

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)**

**DECLARATION OF ANDREW DOVE IN SUPPORT OF JOINT MOTION OF
THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO COMPEL PRODUCTION OF DOCUMENTS
BY PEABODY ENERGY CORPORATION**

Andrew Dove declares as follows:

1. I am an associate at Kramer Levin Naftalis & Frankel LLP, counsel for the Official Committee of Unsecured Creditors of Patriot Coal Corporation. I submit this declaration in support of the Debtors' and Committee's Joint Motion to Compel the Production of Documents (the "Motion").¹

I. Initial Negotiations

2. As part of their investigation of potential estate claims, the Fiduciaries wrote to Peabody on January 11, 2013, providing a copy of a proposed Rule 2004 subpoena and asking to meet and confer. Thereafter, the parties entered into negotiations. 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

¹ Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

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. Confidentiality also played a prominent role – in particular, Peabody’s attempt to limit the disclosure of Rule 2004 materials to the UMWA, a Committee member.

3. 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 promptly, pending the entry of a protective order.

4. After the Court granted the Fiduciaries’ motion for authorization to take discovery under Rule 2004, the parties negotiated a form of order relating to the Court’s ruling. The Fiduciaries provided the first draft of that order on April 30, 2013. Agreement was not reached until June 5, 2013.

5. The Fiduciaries and Peabody also negotiated the terms of a stipulated protective order. The Fiduciaries provided the first draft of that order on March 26, 2013. Agreement was not reached until June 5, 2013.

6. The Fiduciaries served the approved form of Rule 2001 subpoena on Peabody on June 10, 2013. Peabody served a formal objection to the subpoena on June 20, 2013. In subsequent conferences and correspondence, Peabody clarified that it was responding to the subpoena subject to the parties’ agreements.

II. The State of Production

7. As of June 10, 2013, the Fiduciaries and Peabody were continuing to negotiate two issues specific to electronically stored information: the selection of dates for the restoration of archival backup tapes; and the “search terms” that would be employed by Peabody to minimize its production burden by eliminating electronic documents unlikely to be responsive.

A. Restoration dates

8. On May 22, 2013, the Fiduciaries identified 15 dates for the restoration of backup tapes. On June 5, 2013, two weeks later, Peabody reported that tapes were unavailable for five of the selected dates and identified adjacent dates for which tapes were available.

9. The next day, the Fiduciaries identified substitute dates chosen to reduce gaps in coverage. Twelve days later, on June 18, 2013, Peabody informed the Fiduciaries that tapes for three of the substitute dates were also missing (again identifying adjacent days on which tapes were available).

10. The next day, the Fiduciaries responded, seeking information regarding Peabody's deletion and backup protocols in order to inform its selection of alternate dates. By July 1, 2013, twelve days later, Peabody had not replied. On that date, the Fiduciaries sent Peabody a letter that identified new substitute dates in the absence of the outstanding information. *See Ex. A*

11. On July 3, Peabody wrote to the Fiduciaries that it was delivering a complete set of tapes for the dates identified in the July 1 letter to a vendor for the purpose of restoration.

12. On July 25, Peabody informed the Fiduciaries that one of the tapes sent to the vendor was "corrupted" and identified adjacent dates for which tapes were available. Once again, the next day, the Fiduciaries responded identifying a substitute date.

13. The Fiduciaries have not been notified of any other problems with the restoration of archived electronic documents.

B. Search terms for electronic documents

14. To help streamline the discovery process, the Committee engaged H5, an information retrieval consultant, to assist in the development of search terms to guide Peabody's search of its electronic information.

15. With H5's assistance, the Fiduciaries developed a proposed set of sophisticated, targeted search terms, which they transmitted to Peabody on April 1. Peabody did not respond for over a month.

16. After several reminders, on May 7, 2013, Peabody provided high-level comments. Thereafter, on May 16, 2013, the Fiduciaries provided a revised set of search terms. Thirteen days later, on May 28, 2013, Peabody responded by email with a markup that flagged "open issues" that it felt "should be the subject of an actual discussion before going any further with finalizing search terms."

17. On May 29, 2013, the Fiduciaries and Peabody conducted a conference call, concluding with an agreement by both sides to revert on specific points as soon as possible. Two days later, the Fiduciaries did so during a teleconference scheduled at the Fiduciaries' request. Peabody did not revert substantively until June 13, 2013, when it provided its first complete markup setting forth search terms acceptable to Peabody. Among other things, Peabody stated that ten terms out of 43 initially proposed by the Fiduciaries were acceptable to Peabody.

18. On July 1, 2013, the Fiduciaries sent Peabody their revised terms by letter. The letter also stated that any further objections to the proposed terms needed to be evidence-based – meaning that Peabody should test disputed search terms against the electronic information it had collected to determine if the term was overly broad:

Should Peabody contend that particular search terms present an undue review burden, Peabody should run the remaining terms and begin review and production of responsive documents. For those terms that it contends are unduly burdensome, Peabody should provide the number of unique results for each term and estimate the percentage of results that are responsive to the Estate Fiduciaries' Rule 2004 subpoena.

Ex. A.

19. On July 3, 2013, Peabody agreed to use 26 of the 43 search terms (60%) as proposed by the Fiduciaries, while continuing to evaluate the remaining 17 terms. After an additional round of comments from Peabody and the Fiduciaries, these remaining 17 search terms were also agreed upon, which Peabody’s counsel confirmed by email on July 25.

C. Productions to date

20. After service of the Rule 2004 subpoena on June 10, 2013, Peabody has made seven productions that appear to comprise, with limited exceptions, scans of hardcopy documents. The following table summarizes Peabody’s various productions to date:

<i>Production Date</i>	<i>Starting Bates Number</i>	<i>Ending Bates Number</i>	<i>Documents</i>	<i>Images/Pages</i>
06/14/2013	PEC00000001	PEC00003123	620	3,122
07/02/2013	PEC00003124	PEC00016642	840	13,519
07/10/2013	PEC00016643	PEC00017404	94	762
07/11/2013	PEC00017405	PEC00018049	143	645
07/23/2013	PEC00018050	PEC00024610	892	6,561
08/06/2013	PEC00024611	PEC00033828	461	9,218
08/16/2013	PEC00033829	PEC00039065	378	5,237
Total			3,428	39,064

D. The August 20 Conference

21. On July 16, 2013, the Fiduciaries sent Peabody an email inquiring about, among other things, the status of Peabody’s review of email from its “live” system (meaning email that did not need to be restored from backup tapes) and an estimate of when its review of emails obtained from backup tapes would begin and end. In a reply sent on July 19, Peabody declined to answer the Fiduciaries’ inquiries and expressly disclaimed any obligation to provide updates on the status or mechanics of its review. Peabody asserted that it “is under no obligations to provide updates about the mechanics of its document review, or to produce responsive documents or email in any particular order, and Peabody declines to undertake such

burdens voluntarily.”

22. The Fiduciaries proposed to address these issues with the Court at a status conference. Peabody took the position that additional discussions among the parties or formal briefing was more appropriate.

23. 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.

24. By the time of the August 20 conference, the Fiduciaries and Peabody had conducted approximately 30 conference calls and exchanged over 100 emails and letters concerning the Rule 2004 discovery.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29th day of August, 2013.

/s/ Andrew M. Dove
Andrew M. Dove

EXHIBIT A

July 1 Letter