

**IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

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| <b>In re</b><br><br><b>PATRIOT COAL CORPORATION, et al.,</b><br><br><b>Debtors.</b> | <b>Chapter 11</b><br><br><b>Case No. 12-51502-659</b><br><b>(Jointly Administered)</b><br><br><b>Objection Deadline: January 22, 2013</b><br><b>at 4:00 p.m. (Central Time)</b><br><br><b>Hearing Date: January 29, 2013</b><br><b>10:00 a.m. (Central Time)</b><br><br><b>Hearing Location: Courtroom 7 North</b> |
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**OBJECTION OF SHONK LAND COMPANY, LLC TO THE DEBTORS'  
MOTION TO ASSUME LEASES AND CURE OBJECTION**

Shonk Land Company, LLC, by Counsel, hereby Objects to the Debtors' Motion for Authorization to Assume Leases and Objects to the Cure Amount ("Cure Objection"), and in support thereof, states as follows.

**A. OBJECTION TO ASSUMPTION AND CURE OBJECTION**

1. Shonk Land Company, LLC ("Shonk") is a West Virginia limited liability company, and is a lessor under four written leases of certain real estate in West Virginia to three of the Debtors, Wildcat, LLC, Panther, LLC and Robin Land Company, LLC.

2. Attached as Exhibit A is a "Summary of Lease Claims of Shonk Land Company, LLC in the Patriot Coal Cases." Exhibit A shows (i) the claim number of each

Proof of Claim filed by Shonk, (ii) a description of the lease property subject to each claim, (iii) the claim amount and the amount that Shonk asserts is the Cure Amount for each lease, (iv) the Debtors' contract number, and (v) the Debtor's proposed Cure Amounts shown on Schedule A to the Debtors' Motion to Assume.

3. Shonk objects to the Debtors' proposed Cure Amounts because the proposed amounts do not include (a) the entire royalty and rent amounts due under the respective leases; (b) real estate tax reserved as rent under the Robin Land lease and the Panther lease (Debtors' contract numbers LMS2543 and LND324); (c) interest for arrearages called for in the Wildcat and Robin Land leases (Debtors' contract numbers LND322 and LMS2543); and (d) amounts to indemnify and hold Shonk harmless from filed mechanics liens respecting the Robin Land lease and the Panther lease (Debtors' contract numbers LMS2543 and LND324).

4. 11 U.S.C., § 365(b)(1) provides that prior to a debtor's assumption of an unexpired lease, the debtor shall promptly cure all defaults. "[U]nder § 365(b)(1) of the Bankruptcy Code . . . all contractual defaults thereunder must be cured by payments, and all contractual provisions enforced. There are no exceptions." In re Entertainment, Inc., 223 B.R. 141, 150 (Bankr. N.D. Ill. 1998). "It is well settled that the trustee cannot accept the benefits of an executory contract without assuming its burdens as well." In re SteelShip Corp., 576 F.2d 128, 132 (8th Cir. 1978); In re Entertainment, Inc., 223 B. R. 150 (Bankr. N.D. Ill. 1988). "An executory contract (including a lease) must be assumed in its entirety. A debtor may not pick and choose those portions that it wishes to enforce and reject those

which it does not deem desirable. That is black letter law engraved in stone." In re Diamond Head Emporium, 69 B.R. 487, 494 (Bankr. D. Hawaii 1987).

5. In determining what must be paid to cure a default under a lease, courts generally look to state law. In re J. W. Mays, Inc., 30 B.R. 769, 772 (Bankr. S.D. N.Y. 1983).

6. Lease provisions providing for interest or penalties upon default are enforceable in West Virginia. Shipman v. Bailey, 20 W.Va. 140, 147 (1882) (contract extends to interest as fully as it does to principal). When there is a provision in a lease requiring the payment of interest or penalties on arrearages, bankruptcy courts have routinely required payment of interest as a condition to assuming the lease under 11 U.S.C., § 365. In re Entertainment Inc., 223 B.R. 141, 150 (Bankr. N.D. Ill. 1988); In re Diamond Head Emporium, 69 B.R. 487, 495-96 (Bankr. D. Hawaii 1987); In re Tech HiFi, Inc., 49 B.R. 876, 881 (Bankr. D. Mass. 1985); In re Eagle Bus Manufacturing, Inc., 148 B.R. 481, 482 (Bankr. S.D. Texas 1992).

7. The failure to pay real estate taxes as required by a lease "constitutes a failure to perform a contractual duty and thus a default that requires cure under Section 365(b)(1)." In re Bachrach Clothing, Inc., 396 B.R. 219, 221 (N.D. Ill. 2008).

8. Contracts providing for indemnification of one party by another are enforceable in West Virginia. United States Fid. & Guar. Co. v. Hathaway, 183 W.Va. 165, 168-69, 394 S.E.2d 764, 767-68 (1990); State v. Carey, 141 W.Va. 540, 549-50, 91 S.E.2d 461, 465 (1958).

9. Attached as Exhibit B is a "Schedule of Applicable Lease Provisions" referencing the applicable lease provisions providing for the payment of real estate taxes and interest, and for indemnification.

**B. OBJECTION TO PROPOSED TIME TO PAY THE CURE AMOUNTS**

10. Shonk objects to the Debtors' proposal set forth in Paragraph 13 of the Motion to pay the applicable Cure Amounts thirty days after the order is entered with respect to an Assumed Lease, or "as soon as reasonably practical."

11. There is no statutory provision allowing for assumption "as soon . . . as reasonably practical." Pursuant to the Bankruptcy Code, the Cure Amount must be paid "at the time of assumption." Bankruptcy Code, § 365(b)(1); Manhattan King David Restaurant, Inc. v. Levine, 154 B.R. 423, 429 (S.D.N.Y. 1993). Assumption is not supposed to occur later than 120 days or for an additional 90 days if an extension is granted "for cause" in accordance with Bankruptcy Code, § 365(d)(4)(A) and (B).

12. Under the present circumstances where the Court granted the Debtors Motion to extend the deadline to the date when the Motion to Assume is filed rather than to the date of entry of the Order authorizing assumption, additional time should not be granted to pay the Cure Amount. The date of payment of the Cure Amount should be the earliest day possible following a determination of the Cure Amounts for each of the Shonk leases. Assumption of the Shonk leases is not conditional upon, and should not be delayed until, there is a determination of the Cure Amounts for the Debtors' other leases. The date of

payment of the Cure Amounts should be no later than the date the Order is entered authorizing assumption of the Shonk leases.

### **C. TIMELINESS OBJECTION**

13. Shonk also objects to the Debtors' arbitrary imposition of a seven day objection period for filing an Objection to the Motion to Assume. The Case Management Order (Doc. 1386) provides a ten day period following the filing of a Motion for the filing of Objections. The Motion was filed on January 15, 2013. Therefore, the Objection period should extend to January 25, 2013. Given that the Debtor was granted an additional 120 days to decide whether to assume or reject leases, even considering the number of leases subject to the Debtors' review, it is unreasonable to give landlords a mere seven days to file their objections, especially considering the intervening weekend and federal holiday.

**WHEREFORE**, based upon the foregoing, Shonk Land Company, LLC moves the Court to sustain its objections and to condition the assumption of the leases to the Debtors' curing of all of the lease defaults, including the payment of interest and property taxes, and for indemnification with respect to the mechanics liens, and the payment of royalty and rent obligations, and Shonk Land Company, LLC respectfully requests such other and further relief as this Court deems just and proper.

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*Attorneys for Creditor Shonk Land Company, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via first class, United States mail, postage prepaid and/or electronic notice on January 22, 2013 to:

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| 1. | Patriot Coal Corporation<br>12312 Olive Boulevard<br>Suite 400<br>St. Louis, Missouri 63141  | Debtor  |
| 2. | Marshall S. Huebner and Brian M. Resnick Davis<br>Polk & Wardwell LLP<br>450 Lexington Avenue<br>New York, New York 10017                                    | Attorneys for Debtor  |
| 3. | Brian C. Walsh<br>Bryan Cave LLP<br>211 N. Broadway, Suite 3600<br>St. Louis, Missouri 63102   | Local Counsel for Debtors   |
| 4. | Thomas M. Mayer, Adam C. Rogoff<br>and Gregory C. Plotko<br>Kramer, Levin, Naftalis & Frankel LLP<br>1177 Avenue of the Americas<br>New York, New York 10036 | Attorneys for Official<br>Committee of Unsecured<br>Creditors     |
| 5. | Gregory D. Willard<br>Carmody MacDonald P.C.<br>120 South Central, Suite 1800<br>St. Louis, Missouri 63105-1705  | Local Counsel for Official<br>Committee of Unsecured<br>Creditors |
| 6. | Leonora S. Long and Paul A. Randolph<br>Office of the United States Trustee<br>111 South Tenth Street, Suite 6.353<br>St. Louis, Missouri 63102              | Office of the United States<br>Trustee                            |
| 7. | Steven J. Reisman and Michael A. Cohen Curtis,<br>Mallet-Prevost, Colt & Mosle, LLP<br>101 Park Avenue<br>New York, NY 10178                                 | Conflicts Counsel to the<br>Debtors                               |

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| 8.  | Patriot Coal Corporation<br>c/o GCG, Inc.<br>P. O. Box 9898<br>Dublin, OH 43017-5798   | Debtors' authorized<br>claims/noticing agent |
| 9.  | Chambers of the Honorable Kathy A. Surratt-States<br>United States Bankruptcy Court for the Eastern<br>District of Missouri<br>111 South 10 <sup>th</sup> Street, 4 <sup>th</sup> Floor (7 <sup>th</sup> Floor)<br>St. Louis, Missouri 63102 |  |
| 10. | All creditors and parties in interest that are<br>receiving electronic notice in this case.  |  |

  
E. Rebecca Case  
 E. Rebecca Case



**EXHIBIT A**  
**SUMMARY OF SHONK LAND COMPANY, LLC**  
**LEASE CLAIMS IN THE PATRIOT COAL CASES**

| <u>CLAIM NUMBER</u> | <u>DEBTOR PARTY</u>       | <u>PROPERTY DESCRIPTION</u>  | <u>CLAIM AMOUNT/<br/>SHONK'S CURE AMOUNT</u>  | <u>DEBTOR'S CONTRACT ID</u> | <u>DEBTORS' PROPOSED CURE AMOUNT</u> |
|---------------------|---------------------------|--|---|-----------------------------|--------------------------------------|
| 1201                | WILDCAT, LLC <sup>1</sup> | COALBURG LEASE 2 & 4 Agreement of Lease, 12/01/03  | \$27,377.01, Property Taxes plus interest <sup>3</sup> of \$955.16 for a total of: \$28,332.17  | LND 322                     | \$0.00                               |
| 1202                | PANTHER, LLC              | 8693 ACRES POWELLTON SEAM Second Amended and Restated Lease, 10/31/91  | \$6,313.32 in Property Taxes for a total of: \$6,313.22   | LND 330                     | \$0.00                               |
| 1203                | ROBIN LAND COMPANY, INC.  | SHONK LAND II LEASES, KANAWHA AND BOONE COUNTIES, Agreement of Consolidation, Amendment and Restatement of Lease, 01/06/06 | Samples Lease tonnage royalty, etc. \$326,750.30; Winchester Lease tonnage royalty, etc. \$1,233,573.26; Boone Property Taxes \$170,177.92; Kanawha Property Taxes \$95,256.57; Plus interest <sup>3</sup> of \$124,585.57 for a total of: \$1,950,343.62 (Contingent claim for Mechanics Liens filed by Central Contracting, Inc., \$100,492.27) | LMS2543                     | \$1,432,167.56                       |
| 1204                | PANTHER, LLC <sup>2</sup> | EAGLE SEAM LEASE 2 AND 4, Agreement of Lease, 01/01/98   | Pre-Petition tonnage, etc. June, \$181,284.49; Pre-Petition tonnage July 1-9, \$8,780.13; Kanawha Property Taxes \$82,180.06 for a total of: \$272,244.68 (Contingent claim for Mechanic's Liens filed by Strata Mine Services, LLC, \$159,736.94 (\$108,457.27 + \$51,279.67))   | LND 324                     | \$150,063.02                         |

<sup>1</sup> The Lease is subject to a Guaranty by Panther, LLC as set forth in Proof of Claim No. 1200.

<sup>2</sup> The Lease is subject to a Guaranty by Magnum Coal, LLC as set forth in Proof of Claim No. 1205.

<sup>3</sup> Interest in the Proofs of Claim was calculated through December 14, 2012. Interest accrues until the Cure Amounts are paid.

## EXHIBIT B

### SCHEDULE OF APPLICABLE LEASE PROVISIONS WITH REFERENCE TO EXHIBIT NUMBERS

#### I. OBLIGATION TO PAY REAL ESTATE TAXES

- A. WILDCAT (CLAIM 1201; LND322). AGREEMENT OF LEASE<sup>1</sup>, 12/01/03, §11.
- B. PANTHER (POWELLTON) (CLAIM 1202; LND330). SECOND AMENDED AND RESTATED LEASE<sup>2</sup>, 10/31/91, § XX1.
- C. ROBIN LAND (CLAIM 1203; LMS2543). AGREEMENT OF CONSOLIDATION, AMENDMENT AND RESTATEMENT OF LEASE<sup>3</sup>, 01/06/06, § 8.
- D. PANTHER (EAGLE) (CLAIM 1204; LND324). AGREEMENT OF LEASE<sup>4</sup>, 01/01/98, § 7.

#### II. OBLIGATION TO PAY INTEREST

- A. WILDCAT (CLAIM 1201; LND322). AGREEMENT OF LEASE, 01/01/03, §9.3, 10%, plus rate for fifteen year United States Treasury Note, compounded monthly
- C. ROBIN LAND (CLAIM 1203; LMS2543). AGREEMENT OF CONSOLIDATION, AMENDMENT AND RESTATEMENT OF LEASE, § 7.5, 18%

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<sup>1</sup> Exhibit 5 to Claim No. 1201

<sup>2</sup> Exhibit 6 to Claim No. 1202

<sup>3</sup> Exhibit 4 to Claim No. 1203

<sup>4</sup> Exhibit 4 to Claim No. 1204

**III. LESSEE'S OBLIGATION TO INDEMNIFY AND HOLD HARMLESS -  
MECHANICS LIENS <sup>5</sup>**

- C. ROBIN LAND (CLAIM 1203; LMS2543). AGREEMENT OF CONSOLIDATION, AMENDMENT AND RESTATEMENT OF LEASE, 01/06/06, § 14.
- D. PANTHER (EAGLE) (CLAIM 1204; LND324). AGREEMENT OF LEASE, 01/05/98, § 12.

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<sup>5</sup> Notices of Mechanic's Liens are Exhibit 6 to Claim No. 1203 and Exhibits 5-8 to Claim No. 1204.