# Exhibit E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**
**AT CHARLESTON**

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| Hubert Lowe, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Peabody Holding Company, LLC, *et al*.,<br><br>Defendants. | ) | Civ. Action No.: 2:12-cv-06925<br>Honorable Joseph R. Goodwin |

**PEABODY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

Defendants Peabody Holding Company, LLC and Peabody Energy Corporation (together, "Peabody"), by and through their undersigned counsel, respectfully request that the Court enter an Order denying Plaintiffs' Motion to Compel ("Motion") for two reasons: (1) procedurally, Plaintiffs made no effort to confer with Peabody about their apparent discovery disagreements before filing their Motion in direct violation of the Local Rules; and (2) substantively, the discovery requests at issue are irrelevant to Plaintiffs' ERISA claim, and as a result, those requests are not reasonably calculated to lead to the discovery of admissible evidence within the scope of Plaintiffs' claims and this litigation as required by Fed. R. Civ. P. 26.

**FACTS**

Plaintiffs served Peabody with written discovery requests on or about June 11. Peabody timely served its responses to Plaintiffs' requests on July 15. Peabody served Plaintiffs with written discovery requests on June 10 and Plaintiffs served their responses on July 18, three days late. On July 24, Peabody and Plaintiffs held a meet-and-confer to discuss various discovery-

related issues. Among other things, Peabody noted that Plaintiffs' objections to Peabody's requests were late and therefore waived. In the course of the discussion, Plaintiffs represented that their objections would not limit their production. Peabody therefore agreed to delay filing any motion addressing Plaintiffs' objections and their timeliness until Plaintiffs produce documents. In return, Plaintiffs agreed to stipulate that Peabody would have 30 days after receiving Plaintiffs' documents to file a motion to compel or in aid of discovery regarding Plaintiffs' objections or regarding the documents produced.

During the July 24 meet-and-confer, Plaintiffs did not request a reciprocal stipulation. Other than a separate dispute regarding the relevant time period from which responsive documents would be produced, Plaintiffs did not raise any of the concerns about Peabody's responses and objections that they now raise in the Motion.

In a follow-up email regarding the stipulation to preserve Peabody's objections, Plaintiffs forwarded a revised draft of the stipulation in which they inserted a reciprocal extension of time for themselves. (*See* Ex. A (Email from Diana Bardes, Mooney, Green, Saindon, Murphy & Welch, P.C. ("Mooney, Green") to Sara Pikofsky, Jones Day, *et. al.*, (Aug. 13, 2013, 02:09 PM EST))). Peabody agreed to the same extension of time for Plaintiffs to object to documents produced, but refused to allow Plaintiffs an extension of time to challenge Peabody's timely written objections to their discovery requests. Plaintiffs agreed to Peabody's edits.

The joint stipulation explicitly excludes from the stipulation any extensions of time for Plaintiffs to file a motion "regarding any objections by Peabody which limited the scope of documents Peabody would produce in response to Plaintiffs' document requests . . . ." (Doc. 76, Joint Stipulation; *see also* Ex. A (Email from Sara Pikofsky, Jones Day to Diana Bardes, Mooney, Green, *et. al.*, (Aug. 14, 2013, 11:22 AM EST))). At no point in the course of this

email correspondence did Plaintiffs mention that they took issue with Peabody's objections. Plaintiffs did not mention that they intended to file the Motion, nor did they ask for an extension of time, contrary to Plaintiffs' representation. (Doc. 78, Pls.' Mot. to Compel at 4 n.2.)

On August 14 – the day that any motions regarding Peabody's discovery responses were due – in an email exchange discussing the timing of filing the stipulation mentioned above, Plaintiffs informed Peabody that they believed they were entitled to an additional three days for filing any motions pursuant to Local Rule 37.1. Plaintiffs asked Peabody if it disagreed with their reading of the rules, but never asked Peabody for an extension of time. (Ex. A (Email from Diana Bardes, Mooney, Green to Sara Pikofsky, Jones Day, *et. al.*, (Aug. 14, 2013, 06:19 PM EST))). Peabody informed Plaintiffs that it disagreed with Plaintiffs' reading of Local Rule 37.1. (Ex. A (Email from Sara Pikofsky, Jones Day to Diana Bardes, Mooney, Green, *et. al.*, (Aug. 14, 2013, 07:23 PM EST))). After Peabody expressed its disagreement, it received no further correspondence from Plaintiffs until they filed the Motion just before midnight on August 14.

On August 19, five days after Plaintiffs filed their Motion, Plaintiffs requested a telephone conference for August 23 to discuss the issues in their Motion. Peabody agreed to this meet-and-confer. Based on the parties' discussions during that conference, Peabody anticipates that it may be able to reach agreement as the parties continue to discuss Peabody's objections to Instruction 11 and to Requests 7, 12, 26, 28, 43, and 45. Peabody and Plaintiffs also may be able to reach agreement that the relevant starting date for document collection, referenced in Instructions 1 and 15, will be January 1, 2006. The parties were not able to reach agreement on the ending date of the "present" as Plaintiffs requested in Instruction 1 and 15. Nor were the parties able to resolve the disagreement regarding Peabody's scope objections to Requests 29, and 32-40.

## ARGUMENT

### I. Plaintiffs' Motion to Compel Violates the Court's Local Rules.

Plaintiffs filed their Motion without making a good faith (or any) effort to confer with Peabody in person or by telephone as required by L.R. Civ. P. 37.1(b) regarding their disagreements with Peabody's objections to their discovery requests. Accordingly, Plaintiffs' Motion should be denied.

Contrary to Plaintiffs' assertion that they have met their meet-and-confer obligations,(Doc. 78, Pls.' Mot. to Compel at 4 n.2) the emails do not satisfy Plaintiffs' meet-and-confer obligations under the Locals Rules:

> Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each party shall make a good faith effort to confer in person or by telephone to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the moving party to arrange for the meeting. L.R. Civ. P. 37.1(b).

Before filing their Motion, Plaintiffs did not raise any concerns with Peabody about Peabody's discovery responses in person, by telephone, by email, or otherwise, thus violating both the requirement that any meet-and-confer take place by telephone or in person and the requirement that the parties attempt to narrow the areas of disagreement.

Plaintiffs further state that because Peabody did not agree to an extension for their Motion, they filed it out of an "abundance of caution" and "that the email communications exchanged between counsel satisfy the meet and confer requirements of the Local Rules." (Doc. 78, Pls.' Mot. to Compel at 4 n.2.) Plaintiffs are simply incorrect. The Local Rules require that any meet-and-confer be held by telephone or in person, and not by email. Furthermore, Plaintiffs' emails never indicated that they intended to file a motion to compel, much less outline any of their disagreements with Peabody's objections.

Not only is Plaintiffs' abject failure to follow the rules a clear violation, but Peabody has been prejudiced by Plaintiffs' failure to alert Peabody to their disagreements regarding the scope of discovery. Specifically, Peabody has continually been working toward identifying responsive documents and Plaintiffs' change of course between their silence at the July 24 meet-and-confer and their August 14 filing of the motion to compel has hampered Peabody's progress.

Plaintiffs had more than ample opportunity after they received Peabody's responses to bring any concerns about Peabody's objections to Peabody's attention before the deadline for their Motion. And, under the Local Rules, that responsibility lay squarely with Plaintiffs, not with Peabody.[1] In light of Plaintiffs' failure to abide by the express requirements of L.R. Civ. P. 37.1, their Motion should be denied.

## II. There Is No Basis Under the Discovery Rules For Plaintiffs To Seek Information About Current Business Dealings Between Patriot and Peabody Not Related to the Spinoff.

Plaintiffs' apparent disagreements with Peabody's objections are without merit. The crux of the parties' ongoing disagreement is whether Plaintiffs should be permitted to seek discovery about events that not only occurred well after the spinoff, the event that rests at the heart of their claims, but also have no connection to the spinoff. The Court should prohibit this broad discovery tied neither to the claims in the complaint nor to the general subject matter of the litigation.

### A. Neither the Federal Rules nor the case law permits unlimited discovery.

Federal Rule of Civil Procedure 26(b)(1) states that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably

[1] Even with the three extra days remaining under Plaintiffs' interpretation of the Local Rules, it is unclear how they would have met their meet-and-confer obligation by that deadline.

calculated to lead to the discovery of admissible evidence." Although the Federal Rules contemplate broad discovery, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). While relevance in the discovery context is broader than that required for admissibility at trial, the Fourth Circuit has held that this broader standard of discovery does not sanction "fishing expeditions." *See Ernest Cohn v. Bond*, 953 F.2d 154, 159 (4th Cir. 1991) ("Discovery should not become a 'fishing expedition.'") (citing *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1147 (4th Cir. 1988); *see also Susko v. City of Weirton*, No. 5:09-CV-1, 2011 BL 7658, at *4 (N.D. W. Va. Jan. 12, 2011) (while parties must produce information necessary to establish claims, fishing expeditions are not permitted).

This Court has distinguished between two types of discovery– discovery relevant to a party's claims or defenses and discovery relevant to the general subject matter involved in the action. *See Walker v. State Farm Mut. Auto. Ins. Co.*, No. 5:11-0529, 2012 BL 83628, at *10 (S.D. W. Va. Apr. 5, 2012) (Vandervort, M.J.). Only those materials that are related to "the claims and defenses asserted in the pleadings" are deemed relevant and therefore discoverable. *Marfork Coal Co. v. Smith*, 274 F.R.D. 193, 203 (S.D. W. Va. 2011) (Vandervort, M.J.) ("Relevant matters are therefore ones which relate to a party's claim or defense."); *see also Walker*, 2012 BL 83628, at *11 (same). Matters generally relevant to the subject matter of the action are only discoverable if the court finds good cause for such discovery. *Walker*, 2012 BL 83628, at *11; *see also* Fed. R. Civ. P. 26(b)(1) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.")

Thus, Plaintiffs clearly have the burden of proving the necessity of discovery requests that are related, at best, only to the general subject matter of the litigation.[2] *Walker*, 2012 BL 83628 at *11 (requiring a showing of good cause before discovery on matters generally relevant to the subject matter may be had); *AttorneyFirst LLC v. Ascension Entertainment, Inc*., No. 2:03-cv-02467, 2006 BL 65496, at *1 (S.D. W. Va. June 2, 2006) (Stanley, M.J.) (plaintiff's discovery request denied because plaintiff could not "demonstrate how such materials might relate to the facts alleged in its" complaint).

**B. The disputed requests have no connection to either the claims or the subject matter of the litigation.**

Plaintiffs' Motion serves mostly as an insufficient placeholder, failing to provide specific reasoning for overruling Peabody's objections. It nevertheless shows that the discovery requests for which no compromise has been reached (Requests 29 and 32-40) do not relate to the claims in the litigation.[3] Rather, as the Motion shows, Plaintiffs generally seek documents related to two separate broad topics, one of which is related to the claims in the litigation and one of which is not. First, Plaintiffs state that they seek documents related to the relationship between Peabody and Patriot "from the time Peabody first contemplated the dumping of its retiree obligations to Patriot through the time of the successful completion of its efforts . . . ." (Doc. 78, Pls.' Mot. to Compel at 10.) While Peabody obviously disagrees with Plaintiffs' unsupported characterization

[2] As discussed in more detail in Section II.B., these requests are not related to the subject matter of the litigation.

[3] Plaintiffs also suggest that there should be no limit on their discovery requests because the Court has not yet ruled on Peabody's Motion to Dismiss, thereby preventing Plaintiffs from focusing their discovery requests further. This argument has no bearing on the instant dispute. While Peabody believes its motion to dismiss should be granted, it also evaluated and objected to Plaintiffs' discovery requests assuming that all claims and allegations would survive the motion to dismiss. The fact that the Court has not ruled does not have any bearing on the fact that the requests to which Peabody has objected are unrelated to either the claims or the subject matter of the action.

of the spinoff, the parties seem to agree that for discovery purposes only, information related to the spinoff, which was effective on October 31, 2007, is relevant to the claims.

The second broad topic is Plaintiffs' requests related to a wide range of alleged ongoing business relationships between Peabody and Patriot, including information about real estate, equipment, leases, and other unrelated aspects of Peabody's business, none of which are linked to the spinoff. (*Id*. at 8-10). This topic is the crux of Plaintiffs' dispute with Peabody's responses and the focus of the Motion. Information from the time of the 2007 spinoff to the present about any possible current business relationships between Peabody and Patriot (and having no connection to the spinoff) is wholly unrelated to either the subject matter of this litigation or to specific claims raised in the Second Amended Complaint, which focuses on Peabody's actions at the time of the spinoff. And Peabody has already agreed to produce documents responsive to general inquiries regarding the spinoff -- specifically Requests 1 and 2—from January 1, 2006 through May 1, 2008, six months after the spinoff was complete.

In support of their disputed requests, Plaintiffs state that "Peabody continued to reap the benefit of its one-sided arrangement with Patriot after the spinoff of the unionized entities." (*Id*. at 10-11.) Not only is there no claim or allegation in Plaintiffs' Second Amended Complaint (Doc. 39) accusing Peabody of continuing to "reap the benefit" of the spin-off, but the general subject matter of the litigation does not extend beyond the events leading up to the spinoff. Based on the August 23 meet-and-confer, Peabody now believes that Requests 32-40, as well as Plaintiffs' instruction that Peabody produce documents responsive to all requests through the present, are directed toward discovery of the details and impact of this alleged "one-sided arrangement."

Plaintiffs' counsel asserted at the August 23 meet-and-confer, that while they don't believe they need a direct connection between their discovery requests and the claims in the Second Amended Complaint, Plaintiffs nevertheless find the connection between their claims and the disputed discovery requests in paragraph 93 of the Second Amended Complaint.[4] Paragraph 93 alleges, in pertinent part, that "[the] terms of the spinoff, including the financial terms of the arrangements between Peabody and Patriot that continue after the spinoff, were determined by persons who were at the time employees, officers or directors of Peabody or its subsidiaries and, accordingly, had a conflict of interest." The operative allegation describing Plaintiffs' claim, however, states that "Peabody's desire to defeat its liabilities for payment of retiree and other benefits was a determinative factor in its unlawful corporate reorganization scheme that led to the Patriot spinoff. Peabody planned to transfer its employees and benefit plan obligations to Patriot for the purpose of depriving its employees and retired employees of and interfering with the use and enjoyment of their welfare and retiree benefits." (Doc. 39, Second Am. Compl. ¶ 150).

Paragraph 93 has no connection to the claim set forth in paragraph 150 of the Second Amended Complaint, which focuses on the spinoff, nor does it provide any basis for tethering the expansive requests for information about Peabody and Patriot's relationship for the five-plus years from May 1, 2008 through the present, to Plaintiffs' alleged cause of action. The Rule 26(f) report the parties filed jointly in February provides further evidence that the relationship between Peabody and Patriot subsequent to the spinoff is irrelevant to the subject of the litigation. While they identified a number of potential discovery subjects in the Rule 26(f)

[4] Plaintiffs also referred to a declaration of Bennett Hatfield, the CEO of Patriot, filed in the Patriot bankruptcy proceeding as the basis for their assertion of a "one-sided arrangement". The declaration does not discuss any "one-sided arrangements" nor is it part of the claims or litigation here. It does not provide a basis for the far-reaching discovery requests.

report, Plaintiffs did not identify the "one-sided" arrangement or anything coming close as a potential subject of discovery.

Peabody asserted objections to Requests 29 and 32-40 because those requests were not seeking information that was in any way related to the arrangements that were put in place between Peabody and Patriot at the time of the spinoff. Rather, the requests appear to impose on Peabody an amorphous requirement to search for any interactions related to Patriot that had nothing at all to do with the spinoff. Even if such interactions existed, they would not be relevant to either the claims or the subject matter of this action. Plaintiffs' counsel has failed to address, either in the Motion, or in the discussions with Peabody's counsel, why such a search should be undertaken. Furthermore, Plaintiffs rejected Peabody's suggestion that, if documents produced in connection with the spinoff and the subsequent period until May 1, 2008 showed that these alleged "one-sided arrangements" existed, the parties could discuss additional discovery, beyond May 1, 2008, regarding any such arrangements.

If Peabody is required to produce documents from after May 1, 2008, Peabody will be put to the extreme burden of having to review data for a five year period that is well after the spinoff and not related to the spinoff at all, despite the fact that the crux of Plaintiffs' claim is Peabody's actions at the time of the October 31, 2007 spinoff. Plaintiffs have not come close to meeting their burden of demonstrating how information about any dealing between Peabody and Patriot from six months after the spinoff to the present is reasonably calculated to lead to the discovery of admissible evidence related to any of Plaintiffs' claims.

**CONCLUSION**

For the forgoing reasons, Peabody respectfully requests that the Court deny Plaintiffs' Motion.

Dated: August 28, 2013

**PEABODY HOLDING COMPANY, LLC and**
**PEABODY ENERGY CORPORATION**
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**CERTIFICATE OF SERVICE**

I, Wesley P. Page, do hereby certify that a true and correct copy of the "**PEABODY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL"** has been filed with the Clerk of the Court using the ECF system on this Wednesday, August 28, 2013, which will transmit a copy to the following parties of record:

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