many months, ultimately led to agreement on most issues, to date, Peabody has produced very little and stiff-armed the Fiduciaries' requests for transparency about what is forthcoming.

20. Now, over eight months into the process, Peabody has revealed that, until August, it had not run a single search for electronic documents, *see* Aug. 20 Tr. at 75:22-76:9, and had evidently overlooked 80 boxes of archived documents. *See id*. at 76:16-17. Even after the parties' extraordinarily protracted negotiations, Peabody estimates that its production process will not be completed before "early next year." *Id*. at 77:4-6. That timetable would hamstring the Fiduciaries' investigation, undercut the purpose of Rule 2004, and effectively penalize the estates for the Fiduciaries' lengthy efforts to achieve a negotiated resolution. Estate claims are subject to a statute of limitations. The Fiduciaries cannot rule out that Peabody's continued delay, including its proposal to complete production "early next year," is an attempt to gain a strategic advantage by limiting the time the Fiduciaries will have to examine Peabody's documents and determine the most efficient means of maximizing the value of any estate claims.

21. Given the extensive efforts the Fiduciaries have made to resolve matters consensually without Court involvement, and the limited results that cooperation has obtained, a court-imposed production deadline is appropriate and consistent with Rule 2004's intent. Bankruptcy courts, including this Court, set appropriate deadlines for Rule 2004 discovery as a matter of course. *Cf. In re Burton Douglas Morriss*, Case No. 12-40163-659 (Bankr. E.D. Mo. March 6, 2012) [Dkt. No. 69] (deadline set for discovery pursuant to Rule 2004); *In re President Casinos, Inc.*, Case No. 02-53005-659 (Bankr. E.D. Mo.) [Dkt. No. 1105, Dec. 14, 2005 and Dkt. No 1139, Feb. 10, 2006] (same).[3] Here, at this late stage, a certain deadline is more than justified. Such a mandate is imperative to ensure that the Rule 2004 investigation can be completed in a timely fashion and the Fiduciaries can ascertain the viability of potential causes of action and, if appropriate, determine how to prosecute those claims within the context of the pending reorganization.

II. October 1, 2013 Is a Reasonable Deadline

22. Peabody's claim that it cannot complete production before 2014 is unsupportable and contrary to the needs of this case. *See* Tr. at 83:19-25 ("[T]he beginning of 2014 seems like a long time . . . . I think we've got to move things along a little faster, certainly being here in bankruptcy court."). By Peabody's own admission, running the agreed search terms on the agreed databases over the agreed time period has generated 630,000 document to review. Peabody has known the exact content of the

[3] *See also In re Robert E. Derecktor, Inc.*, Case No. 12-22393 (Bankr. S.D.N.Y. Feb. 15, 2013) [Dkt. No. 82]; *In re NewPage Corp.*, Case No. 11-12804 (Bankr. D. Del. Apr. 25, 2012) [Dkt. No. 1477]. Target deadlines also apply in other discovery ongoing in this very investigation by the Fiduciaries. *See, e.g., Stipulated Order Authorizing the Issuance of a Subpoena Duces Tecum to Morgan Stanley Pursuant to Rule 2004* at ¶ 2, Dkt. No. 4043 (Morgan Stanley to use reasonable efforts to complete Rule 2004 production within 60 days absent other agreement).

Debtors' requests for many months. It is only fair that Peabody bear any additional burden of review caused by its decision to wait until early August to being running search terms, rather than further delaying the Fiduciaries' investigation.

23. There are, moreover, numerous reasons to believe that Peabody's review can be completed earlier than it suggests. The sophisticated search terms, developed with H5 and negotiated with Peabody, are likely to return a much higher percentage of responsive documents than search terms developed by counsel without the expertise and insight of an outside expert. *See* Brassil Decl. at ¶ 4. These search terms will thus streamline Peabody's responsiveness review, not impede it. *See id*. at ¶ 5. Peabody's review for privileged material will also be facilitated by the confidentiality agreement's "clawback" protections, which implement Federal Rule of Evidence 502(d)'s protection against waiver of a privilege through production. *See* Dkt. No. 4114 at ¶ 14; *In re Coventry Healthcare, Inc. ERISA Litig.*, 2013 U.S. Dist. LEXIS 39050, 15 (D. Md. Mar. 21, 2013) (clawback order can *eliminate* need to review electronically stored information); *Adair v. EQT Prod. Co.*, 2012 U.S. Dist. LEXIS 75132, 13 (W.D. Va. May 31, 2012) (same).

24. Furthermore, Peabody's counsel has represented that reviewing attorneys will be "assisted on the front end by analytical tools available in the software program." Aug. 20 Tr. at 76:21-22. These tools offer powerful efficiencies.[4] Peabody has

[4] *See, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 Rich. J.L. & Tech. 11, ¶ 52 (2011) ("The technology-assisted reviews require, on average, human review of only 1.9% of the documents, a fifty-fold savings over exhaustive manual review."); Hon. Craig B. Shaffer, *"Defensible" by What Standard?*, 13 Sedona Conf. J. 217, 234 (Fall 2012) ("Technology-assisted review procedures have the potential to reduce discovery costs and expedite the production of relevant, non-privileged ESI.").

acknowledged that it had restored all backup tapes no later than "early August," *see id*. at 76:22-77:9, and electronic materials on its live system have always been available for search. In light of these facts, an October 1, 2013 deadline will provide Peabody with a minimum of eight weeks to complete production. That should be more than sufficient, particularly given the efficiency a technology-driven approach can provide. But even if Peabody must now catch-up, Peabody's counsel – one of the country's largest firms – is well suited to provide whatever staffing is required.

CONCLUSION

For the foregoing reasons, the Fiduciaries respectfully request that the Court set a deadline of October 1, 2013 for Peabody to complete its production of discovery sought under the Rule 2004 Order, schedule periodic conferences, and grant such other relief as is due and proper.

[*Signature page follows*]

Dated: August 29, 2013

Respectfully Submitted,

DAVIS POLK & WARDWELL LLP

By: /s/ Michael J. Russano
Marshall S. Huebner
Elliot Moskowitz
Michael J. Russano

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7983

Counsel to the Debtors
and Debtors in Possession

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: /s/ P. Bradley O'Neill
Thomas Moers Mayer
P. Bradley O'Neill

1177 Avenue of the Americas
New York, New York 10036
Telephone (212) 715-9100
Facsimile: (212) 715-8000

Counsel for the Official Committee of
Unsecured Creditors